

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

-----X

In the Matter of an :  
Article 78 Proceeding :

ROBERT B. BERNSTEIN, : Index No. 6807-06  
 :  
 Petitioner, :

v. :

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

-----X

**MEMORANDUM OF LAW IN OPPOSITION TO PROPOSED INTERVENERS’  
MOTION FOR LEAVE TO REARGUE**

Pro Se Petitioner Robert B. Bernstein submits this memorandum of law in opposition to the motion by the mayors of the Town of Greenburgh’s six villages and two villages themselves (the “Proposed Interveners”), pursuant to CPLR 2221(d), for leave to reargue and vacate this Court’s August 11, 2006 Decision and Order denying the Proposed Interveners’ motion to intervene.

**Preliminary Statement**

The motion for leave should be denied, or if leave is granted, reargument should be denied, because the motion is predicated on case law which has been overruled by the Court of Appeals. Accordingly, the Proposed Interveners have failed to establish that this Court overlooked or misapprehended any relevant facts, or misapplied any controlling principle of law.

To the contrary, the motion itself is sanctionable and, if not withdrawn upon receipt of these answering papers, the Court may wish to impose sanctions.

### **The Prior Court Ruling**

This is a proceeding pursuant to Article 78 of the Civil Practice Law and Rules in which Petitioner seeks a judgment declaring that the actions of the Town of Greenburgh (the “Town”) and Paul Feiner (its supervisor and chief executive and financial officer) (collectively, “Respondents”) adopting a budget that levies taxes only on assessable lands in the unincorporated part of the Town for costs of acquiring and maintaining parks to be in violation of state law and enjoining Respondents from continuing to levy taxes in this illegal manner in the future.

The Proposed Interveners moved to intervene on the ground that, because they represent taxpayers who live in the incorporated areas of the Town, they would be adversely affected by a ruling in Petitioner’s favor that would require them to pay their fair share of taxes for Town parks that are freely open and usable by the village residents of the Proposed Interveners. On August 11, 2006, this Court denied leave to intervene on the ground that the Proposed Interveners failed to show that they possess a “legally cognizable claim.” On August 30, 2006, the Proposed Interveners obtained by order to show cause an *ex parte* stay of the instant proceeding and now seek leave to reargue.

### **ARGUMENT**

#### **I. THE RELEVANT LEGAL STANDARD**

It is an established principle of law that an application seeking reargument is properly addressed to the sound discretion of the court and may only be granted upon a showing that relevant facts were overlooked or misapprehended by the court, or that it misapplied any

controlling principle of law, thereby mistakenly reaching its earlier decision. *See* CPLR 2221(d)(2); *see also* *Grassel v. Albany Medical Center Hosp.*, 223 A.D.2d 803, 805 (3<sup>rd</sup> Dep't), *lv. denied*, 88 N.Y.2d 842 (1996); *Pahl Equip Corp. v. Kassis*, 182 A.D.2d 22 (1<sup>st</sup> Dep't), *lv. denied, app. dismissed*, 80 N.Y.2d 1005 (1992); *Saccomagno v. City of New York*, 29 A.D.3rd 979, 980 (2d Dep't 2006); *Duque v. Ortiz*, 154 A.D.2d 333, 334 (2d Dep't 1989); *Klein v. Mount Sinai Hosp.*, 121 A.D.2d 164 (1<sup>st</sup> Dep't 1986); *Foley v. Roche*, 68 A.D.2d 558, 567 (1<sup>st</sup> Dep't 1979); *see also* *North Am. Van Lines Inc. v. Am. Int'l Cos.*, 11 Misc. 3d 1076A (Sup. Ct. N.Y. Cty., April 10, 2006); *Bernstein v. Feiner*, Index No. 10944/03 (Sup. Ct. Westchester Cty., May 6, 2005) slip. op. at 1-2. These statutorily created limitations upon consideration of an application for reargument reflect the well-settled view that the motion to reargue is not designed to serve as a vehicle which may enable an unsuccessful party to re-litigate an issue which was previously decided. *See* *McGill v. Goldman*, 261 A.D. 2d 593, 594 (2d Dep't 1999); *see also* *Matter of Mayer v. National Arts Club*, 192 A.D.2d 863, 865 (3d Dep't 1993); *Pahl Equip. Corp. v. Kassis*, *supra* at 594; *Bernstein v. Feiner*, *supra* at 2.

