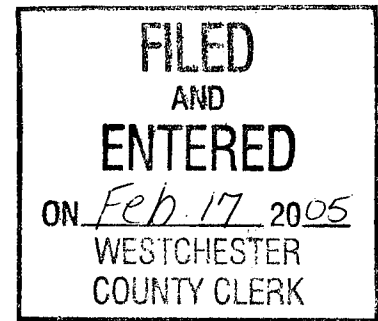


LEGAL FILE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER



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In the Matter of the Application of
ROBERT B. BERNSTEIN,

AMENDED
DECISION
ORDER & JUDGMENT

Petitioner,

Index No. 10944/03

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules

COPY

- against -

PAUL J. FEINER, as Town Supervisor,
Town of Greenburgh, New York, and the
TOWN OF GREENBURGH,

Respondents.

-----X
MOLEA, J.

The following papers, numbered one (1) through one-hundred and forty-seven (147) were read upon review of the instant petition for relief brought pursuant to Article 78 of the Civil Practice Law and Rules (CPLR).

Notice of Petition	1-3
Verified Petition - Exhibits	4-40
Notice of Motion to Dismiss.	41-42
Affirmation in Support - Exhibits	43-66
Memorandum of Law in Opposition	67-95
Reply Affirmation - Exhibit	96-100
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Upon the foregoing papers, it is ordered and adjudged that the instant petition is disposed of as follows:

Petitioner brought this proceeding by petition submitted pursuant to Article 78 of the CPLR, seeking, inter alia, (1) a declaration that it would be a violation of Town Law §§ 220 and

232 for the respondent Town of Greenburgh (hereinafter, Town) to impose a tax solely upon the unincorporated area residents of the Town to finance the cost of acquiring, operating and maintaining the property known as Taxter Ridge; (2) a permanent injunction enjoining the Town from financing the purchase of any portion of the property known as Taxter Ridge unless such funds are collected from a tax levied upon all assessable property in the Town; (3) to compel an accounting of all expenses incurred by the Town for the acquisition and operation of parkland; (4) to compel an accounting of the so-called "Greenways Fund", a fund created in 1997 for the purchase of undeveloped property for parkland; and (5) damages for tax payments made by property owners in the unincorporated areas to cover the purchases of properties known as Hart's Brook Preserve in 1999 and Glenville Woods in 2001. Respondent opposed the instant petition and moved this Court to dismiss same pursuant to CPLR 3211, which motion was granted by this Court by Decision and Order, entered November 12, 2003, upon determinations that the petitioner did not have standing to bring this proceeding, and that the petitioner's claims were untimely in that they were not yet ripe for review.

By Decision and Order, dated December 20, 2004, the Appellate Division, Second Department in *Matter of Bernstein v. Feiner* (787 NYS2d 357) modified, on the law, the order and judgment of this Court, as entered on November 12, 2003, by deleting the provision thereof granting those branches of the motion which were to dismiss the first, third and fourth causes of action and substituting therefore a provision denying those branches of the motion, thereby reinstating those causes of action and remitting this proceeding to this Court for further proceedings upon the reinstated causes of action.

On May 14, 2003, the Town Board of the Town of Greenburgh unanimously approved a

resolution expressing its intention to acquire a two-hundred acre parcel of real property located within the Town known as Taxter Ridge¹, in conjunction with the County of Westchester and the State of New York, seeking to preserve this largely undeveloped property for use as parkland. This resolution further provided that the Town intended to make the use of Taxter Ridge available to all persons irrespective of residency status. On March 5, 2004, consistent with the above-referenced resolution, the Town, the County of Westchester and the State of New York jointly purchased Taxter Ridge for the sum of \$10,873,884, each having assumed the obligation to pay one-third of the purchase price. It is undisputed between the parties that the Town intends to finance the purchase, improvement and maintenance of Taxter Ridge through the levy of a tax solely upon the property owners in the unincorporated areas of the Town.

In support of the first cause of action raised in the instant petition, the petitioner alleges that the Town's imposition of a tax solely upon the property owners in the unincorporated area of the Town to finance the cost of acquiring, operating and maintaining Taxter Ridge as parkland to be made available for use by all persons irrespective of residency status would constitute a violation of Town Law §§ 220 and 232. Subdivision 4 of Town Law § 220, entitled "General town improvements", provides, *inter alia*, that a town board is authorized to acquire land for the purpose of establishing public parks, whereas Town Law § 232 provides, *inter alia*, that the funds required to pay for the costs of such acquisitions shall be derived from the imposition of a tax "assessed, levied and collected from all taxable property in the town in the same manner and at the same time as the annual tax for other town charges." Furthermore, the establishment of a

¹Of the total acreage of Taxter Ridge, approximately 183 acres are situated in an unincorporated area of the Town and approximately 17 acres are situated in an incorporated area of the Town.

public park pursuant to Town Law § 220 (4) constitutes a “town-wide improvement” which must be made available for use by all residents of the town, irrespective of whether they reside in incorporated or unincorporated areas of the town (*see, Incorporated Vil. of Lloyd Harbor v. Town of Huntington*, 4 NY2d 182; *see also, Incorporated Vil. of Ardsley v. Town of Greenburgh*, 79 AD2d 628, 629, *mod* 55 NY2d 915).

