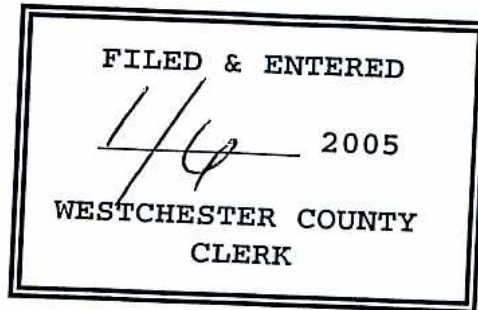


SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

P R E S E N T:

HON. ORAZIO R. BELLANTONI
JUSTICE OF THE SUPREME COURT



THE BOARD OF EDUCATION OF THE
MAMARONECK UNION FREE SCHOOL DISTRICT,

Plaintiff,

- against -

ATTORNEY GENERAL OF THE STATE OF NEW
YORK, as the Statutory Representative
of Ultimate Charitable Beneficiaries,

Defendant.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

In the Matter of the Application of
RICHARD CANTOR,

Petitioner,

- against -

MAMARONECK UNION FREE SCHOOL DISTRICT
and THE BOARD OF EDUCATION OF THE
MAMARONECK UNION FREE SCHOOL DISTRICT,

Respondents.

Plaintiff Board of Education of the Mamaroneck Union Free School District moves for an order, pursuant to CPLR 3212, granting summary judgment in its favor and awarding the relief requested in the first cause of action of the complaint.

Petitioner Richard Cantor moves for an order: (1) consolidating the instant proceeding with the pending lawsuit before the Supreme Court of the State of New York, County of Westchester, entitled *The Board of Education of the Mamaroneck*

SHORT FORM ORDER
Index No. 9681/04
Motion Date: 8/25/04

Index No. 10481/04

Union Free School District v. Attorney General of the State of New York, as the Statutory Representative of the Ultimate Charitable Beneficiaries, bearing Index No. 09681/04, and scheduling this action for a hearing; (2) declaring that the restrictive covenants in the Deeds annexed to the accompanying Verified Petition as Exhibit "A" prohibit the Respondent herein, or any other successor owner of the real premises known as the Richard M. Kemper Memorial Park ("Kemper Memorial Park"), or their agents, servants, contractors or employees, from moving, modifying, encroaching upon, reconfiguring, or otherwise relocating the premises, or otherwise altering its original construction, configuration, and use solely as The Kemper Memorial Park; (3) pursuant to: (i) the contractual obligations owed by the Respondent to Adolf and Helen Kemper, the donors of the Kemper Memorial Park, their successors, heirs, and assigns; (ii) the unequivocal terms of the restrictive covenants contained in the Deed to the Kemper Memorial Park restricting its use and placement; and (iii) the requirement of New York Education Law Section 1709(12), which directs the board of education of every union free school district "[t]o take and hold for the use of the said school ... any real estate transferred to it by gift, ... and apply the same, ... according to the instructions of the donor or testator[]", temporarily and permanently enjoining the Respondent, its successors, assigns, agents, servants or employees, from moving, modifying, encroaching upon, reconfiguring, or otherwise relocating the premises, or otherwise altering its use as the Kemper Memorial Park, in contravention of the restrictive covenants contained in the Deeds for the Kemper Memorial Park; (4) pursuant to the aforementioned authority, requiring the Respondent, its successors, assigns, agents, servants or employees to be responsible for the reasonable maintenance restoration and care needs of the Kemper Memorial Park; (5) directing that the President of the Kemper Memorial Park Preservation Fund be named as a necessary party in any discussions regarding all future decisions relative to the Park, including but not limited to its restoration, care, maintenance and management; or (6) in the alternative to the above requested relief, directing Respondents to reconvey the premises identified as the Kemper Memorial Park to the heirs of the original donors, Adolf and Helen Kemper, in fee simple; and (7) in addition to the relief requested above, awarding Petitioner's counsel reasonable counsel fees for the necessity of pursuing litigation to enforce the terms of the aforesaid restrictive covenant, Education Law mandates and contractual obligations owed by the Respondent.

The following papers were read:

Notice of Motion - Affirmation in Support of Robert S. Davis, Esq. - Annexed Exhibits 1(A-E)-2 - Affidavit in Support of Cecilia Absher - Affidavit of Robert S. Retnauer	1-11
Plaintiff's Memorandum of Law in Support	12

Affirmation in Response of Judith C. McCarthy, Esq.	13
Order to Show Cause - Verified Petition	11-25
- Annexed Exhibits A-J	
Verified Answer - Annexed Exhibits A-C - Affidavit of Robert S. Retnauer	26-30
Respondents' Memorandum of Law in Opposition	31-32
- Annexed Exhibit A	
Verified Reply	33

Upon the foregoing papers it is hereby ORDERED that the motions are decided in accordance with the following.

As respondents join in petitioner's request, the CPLR Article 78 proceeding bearing Index No. 10481/04 is consolidated with the related action bearing Index No. 9681/04.

Initially, with respect to standing, petitioner, the grandson of Adolph and Helen Kemper, and as a representative of said donors' estate, may enforce the terms of the gift. See Smithers v St. Luke's-Roosevelt Hospital Center, 281 AD2d 127 (1st Dept 2001).

The deeds at issue contain restrictive covenants which require the conveyed land to "be held and maintained in perpetuity for public and school uses as a memorial to [the donors' son,] the late Lt. Richard [M.] Kemper, and the other students and former students of Union Free School District No. 1, Town of Mamaroneck, N.Y., who gave their lives in the service of the United States of America in WW II; all of said parcels to be collectively known as 'Richard Kemper Park'." See Exhibit A annexed to the verified petition. In connection with said gift, the Kempers underwrote virtually all costs to construct and beautify the memorial park, including the landscaping, purchase of the granite monument and granite benches.

However, respondents, the Mamaroneck Union Free School District and its Board of Education, are not fulfilling their part of the bargain. Respondents' proposal, which scales back the size of the Kemper Memorial Park and creates a "buffer" between same and the soccer field with "newly dedicated land," regardless of how "tasteful, visually appealing, and more visible to drivers and pedestrians on Boston Post Road," does not significantly honor the sacrifice of those soldiers who gave their lives in service of their country, and violates the specific covenants, quoted above. Moreover, since no general charitable objective is manifest in said deeds, the doctrine of cy pres cannot be applied. See In re Shatford's Will, 18 Misc.2d 953 (NY Sur 1959).


Accordingly, respondents are prohibited from implementing the project. See Chambers v Old Stone Hill Road Associates,

1 NY3d 424 (2004) (restrictive covenants will be enforced when the intention of the parties is clear and the limitation is reasonable and not offensive to public policy).

All other requested relief is denied.

Settle judgment on ten (10) days notice within thirty (30) days hereof.

Dated: *January 5, 2005*
White Plains, New York


HON. ORAZIO R. BELLANTONI
Justice of the Supreme Court

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