

STATE OF NEW YORK
SUPREME COURT : COUNTY OF NIAGARA

DAVISON ROAD PROPERTIES, LLC

Petitioner,

**VERIFIED ARTICLE 78
PETITION**

Index No. _____

vs.

THE CITY OF LOCKPORT, THE CITY OF LOCKPORT
COMMON COUNCIL, MAYOR JOHN LOMBARDI III,
DR. JOHN D. CRAIG, ANITA MULLANE, MARK S.
DEVINE, KATHRYN FOGLE, MARGARET LUPO,
KEVIN M. KIRCHBERGER,

Respondents.

Petitioner DAVISON ROAD PROPERTIES, LLC, by its attorneys, Tiveron Law PLLC,
for its petition herein, alleges the following:

1. Petitioner brings this proceeding pursuant to CPLR Article 78 to request a judgment annulling and reversing Respondent’s March 26, 2025, adoption of the City of Lockport Comprehensive Plan and Zoning Code, reinstating the Comprehensive Plan and Zoning Code previously published on or about February 10 and February 25, 2025, respectively, and awarding attorneys’ fees, costs, and such further relief as the Court deems just and proper.

2. At all times hereinafter mentioned, Petitioner was and is a limited liability company which holds title to eight parcels comprising approximately 38,000 square feet of space on Davison Road in the City of Lockport, Niagara County, New York.

3. At all times hereinafter mentioned, Respondent, the City of Lockport ("Lockport"), is a municipality in Niagara County and the State of New York with offices located at One Locks Plaza, Lockport, New York 14094.

4. At all times hereinafter mentioned, Respondent, the City of Lockport Common

Council ("Council"), is the legislative body of the City of Lockport, comprised of the Mayor and six Aldermen with offices located at One Locks Plaza, Lockport, New York 14094.

5. At all times hereinafter mentioned, Respondent Mayor John Lombardi, III is the Mayor of the City of Lockport with offices located at One Locks Plaza, Lockport, New York 14094.

6. At all times hereinafter mentioned, Respondent Dr. John D. Craig is the 1st Ward Alderman of the Lockport Common Council with offices located at One Locks Plaza, Lockport, New York 14094.

7. At all times hereinafter mentioned, Respondent Anita Mullane is the 2nd Ward Alderman of the Lockport Common Council with offices located at One Locks Plaza, Lockport, New York 14094.

8. At all times hereinafter mentioned, Respondent Mark S. Devine is the 3rd Ward Alderman of the Lockport Common Council with offices located at One Locks Plaza, Lockport, New York 14094.

9. At all times hereinafter mentioned, Respondent Kathryn Fogle is the 4th Ward Alderman of the Lockport Common Council with offices located at One Locks Plaza, Lockport, New York 14094.

10. At all times hereinafter mentioned, Respondent Margaret Lupo is the 5th Ward Alderman of the Lockport Common Council with offices located at One Locks Plaza, Lockport, New York 14094.

11. At all times hereinafter mentioned, Respondent Kevin M. Kirchberger is the Alderman at Large of the Lockport Common Council with offices located at One Locks Plaza, Lockport, New York 14094.

STATEMENT OF FACTS

12. In or about January of 2024, Petitioner acquired the aforementioned properties in the Professional Parkway/Davison Road corridor of Lockport.

13. Of the eight units comprising the property, only two have tenants. The remaining units, as well as many of the neighboring buildings in the corridor, remain vacant despite extensive marketing efforts.

14. Respondent undertook a four-year-long planning process for a new Comprehensive Plan and Zoning Code, engaging two official committees composed of city officials, staff, residents, and business owners, with public engagement spanning 2021 through 2024.

15. Pursuant to the zoning map published on February 25, 2025, the subject parcels were designated "Mixed-Use Neighborhood" (MU-N), which expressly permitted residential uses up to four dwelling units per structure and supported adaptive reuse of underutilized office and commercial properties.

16. The City's 2024 Comprehensive Plan, developed concurrently with the zoning code, emphasized the transformation of aging commercial corridors like Davison Road through mixed-use redevelopment, residential conversion, and investment in housing diversity.

17. At no point during the public workshops, stakeholder meetings, draft reviews, or committee deliberations was there any indication that the MU-N designation would be removed or that a new district—"Mixed Office" (MO)—would be introduced.

