

**Matter of Joy Bldrs., Inc. v Town of Clarkstown  
Planning Bd.**

2002 NY Slip Op 30181(U)

July 23, 2002

Supreme Court, Rockland County

Docket Number: 1066/02

Judge: George M. Bergerman

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ROCKLAND

-----X  
In the Matter of the Complaint

JOY BUILDERS, INC., ISRAEL HERSKOWITZ and  
JOSEPH HERSKOWITZ,

Plaintiffs/Petitioners,

-against-

THE TOWN OF CLARKSTOWN PLANNING BOARD,  
THE TOWN OF CLARKSTOWN DEPARTMENT OF  
ENVIRONMENTAL CONTROL and DENNIS M.  
LETSON, P.E.,

Defendants/Respondents.

Index No. 1066/02  
Motion Date: 5/24/02  
Motion Cal. Nos. 19, 20

DECISION AND ORDER

for a judgment declaring void a determination of  
January 17, 2002 as unconstitutional and  
annulling and reversing the determination of  
the Planning Board imposing penalty.

-----X  
BERGERMAN, J.,

This is an Article 78 proceeding by the petitioner seeking a judgment declaring void respondents' determination of January 17, 2002 as unconstitutional and annulling and reversing said determination. The respondents cross move for an order dismissing the petition on the grounds of res judicata/collateral estoppel.

In a prior proceeding before Justice Weiner (*Joy Builders, Inc. v. Clarkstown*, Rockland County Supreme Court, Index No. 3578/00) petitioners sought a writ of mandamus directing respondent CLARKSTOWN PLANNING BOARD to process its application for subdivision approval of a 113 acre parcel known as the Smith Farm property. In denying mandamus relief, Justice Weiner found that petitioner had "paid bribes to a Planning Board member and a county

political leader to obtain subdivision approval for the Smith Farm property". Based on this misconduct, Justice Weiner held that "it would be a manifest injustice to compel the respondent Planning Board to proceed with petitioner's subdivision approval application" and granted respondents' cross-motion to dismiss the mandamus proceeding.

Since Justice Weiner's decision, petitioners (Joseph and Israel Herskowitz) have been sentenced by the Federal Court for tendering bribes with respect to the Smith Farms subdivision application. The petitioner herein alleges that the Federal Court sentencing did not restrain the Herskowitz' from submitting further subdivision applications or otherwise restrain their business activities.

On November 29, 2001, petitioners submitted an application to the Clarkstown Planning Board for the subdivision of seven lots on 11.5 acres of land, not part of the Smith Farm property. On December 5, 2001, the Clarkstown Department of Environmental Control circulated the Environmental Assessment Form (EAF) submitted by the petitioners on behalf of the Planning Board. An appearance before the technical advisory committee of the Planning Board was scheduled for January 16, 2002 for the purpose of reviewing the application. When petitioners' surveyor appeared on January 16, 2002, the surveyor was advised that the appearance had been canceled by the Board.

By letter dated January 17, 2002, the Planning Board, by its Deputy Director (Dennis M. Letson) advised petitioners as follows:

"Please be advised that the head Agency distribution [sic] for the referenced subdivision was in error, and is hereby rescinded.

The Clarkstown Planning Board, as affirmed by the Court, has established a policy that it will not receive nor entertain applications from this applicant".

The Court finds that Justice Weiner's decision does not provide legal basis for maintaining a defense of res judicata/collateral estoppel in this proceeding. Justice Weiner's decision related only to the Smith Farm property and petitioner's illegal actions with regard thereto. That decision was rendered prior to the sentencing of the Herskowitz' for their misconduct in attempting to bribe Planning Board members. Justice Weiner was not requested to and did not hold that petitioners would be banned from submitting land use applications for other properties.

Further, at the time Justice Weiner determined the prior proceeding, the Herskowitz' had not yet been sentenced by the Federal Court.

Accordingly, the Court finds that the issues before Justice Weiner and the issues presented in this proceeding are not identical.

If respondents contend that petitioners should forever be barred from submitting land use application for properties other than the Smith Farm property, based upon petitioner's illegal activities with respect to the Smith Farm property, they will be required to assert that position on the merits in the instant proceeding.

The respondents' motion to dismiss is denied.

Respondents are directed to serve and file an answer within five days of the date of service of a copy of this decision and order with notice of entry thereof and the matter will be renoticed for hearing pursuant to the provisions of CPLR §7804 subd.(f).

In rendering this decision and order the Court considered the following papers:

(1) notice of petition, (2) respondents' motion to dismiss, (3) petitioners' reply affirmation, and (4) respondents' reply affirmation.

Dated: New City, New York  
July 23, 2002

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J.S.C.

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