## **II. THE PROPOSED INTERVENERS HAVE NOT SATISFIED THE REQUIREMENTS FOR LEAVE TO REARGUE**

### **A. The Reargument Motion Is Based on Case Law Which Has Been Overruled by the Court of Appeals**

The Proposed Interveners argue that the Court's determination that the "villages themselves would not be directly affected" by a ruling in Petitioner's favor overlooks the fact that the Villages of Hastings and Elmsford each own parcels of assessable property in the Town, that in 2006 they each paid annual property taxes to the Town of \$79.39 and \$4.13, respectively, and that, even though these amounts may be small, they are enough to qualify for "standing" to bring suit. *See* Affirmation of Richard L. O'Rourke ("O'Rourke Aff."), dated August 20, 2006, ¶¶ 6-9.

They also argue that the Court overlooked the fact that the village mayors likewise paid small amounts of property taxes to the Town in 2006, and that, for the same reason, they too have “standing.” *See O’Rourke Aff.*, ¶ 10-19.

The Proposed Interveners argue that these facts are relevant -- and were overlooked -- because the Court supposedly misapplied controlling principles of law in *Dubbs v. Board of Assessment Review*, 46 A.D. 2d 651, 359 N.Y.S.2d 815 (2d Dep’t 1974) and *Akari House, Inc. v. Irizzary*, 81 Misc.2d 543, 366 N.Y.S.2d 955 (Sup. Ct. N.Y. Cty. 1975), where taxpayers whose property taxes were affected even minutely had standing to challenge certain government actions. *See O’Rourke Aff.*, ¶ 9. However, the Proposed Interveners failed to advise this Court that the holdings in these two cases were overruled by the Court of Appeals in *Colella v. Board of Assessors of the County of Nassau*, 95 N.Y.2d 401, 409-410 (2000) (taxpayer standing requires a showing (i) that the injury is “different in kind and degree from the community generally” and (ii) that the alleged injury falls within the zone of interests that the statute at issue is intended to promote or protect). *Dubbs* and *Akari* are therefore no longer good law in New York and the Proposed Interveners should not have sought leave to reargue on the basis of such authority.

*Colella* involved a challenge by certain taxpayers to a decision by Nassau County to grant a property tax exemption. The Second Department, relying expressly on *Dubbs*, had held that the taxpayers there had standing. *See Colella v. Board of Assessors of the County of Nassau*, 266 A.D.2 286, 287 (2d Dep’t 1999). In reversing and thereby overruling *Dubbs*, the Court of Appeals stated as follows:

It is highly dubious as to whether the minuscule even if calculable adverse real property tax impact on the individual petitioners here, an injury indistinguishable from that incurred by all other Nassau

County real property owners, fulfills the first prong for standing, that is, suffering “special damage, different in kind and degree from the community generally.”

95 N.Y.2d at 410. Here, if Petitioner were to prevail in the instant Article 78 proceeding, the villages and mayors will each be required to pay their fair share of taxes to cover the cost of the Town’s parks – just like every other taxpayer in Greenburgh. Their injury is thus an injury which would be indistinguishable from that suffered by all other Town of Greenburgh real property owners. Such injury is therefore not “special damage, different in kind and degree from the community generally.” Accordingly, the Proposed Interveners have not demonstrated with this argument that the Court overlooked or misapprehended any relevant facts, or misapplied any controlling principle of law. To the contrary, their argument, based entirely on case law which has been overruled, underscores that the Court was absolutely correct in its original determination that the Proposed Interveners have no legally cognizable claim.

Furthermore, even if the Proposed Interveners had a legally cognizable injury, and they do not, in order to have a legally cognizable claim under *Colella*, the alleged injury must also fall “within the zone of interests or concerns sought to be promoted or protected by the statutory provision” at issue. 95 N.Y.2d at 410. The Proposed Interveners have not shown that the Court overlooked or misapprehended anything relevant in that regard either. To the contrary, the instant proceeding is a claim under Town Law §§ 220 and 232. As the Second Department held in *Bernstein v. Feiner*, 13 A.D. 2d 519, 520-21 (2d Dep’t 2004), these statutes “specifically mandate” that the payment of all public improvements, such as parks, be imposed upon *all* the taxpayers of a town.” (emphasis in text). These statutes protect against a town choosing to tax one part of a town and not the other, which is why Petitioner, a taxpayer in unincorporated Greenburgh, has standing to challenge the Town’s actions in charging only taxpayers in the

Town's unincorporated areas for the costs of Town parks. There is certainly nothing in Town Law §§ 220 and 232 which would protect or prevent the Proposed Interveners from being taxed for Town parks that village residents themselves are free to use. Accordingly, their injury is not within the zone of interests these statutes seek to promote or protect.