18. On March 12, 2025, with no advance notice or study, the Council announced the rezoning of 60 parcels in the Davison Road corridor from MU-N to a newly created MO district. This rezoning applied exclusively only to those 60 parcels and was not mentioned in any previous iteration of the zoning code or map.

19. The MO designation prohibits all forms of residential development—even by special permit—and represents the only zoning classification in the entire City that entirely prohibits residential use.

20. On March 26, 2025, the Council voted unanimously to adopt the revised zoning map and code, implementing the MO district without further study, Planning Board input, or public comment. This action departed significantly from the previously adopted planning documents and their underlying data.

21. No environmental review or SEQRA-compliant study was conducted regarding the change, in direct violation of statutory requirements given the material impact on land use, housing availability, and corridor redevelopment.

22. The MO district's creation and application contradicts the vision, objectives, and policy strategies of both the draft and final Comprehensive Plans, which sought to repurpose vacant commercial properties, increase housing stock, and revitalize corridors like Davison Road.

23. Public input gathered through visual surveys, community workshops, and stakeholder interviews overwhelmingly supported mixed-use development, walkable neighborhoods, and upper-floor residential conversions—all of which the MO designation expressly forbids.

24. A prior judgment by the New York State Supreme Court reduced the assessed value of Petitioner's properties from over \$3 million to approximately \$848,000, citing ongoing vacancy and market failure. Similar properties in the corridor have experienced analogous reductions.

25. Multiple commercial appraisals and third-party reports submitted to the Council confirmed the economic infeasibility of restoring these parcels as office use alone. Conversely, market data indicates strong demand for residential units in Lockport and Niagara County.

26. Petitioner, and other similarly situated property owners, reasonably relied on the February zoning map and the consistent message of redevelopment conveyed through the four-year planning process, only to be retroactively harmed by a targeted rezoning that reversed course without justification.

27. Upon information and belief, the decision to rezone the 60 parcels on Davison Road to "Mixed Office" was made in a closed-door session of the Common Council without notice to the public, the Planning Board, or affected stakeholders. This action contravenes the transparency and due process requirements mandated by state law.

28. Several Council members who supported this change reside in or near the affected area and harbor a discriminatory and irrational belief that permitting residential conversion would introduce low-income tenants and individuals from lower socio-economic backgrounds. This fear was not supported by data, market conditions, or the proposed redevelopment plans, which demonstrated that the converted residential units would be high-quality, market-rate apartments aligned with current demand and design standards.

29. Rather than acting to advance the public welfare of the entire City of Lockport, the Council acted in its own perceived neighborhood interest, undermining years of planning effort and the broader policy goals to address the City's housing shortage and declining commercial corridors. This conduct reflects improper favoritism and a dereliction of the Council's duty to act for the benefit of the community as a whole.

30. Moreover, by blocking residential redevelopment and allowing the Professional Parkway corridor to continue its decline, the Council has invited long-term economic harm. If the MO zoning designation is allowed to stand, it will likely result in property devaluations of between

\$35 million and \$50 million across the affected parcels. This lost valuation will have to be offset through increased tax burdens on other Lockport residents, producing citywide financial harm.

31. The Council's short-sighted decision fails to recognize that the stagnation and visible deterioration of the Davison Road corridor negatively impacts adjacent residential neighborhoods, including those represented by the very Council members advocating for the rezoning. Rather than protecting neighborhood values, this policy accelerates blight, depresses surrounding property values, and damages the long-term viability of the community.

32. Cities across Western New York and the country have successfully revitalized declining commercial areas by embracing mixed-use redevelopment, adaptive reuse, and infill residential projects. The Comprehensive Plan embraced this vision for Lockport—and the MU-N zoning designation gave it form. If permitted to proceed, residential conversion of these vacant buildings would trigger reinvestment, improve tax revenues, and enhance quality of life for Lockport residents, just as it has in comparable municipalities.

ARTICLE 78 STANDARDS

33. The Court of Appeals has emphasized that “[t]here is no doubt that the reason for the enactment of [Article 78] was to make it possible, where warranted, to ameliorate harsh impositions of sanctions by administrative agencies. That purpose should be fulfilled by the courts not only as a matter of legislative intention, but also in order to accomplish what a sense of justice would dictate.” *Horn v Intl. Bus. Machs. Corp.*, 110 AD2d 87 [2d Dept 1985]).

