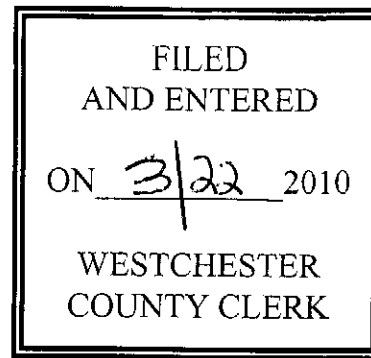


To commence the statutory time period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order with notice of entry, upon all parties.



SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

-----X

PAUL J. FEINER,  
in his capacity as a Town resident and as  
Supervisor and a member of the Town Board of  
THE TOWN OF GREENBURGH,

Petitioner,

For a Declaratory Judgment Pursuant to Article 30  
And a Writ of Mandamus Pursuant to Article 78  
of the Civil Practice Law and Rules

**DECISION AND ORDER**  
Index No.: 2656/10

-against-

BARBARA GRODEN, MYRNA T. ANOVER and  
RUTH JACOBS in their official capacities as members  
of the Board of Commissioners of the Hartsdale Public  
Parking District in the Town of Greenburgh and THE  
BOARD OF COMMISSIONERS OF THE HARTSDALE  
PUBLIC PARKING DISTRICT,

Respondents.

-----X

LOEHR, J.

The following papers numbered 1-3 were read on the application of Petitioner for an order declaring Section 2 of Chapter 402 of the Laws of 1950 to be unconstitutional and compelling the Board of Commissions of the Hartsdale Public Parking District (the "Commissioners") to recognize the appointment of Barry Kessler as a Commissioner.

	<u>Papers Numbered</u>
Order To Show Cause - Verified Petition - Exhibits	1
Affirmation in Opposition - Exhibits	2

Upon the foregoing papers, Chapter 402 of the Laws of 1950 (the "Act") authorized the Town of Greenburgh to establish a Public Parking District (the "District") for the purpose of acquiring lands as parking sites and improving same as parking facilities, the costs of which to be borne by landowners in the District. The District was established by the Town in 1952. Pursuant to Section 2 of the Act, upon initial establishment of the District and upon expiration of their terms, the Town Board was authorized to appoint three Commissions, each of whom were required at the time of their appointment to be (a) a resident of the District and (b) an owner of real property within the District.

At a Town Board meeting on April 22, 2009, the Town Board appointed Barry Kessler ("Kessler") to a three-year term as Commissioner beginning January 1, 2010 and expiring December 31, 2012, replacing Commissioner Ruth Jacobs whose three-year term expired on December 31, 2009. Although a resident of the District, Kessler was not an owner of real property in the District. Based thereon, by letter dated November, 23, 2009, the Commissioners notified the Town Board that they could not recognize Kessler and requested that the Town Board rescind the appointment. This action resulted.

Petitioner, as a resident of the Town, and as the Supervisor and member of the Town Board of the Town of Greenburgh, seeks a declaration that, to the extent Section 2 of the Laws of 1950 requires a Commissioner to own real property in the District, it is an unconstitutional denial of equal protection against those who do not own real property in the District in violation of Article 1, Section 11 of the New York State Constitution.

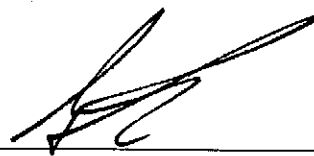
As a threshold matter, Petitioner lacks standing to bring this action. Petitioner brings this action on behalf of the Town and individually as a resident of the Town. As to the Town, political subdivisions are powerless to challenge the constitutionality of an act of the Legislature that restricts the subdivision's powers (*Village of Herkimer v Axelrod*, 58 NY2d 1069 [1983]). As to Petitioner individually, under settled principles of standing, those who challenge a statute as unconstitutional must demonstrate actual or threatened injury to a protected right and that they have been aggrieved by the unconstitutional feature of the statute. Here, Petitioner does not assert he was denied appointment as a Commissioner based on the Act but that Kessler was. Constitutional litigants are not entitled to raise the unconstitutionality of a statute as it is applied

to others (*Matter of Daniel C.*, 99 AD2d 35, 42 [2d Dept 1984]). Were this Court to reach the equal protection issue, the Court of Appeals in *Esler v Walters* (56 NY2d 306 [1982]) held that the Legislature could make distinctions in limited use districts, such as the District here, between landowners and non-landowners without violating the equal protection clause of the State Constitution.

Petitioner also seeks an order of mandamus compelling the Commissioners to recognize Kessler's appointment. As the appointment was in violation of the Act, mandamus will not lie.

Based thereon, the Petition is dismissed. This constitutes the decision and order of the Court.

Dated: White Plains, New York  
March 22, 2010



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HON. GERALD E. LOEHR  
Acting J.S.C.

TIMOTHY W. LEWIS, Town Attorney  
Attorney for Petitioner  
177 Hillside Avenue  
Greenburgh, NY 10607

HUFF WILKES, LLP  
Attorneys for Respondents  
200 White Plains Road  
Tarrytown, NY 10591