Nor do the Proposed Interveners have an argument under the so-called Finneran Law, otherwise known as Chapter 891 of the 1982 Sessions Laws. That statute, which allows the Town of Greenburgh under certain circumstances to tax only property owners in unincorporated Greenburgh, applies only to parks which are restricted in use to residents of unincorporated Greenburgh. See *Bernstein v. Feiner*, Index No. 10944/03, Amended Decision, Order and Judgment (Sup. Ct., Westch. Cty Feb. 17, 2005) slip. op. at 6 (“[t]he 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”). The instant Article 78 proceeding only involves parks which are not restricted in use to residents of unincorporated Greenburgh. The Finneran Law is therefore not applicable here.

The Proposed Interveners nevertheless argue that they should be allowed to intervene in order to argue that the Town violated the Finneran Law in opening Town parks to residents other than residents of unincorporated Greenburgh. See *O'Rourke Aff.*, ¶¶ 20-26. This is a repeat of arguments made by the Proposed Interveners in their original motion, they were answered in the Affidavit of Robert B. Bernstein, dated May 25, 2006 at ¶¶ 15- 16 (demonstrating that, among other things, their arguments are time-barred), the Proposed Interveners offer no arguments to the contrary, and there is no demonstration by the Proposed Interveners that, in rejecting their arguments, the Court overlooked or misapprehended any

relevant facts, or misapplied any controlling principle of law. Indeed, they seem to ignore the relevant legal standard altogether.

**B. The Motion is Sanctionable and Should Therefore Be Withdrawn**

Under N.Y. Comp. Codes R. & Regs, tit. 22, §130-1.1 et seq., conduct is sanctionable if it is frivolous, and conduct is frivolous if it is (i) completely without merit in law and cannot be supported by reasonable argument for an extension, modification or reversal of existing law or (ii) undertaken primarily to delay or prolong the resolution of the litigation. Under 22 NYCRR § 130-1.1(d), an award of costs and the imposition of sanctions may be made either upon motion or, as Petitioner suggests here, “upon the Court’s own initiative, after a reasonable opportunity to be heard.”

As explained above, in obtaining the order to show cause and an *ex parte* stay of the underlying proceeding, the Proposed Interveners argued that the villages and village mayors each have standing to intervene because they will be impacted financially by a ruling in Petitioner’s favor, and in support of that argument, as demonstrated above, they relied entirely on *Dubbs v. Board of Assessment Review*, and *Akari House, Inc. v. Irizzary*, both of which were overruled by the Court of Appeals in *Colella v. Board of Assessors of the County of Nassau*, 95 N.Y.2d 401, 741 N.E.2d 113, 718 N.Y.S.2d 268 (2000).

Because the Proposed Interveners based their argument on authority which is no longer good law in New York, and because they obtained the Order to Show Cause without informing the Court of that fact, their conduct in seeking a stay and reargument on that basis is sanctionable within the meaning of 22 NYCRR § 130-1.1(c)(1) and (2). *See, e.g., Yenom Corp. v. 155 Wooster St. Inc.*, 818 N.Y.S. 2d 210, 216-17 (1st Dep’t 2006) (appellate division, on own

motion, awarded sanctions in the amount of expenses and attorneys fees for filing and maintaining a frivolous appeal). Therefore, in accordance with 22 NYCRR § 130-1.1(c)(3), the motion should be withdrawn upon service of Petitioner's answering papers and, if not withdrawn, the Court may wish to exercise its own authority under 22 NYCRR § 130-1.1(d) to impose sanctions against the Proposed Interveners for filing and maintaining a frivolous motion.

**CONCLUSION**

For the foregoing reasons, and for the reasons set forth in the Court's Decision and Order dated August 11, 2006, Petitioner respectfully requests that the Proposed Interveners' motion for leave to reargue be denied in its entirety. Alternatively, if leave to reargue is granted, Petitioner respectfully requests that reargument be denied.

Dated: Hartsdale, New York  
September 11, 2006

ROBERT B. BERNSTEIN



48 Old Colony road  
Hartsdale, New York 10530  
(914) 522-8126

Petitioner Pro Se

To: KEANE & BEANE, P.C.  
445 Hamilton Avenue  
15th Floor  
White Plains, New York 10601  
By: Richard L. O'Rourke, Esq.

Attorneys for the Proposed Interveners

TIMOTHY W. LEWIS  
Town Attorney for the Town of Greenburgh  
177 Hillside Avenue  
Greenburgh, New York 10607

Attorneys for Respondents