34. CPLR 7803 provides that “[t]he only questions that may be raised in a proceeding under this article are: (1) whether the body or officer failed to perform a duty enjoined upon it by law; or (2) whether the body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction; or (3) whether a determination was made in violation of lawful procedure,

was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed; or (4) whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence.”

35. This petition is brought pursuant to the “failure to perform a duty,” “excess of jurisdiction,” and “arbitrary and capricious” standards set forth under subsections (1), (2), and (3), respectively.

36. CPLR 7806 sets forth this Court’s jurisdiction to grant the relief requested in this petition: “The judgment may grant the petitioner the relief to which he is entitled, or may dismiss the proceeding either on the merits or with leave to renew. If the proceeding was brought to review a determination, the judgment may annul or confirm the determination in whole or in part, or modify it, and may direct or prohibit specified action by the respondent. Any restitution or damages granted to the petitioner must be incidental to the primary relief sought by the petitioner, and must be such as he might otherwise recover on the same set of facts in a separate action or proceeding suable in the supreme court against the same body or officer in its or his official capacity.”

37. “Judicial review of an administrative determination is limited to the grounds invoked by the agency. [The Court] may not sustain the determination by substituting a more appropriate basis [for the determination].” *Aronsky v. Bd. of Educ.*, 75 N.Y.2d 997, 1000 (1990).

38. Further, “[w]here no triable issue of fact is raised, a summary determination is appropriate based on the pleadings, papers and admissions in accordance with the standards for granting summary judgment.” *10 W. 66th St. Corp. v. N.Y. State Div. of Hous. & Cmty. Renewal*, 184 A.D.2d 143, 148 (1st Dep’t 1992).

39. The facts and issues in this case are not in dispute. The exhibits annexed to this Petition comprise clear evidence of precisely what occurred, and there are no triable issues of fact. While this is not a motion for summary judgment, this case is nevertheless ripe for summary determination, unless Respondents can credibly dispute any of the facts that are now before the Court.

A. RESPONDENTS FAILED TO PERFORM A DUTY ENJOINED UPON IT BY LAW.

40. CPLR § 7803(3) authorizes relief where a determination was made in violation of lawful procedure, was affected by an error of law, was arbitrary and capricious, or constituted an abuse of discretion.

41. A zoning action is arbitrary and capricious if it is made without regard to the facts, lacks a rational basis, or is inconsistent with the goals of a comprehensive plan. See *Horn v Intl. Bus. Machs. Corp.*, 110 AD2d 87 [2d Dept 1985], *Pecoraro v Bd. of Appeals*, 2 NY3d 608 [2004].

42. Courts will invalidate zoning decisions that result in "spot zoning," i.e., where a small area is singled out for treatment different from that of similar surrounding land, with no reasonable basis related to public welfare. *Rogers v. Village of Tarrytown*, 302 N.Y. 115 [1951]; *Bedford v Mount Kisco*, 33 NY2d 178 [1973].

43. The Respondent's action in creating and applying the MO zoning classification exclusively to the Davison Road corridor constitutes unlawful spot zoning. The area was singled out and treated inconsistently with surrounding zones based on no identifiable planning justification.

44. Respondents' adoption of the MO designation was effectuated without a revised environmental review, supplemental planning analysis, or any opportunity for public hearing or Planning Board recommendation, in violation of SEQRA and General City Law § 28-a.

45. Respondents' conduct ignored the recommendations of the duly appointed planning and zoning committees and contradicted the stated housing, economic development, and corridor revitalization objectives in the Comprehensive Plan.

46. Petitioner and similarly situated owners were denied the opportunity to rely on a consistent planning framework and were prejudiced by the Council's arbitrary deviation, without notice, evidence, or legislative findings.

47. The MO designation undermines the Comprehensive Plan and prevents Petitioner from pursuing feasible, market-driven redevelopment aligned with the community's long-term goals.

48. As was set forth above, CPLR 7803(1) allows Article 78 petitioners to raise the question of "whether the body or officer failed to perform a duty enjoined upon it by law."

49. Respondents herein failed to perform a duty enjoined upon it by law, in that they did not afford the Petitioner the due process specified in General City Law §28-a.

50. The function of this Article 78 subsection "is to 'enforce an administrative act positively required to be done by a provision of law.'" *Usen v. Sipprell*, 41 A.D.2d 251, 257 (4th Dep't 1973) (quoting *Walsh v. La Guardia*, 269 N.Y. 437, 441 (1936)).