Despite the provisions of Town Law §§ 220 and 232, the Town had traditionally limited the use of its public parks to those residents of the unincorporated area of the Town, while financing the costs of the acquisition and maintenance of such public parks through the levy of a tax solely upon property owners in the unincorporated area of the Town to the exclusion of property owners in the incorporated villages of the Town². This taxation scheme was rejected by the Court of Appeals in *Incorporated Vil. of Ardsley v. Town of Greenburgh* (55 NY2d 915), where the Court found that the Town had unlawfully financed the acquisition of parkland through selective taxation, specifically holding that the Town’s purchase of parkland pursuant to Town Law § 220 constituted a “town-wide improvement”, the costs of which must be assessed against all taxable property in the Town pursuant to Town Law § 232 (*see, Incorporated Vil. of Ardsley v. Town of Greenburgh, supra*, at 918).

The Town subsequently sought to obtain authorization from the New York State Legislature to continue its traditional practices of financing and operating its park system. Essentially, the Town sought an exemption from the taxation scheme established through Town Law § 232 insofar as its express terms required that the Town finance the costs of its acquisition,

²All of the incorporated villages in the Town have established public park, playground and recreational facilities, and it is the longstanding policy and practice of nearly all of these incorporated villages to restrict the use of such facilities to their respective residents.

operation and maintenance of public parks, playgrounds and recreational facilities through the levy of a tax upon all taxable property in the Town. Upon consideration of a home rule request from the Town, the New York State Legislature enacted Chapter 891 of the Session Laws of 1982 (hereinafter, Chapter 891) as a law of local application. This legislation was enacted in response to the Court of Appeals' decision in *Incorporated Vil. of Ardsley v. Town of Greenburgh*, as discussed in greater detail *infra*, which required that the Town finance the acquisition, operation and maintenance of its parkland through the taxation scheme mandated through Town Law § 232 rather than that which had been traditionally utilized. In effect, the legislative enactment of Chapter 891 served to authorize the Town to continue its traditional practice of acquiring parkland for the exclusive use of the residents of the unincorporated areas of the Town, while financing the costs associated with the acquisition and maintenance of such parkland from the taxation of only the owners of property located within the unincorporated areas of the Town, specifically providing that

. . . all costs of acquisition by the Town of Greenburgh, Westchester county, of any public park, playground or recreational facility heretofore or hereafter made, all costs of construction or acquisition of any improvement at any such town public park, playground or recreational facility heretofore and hereafter made, and all costs of operation and maintenance of any such facility, shall be raised by the levy of a tax upon the lots and parcels of land within said town located in the area outside of incorporated villages and such public park, playground and recreational facilities of said town shall, subject to any agreements between said town and the United States government contained in any grant contract, be restricted in use to residents of said town residing in the area of said town outside of incorporated villages. Taxes heretofore raised through the levy upon the lots and parcels of land within said town located in the area of said town outside of incorporated villages to pay said costs are hereby legalized, ratified, validated and confirmed.

McKinney's 1982 Session Laws of New York, Chapter 891, Section 2, p. 2252

In substance, as can be readily understood from a plain reading of its terms, Chapter 891 provides the Town with a unique taxation scheme for the acquisition, operation and maintenance of its public parks, playgrounds and recreational facilities which serves to exempt the Town from the taxation scheme otherwise mandated by Town Law § 232. However, the express terms of Chapter 891 limit its applicability to only those parks, playgrounds and recreational facilities which are restricted in use to residents of the unincorporated areas of the Town. This absolute limitation upon the applicability of Chapter 891 serves to preclude the Town from utilizing the taxation scheme provided therein to finance the costs associated with the acquisition, operation and maintenance of Taxter Ridge due to the Town's stated intention to make this parkland available for use by all persons irrespective of residency status.

In recognition of the limited applicability of the taxation scheme provided by Chapter 891, the respondents argue that the Town's election to jointly purchase Taxter Ridge in conjunction with the County of Westchester and the State of New York, each having assumed the obligation to pay one-third of the purchase price, should be considered analogous to the exclusive use exemption provided in Chapter 891 for grant contract agreements entered into between the Town and the federal government.