51. The Court of Appeals has explained that "[m]andamus is available . . . only to enforce a clear legal right where the public official has failed to perform a duty enjoined by law. Thus, mandamus does not lie to enforce the performance of a duty that is discretionary, as opposed to ministerial. A discretionary act 'involve[s] the exercise of reasoned judgment which could

typically produce different acceptable results whereas a ministerial act envisions direct adherence to a governing rule or standard with a compulsory result.” *N.Y. Civ. Liberties Union v. State*, 4 N.Y.3d 175, 184 (2005) (quoting *Tango v. Tulevech*, 61 N.Y.2d 34, 41 (1983)).

52. It is respectfully submitted that General City Law § 28-a affords the Petitioners a clear legal right of some specific minimum due process safeguards and the Respondents failed to follow it.

B. RESPONDENTS’ DETERMINATIONS WERE MADE IN VIOLATION OF LAWFUL PROCEDURE, WERE AFFECTED BY AN ERROR OF LAW, AND WERE ARBITRARY AND CAPRICIOUS.

53. As was set forth above, CPLR 7803(3) allows Article 78 petitioners to raise the question of “whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed.”

54. It is respectfully submitted that the Respondents’ determinations herein were made in violation of lawful procedure, were affected by an error of law, and were arbitrary and capricious, in that Respondent’s actions violated the provisions of General City Law §28-a.

55. The Court of Appeals has delineated the applicable standard of review for Article 78 petitions brought pursuant to the “arbitrary and capricious” standard: “The arbitrary or capricious test chiefly ‘relates to whether a particular action should have been taken or is justified and whether the administrative action is without foundation in fact.’ Arbitrary action is without sound basis in reason and is generally taken without regard to the facts . . . ‘[T]he proper test is whether there is a rational basis for the administrative orders, *the review not being of determinations made after quasi-judicial hearings required by statute or law.*’ Where, however, a

hearing is held, the determination must be supported by substantial evidence; and where a determination is made and the person acting has not acted in excess of his jurisdiction, in violation of lawful procedure, arbitrarily, or in abuse of his discretionary power, including discretion as to the penalty imposed, the courts have no alternative but to confirm his determination. Rationality is what is reviewed under both the substantial evidence rule and the arbitrary and capricious standard.” *Pell v. Bd. of Educ.*, 34 N.Y.2d 222, 231 (1974) (emphasis in original) (quoting *Colton v. Berman*, 21 N.Y.2d 322, 329 (1967)); see also, *In re Alexis v. City of Niagara Falls*, 106 A.D.3d 1501, 1501 (4th Dep’t 2013).

56. In sum, “[a]n action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts.” *In re Murphy v. N.Y. State Div. of Hous. & Cmty. Renewal*, 21 N.Y.3d 649, 652 (2013) (quoting *In re Peckham v. Calogero*, 12 N.Y.3d 424, 431 (2009)); see also, *Ward v. City of Long Beach*, 20 N.Y.3d 1042, 1043 (2013).

57. Notably, “[a]n administrative agency acts arbitrarily and capriciously when it fails to conform to its own rules and regulations.” *Law Enforcement Officers Union v. State of New York*, 229 A.D.2d 286, 291 (3rd Dep’t 1997), appeal denied, 90 N.Y.2d 807 (1997) (quoting *Era Steel Constr. Corp. v. Egan*, 145 A.D.2d 795, 799 (3rd Dep’t 1988)); see also, *In re Lipani v. N.Y. State Div. of Human Rights*, 56 A.D.3d 560, 561 (2nd Dep’t 2008) (“[A]n administrative determination is arbitrary and capricious when it exceeds the agency’s statutory ‘authority or [is made] in violation of the Constitution or laws of this State.’ Such an arbitrary administrative determination requires reversal, on the law, ‘even though there is in the record substantial evidence to support the determination made.’”).

58. Here, it is respectfully submitted that Respondents’ determinations did not comply with the requirements of General City Law § 28-a.

59. As a result, it is respectfully submitted that the Respondents acted in an arbitrary and capricious manner by not following the requirements of General City Law § 28-a.

60. The following exhibits are set forth within the Amended Affirmation of Corey J. Hogan, dated May 20, 2025, which is incorporated by reference as if it were set forth herein in support of this Petition, each of which substantiates key factual assertions and supports the legal claims of arbitrary, capricious, and unlawful conduct by Respondent:

A. Hogan Aff Exhibit A – Court Judgment Reducing Assessed Value: This final judgment from the New York State Supreme Court reduced the assessed value of Petitioner's parcels from over \$3 million to approximately \$848,000 due to prolonged vacancy and lack of market demand for office space. It confirms the economic realities faced by property owners in the corridor and highlights why residential reuse—as originally allowed—is necessary and appropriate.

B. Hogan Aff Exhibit B – February 25, 2025 Draft Zoning Map: This map clearly designates the subject parcels on Davison Road as "Mixed-Use Neighborhood" (MU-N), which expressly permitted residential development. It reflects the zoning designation adopted after years of public input and committee planning and was the official draft on which Petitioner and others reasonably relied in making redevelopment plans. It demonstrates that the abrupt change to "Mixed Office" zoning on March 26, 2025 was a reversal of the City's own published and reviewed land use strategy.

C. Hogan Aff Exhibit C – Riccio Real Estate Brokerage Letter: Prepared by a commercial brokerage familiar with the corridor, this letter explains that marketing efforts since 2021 for office/commercial use have failed, with 8 of 19 buildings entirely vacant and the others largely underutilized. It confirms the lack of tenant interest and supports Petitioner's claim that

continued office-only zoning is economically irrational and unjustified.

D. Hogan Aff Exhibit D – Environmental Concerns Map: This exhibit confirms that no environmental conditions, infrastructure deficiencies, or engineering concerns exist in the Davison Road area that would preclude residential development. It refutes any argument that the zoning shift to MO was driven by health, safety, or environmental limitations.

E. Hogan Aff Exhibit E – Proposed Redevelopment Renderings: This set of renderings and development plans illustrates the proposed adaptive reuse of the Davison Road buildings into high-quality residential units consistent with community preferences and the Comprehensive Plan's goals. It shows how these vacant properties can be transformed into productive, tax-generating, mixed-use sites through reasonable reinvestment.

F. Hogan Aff Exhibit F – The March 26, 2025 City of Lockport Official Zoning Map, which was voted on and passed unanimously by the City of Lockport Common Council, displays the abrupt and intentional change in zoning on the South end of Davison Road from “Mixed-Use Neighborhood” (MU-N) to the newly created and sole area designated as “Mixed-Office” MO.

61. Each of these exhibits directly supports the Petition and underscores the procedural irregularity, lack of rational basis, and prejudicial impact of the March 26, 2025 rezoning. The exhibits validate Petitioner's reliance on prior planning documents and demonstrate the harm inflicted by the Council's abrupt and unlawful reversal.

WHEREFORE, Petitioner respectfully requests that this Court:

A. Issue a judgment annulling and reversing Respondent's March 26, 2025 adoption of the revised Comprehensive Plan and Zoning Code;

B. Reinstate the zoning classification of the subject parcels as "Mixed-Use Neighborhood" consistent with the February 25, 2025 draft;

C. Declare the MO zoning classification and its application to the subject parcels void and unenforceable as unlawful spot zoning;

D. Award Petitioner costs and reasonable attorneys' fees;

E. Grant such other and further relief as the Court deems just and proper.

Dated: May 21, 2025
Amherst, New York

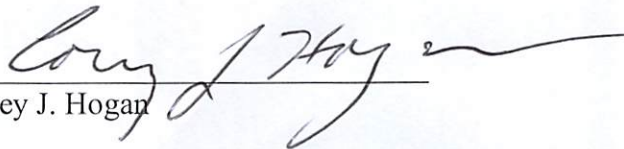


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VERIFICATION

STATE OF NEW YORK)
COUNTY OF ERIE) SS:
TOWN OF AMHERST)

Corey J. Hogan, being duly sworn hereby affirm and verify I am the owner of Davison Road Properties, LLC, Petitioner herein. I have read the annexed Verified Petition and know the contents thereof, and the same is true to my knowledge except those matters therein which are stated to be alleged on information and belief, and as to those matters I believe them to be true.


Corey J. Hogan

Sworn to me this 12 day
of May, 2025.


Notary Public

Steven M. Cohen
Notary Public – State of New York
Qualified in Erie County
My Commission expires March 6, 2027