Turning to the respondent's argument, aside from the complete absence of any legal authority or legislative history supporting such an expansive interpretation of Chapter 891, such a reading would directly contravene the express terms of the statute itself. In this regard, "[i]t is a basic principle of statutory interpretation that 'statutory language is generally to be construed in accordance with its plain and obvious sense, and the meaning attached to it should be neither strained nor artificial' " (*ILC Data Device Corp. v. County of Suffolk*, 182 AD2d 293, 298-299,

quoting *Shoreham-Wading Riv. Cent. School Dist. v. Town of Brookhaven*, 107 AD2d 219, 223, *app. dismissed* 65 NY2d 990; *see also, State v. Sour Mtn. Realty, Inc.*, 276 AD2d 8, 12; McKinney's Cons. Laws of N.Y., Book 1, Statutes, § 94). Here, it is apparent from the statutory language at issue that if the New York State Legislature sought to include Westchester County and the State of New York within the exemption it expressly provided for the acquisition of parkland, playgrounds and recreational facilities made by the Town in conjunction with federal authorities, it could have simply drafted the legislation in a manner consistent with such an intention. Moreover, the respondent's alternative argument that this Court should defer to the Town's interpretation of the scope of the exemption provisions of Chapter 891, characterizing its interpretation as one made in "good faith", despite the unambiguous nature and singular meaning of the exemption provisions at issue is patently contrary to law (*see, City of New York v. State*, 282 AD2d 134, *aff'd* 98 NY2d 740; *see also, Shoreham-Wading Riv. Cent. School Dist. v. Town of Brookhaven, supra*, at 223).

Accordingly, this Court finds that the respondent's assessment, levy and collection of a tax solely from the owners of property located within the unincorporated area of the Town, in order to finance the cost of acquisition, operation and maintenance of Taxter Ridge as parkland to be made available for use by all persons irrespective of their residency status, constitutes a violation of Town Law §232. In this regard, the Court references the express terms of Town Law §232 which require that the expenses associated with Taxter Ridge be considered town-wide charges which must be assessed, levied and collected from all taxable property in the Town including the owners of property located within the incorporated villages of the Town.

In support of the third and fourth causes of action raised in the instant petition, the

petitioner alleges that the respondents' disclosures in response to his applications seeking financial accountings concerning the so-called "Greenways Fund" and Town expenditures for the acquisition, operation and maintenance of parkland purchased during respondent Feiner's tenure as Town Supervisor are insufficient to satisfy the reasonable requirements of the requested accountings. Although mandamus is an appropriate remedy to determine whether the Town should be compelled to perform the accounting the petitioner seeks (*Matter of Bernstein v. Feiner*, __ AD3d __, 787 NYS2d 357), the petitioner has failed to make the requisite showing of a legal basis supporting the financial accountings requested. In any event, the respondents have voluntarily responded to the petitioner's instant application through the filing of the affirmation in opposition to the petition, wherein exhibits were annexed which provided the petitioner with records outlining the expenses the Town incurred for acquiring, operating and maintaining public parkland over the preceding six years and an analysis of the revenue sources and disbursements of the so-called "Greenways Fund". Furthermore, these records were supplemented by the preparation of an affidavit by James L. Heslop, the Greenburgh Town Comptroller, through which he relates his responsibility for the preparation of the above-referenced records and provides details concerning the sources of the figures set forth in those records.

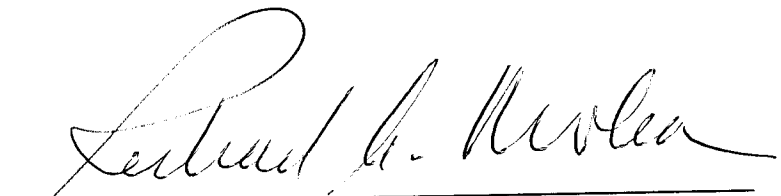
Accordingly, the petitioner's applications seeking further financial accountings are denied.

Based upon the foregoing, the instant petition is granted insofar as same sought a declaration that it would be a violation of Town Law § 232 for the respondents to impose a tax solely upon the owners of property located in the unincorporated area of the Town to finance the cost of acquiring, operating and maintaining Taxter Ridge, and denied insofar as same sought to

compel a financial accounting of all expenses incurred by the Town for the acquisition and operation of parkland and of the so-called "Greenways Fund".

The foregoing constitutes the Decision, Order and Judgment of this Court.

Dated: White Plains, New York
February 17, 2005



Honorable Richard A. Molea
Acting Justice of the Supreme Court

TO:

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Town Attorney, Town of Greenburgh
Attorney for Respondents
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Elmsford, New York 10523-0205

DOCKET	
SERVED	DATE
SIGNED	
FILED	2/17/05
SUBMITTED	
OBTAINED	3/1/05 RBB
DIARY	

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