

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

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CA 08-01913

PRESENT: HURLBUTT, J.P., CENTRA, PERADOTTO, GREEN, AND GORSKI, JJ.

IN THE MATTER OF LOCKPORT SMART GROWTH, INC.,
DOROTHY STOCKTON, THOMAS WALKER, JOSEPH P.
STUART, JR., JAMES EMMERT, JOAN A. GRIGG, AND
JOANNE WOODSIDE, PETITIONERS-APPELLANTS,

V

MEMORANDUM AND ORDER

TOWN OF LOCKPORT, TOWN OF LOCKPORT PLANNING
BOARD, RICHARD FORSEY, ROBERT BALCERZAK, MORRIS
WINGARD, DAVID KINYON, WALTER THORMAN, RODNEY
CONRAD, WILLIAM FEW, AND ROBERT LANGDON, IN THEIR
CAPACITIES AS MEMBERS OF TOWN OF LOCKPORT
PLANNING BOARD, WAL-MART STORES, INC., WAL-MART
REAL ESTATE BUSINESS TRUST, AND LOCKPORT L.L.C.,
RESPONDENTS-RESPONDENTS.
(PROCEEDING NO. 1.)

IN THE MATTER OF LOCKPORT SMART GROWTH, INC.,
JOAN A. GRIGG, AND JAMES EMMERT,
PETITIONERS-APPELLANTS,

V

TOWN OF LOCKPORT ZONING BOARD OF APPEALS,
EUGENE NENNIS, IN HIS OFFICIAL CAPACITY AS TOWN
OF LOCKPORT BUILDING INSPECTOR, WAL-MART STORES,
INC., LOCKPORT L.L.C., AND WAL-MART REAL ESTATE
BUSINESS TRUST, RESPONDENTS-RESPONDENTS.
(PROCEEDING NO. 2.)

HODGSON RUSS LLP, BUFFALO (DANIEL A. SPITZER OF COUNSEL), AND
OTTAVIANO & SANSONE, LLP, LOCKPORT, FOR PETITIONERS-APPELLANTS.

SEAMAN, JONES, HOGAN & BROOKS, LLP, LOCKPORT (MORGAN L. JONES, JR., OF
COUNSEL), FOR RESPONDENTS-RESPONDENTS TOWN OF LOCKPORT, TOWN OF
LOCKPORT PLANNING BOARD, RICHARD FORSEY, ROBERT BALCERZAK, MORRIS
WINGARD, DAVID KINYON, WALTER THORMAN, RODNEY CONRAD, WILLIAM FEW, AND
ROBERT LANGDON, IN THEIR CAPACITIES AS MEMBERS OF TOWN OF LOCKPORT
PLANNING BOARD, TOWN OF LOCKPORT ZONING BOARD OF APPEALS, AND EUGENE
NENNIS, IN HIS OFFICIAL CAPACITY AS TOWN OF LOCKPORT BUILDING
INSPECTOR.

HARTER SECREST & EMERY LLP, BUFFALO (MARC A. ROMANOWSKI OF COUNSEL),
FOR RESPONDENTS-RESPONDENTS WAL-MART STORES, INC. AND WAL-MART REAL
ESTATE BUSINESS TRUST.

HOPKINS & SORGI PLLC, WILLIAMSVILLE (SEAN W. HOPKINS OF COUNSEL), FOR
RESPONDENT-RESPONDENT LOCKPORT L.L.C.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered May 16, 2008 in consolidated proceedings pursuant to CPLR article 78. The judgment dismissed the petitions.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed without costs.

Memorandum: In these consolidated proceedings pursuant to CPLR article 78, petitioners seek, inter alia, to annul the determinations of respondent Town of Lockport Planning Board (Planning Board) and respondent Town of Lockport Zoning Board of Appeals (ZBA) granting certain variances to allow the construction of a Super Wal-Mart. In addition, petitioners contend that respondents Wal-Mart Stores, Inc. and Wal-Mart Real Estate Business Trust (collectively, Wal-Mart respondents) did not obtain necessary waivers and variances with respect to several applicable zoning ordinances. We conclude that Supreme Court properly dismissed the petitions.

We note at the outset that our interpretation of section 200-70 of the Code of the Town of Lockport (Town Code), entitled "Special Uses," differs from that of petitioners. That section merely provides that "[a]ny of the following uses may be permitted upon obtaining a special use permit, provided such use complies with all applicable dimensional and other requirements of this chapter" In other words, a use complies with all applicable dimensional and other requirements once any required variances are obtained and, "[i]ndeed, Town Law § 274-b (3) expressly provides for the issuance of a special use permit in conjunction with an area variance" (*Matter of Real Holding Corp. v Lehigh*, 304 AD2d 583, 584, *affd* 2 NY3d 297). We likewise conclude that the Wal-Mart respondents were not required to obtain a variance with respect to Town Code § 200-94 (B), which mandates a maximum lot coverage within the Commercial Corridor Overlay District (CCOD) of 75%, or with respect to Town Code § 200-94 (H), which regulates fencing and explicitly provides that "[t]he Planning Board may vary fence location, height and construction to accommodate an aesthetically pleasing buffer zone." Petitioners contend that the waivers from the CCOD requirements granted by the Planning Board for "extreme difficulties" are invalid. We reject that contention. Section 200-93 (C) of the Town Code provides that the Planning Board, in its discretion, may grant waivers from respondent Town of Lockport's site development standards if a developer can establish that "extreme difficulties" would be encountered with strict conformance. Initially, we conclude that, taking into account the purpose of the CCOD regulations and restrictions, the extreme difficulties standard is " 'capable of a reasonable application and [is] sufficient to limit and define the [Planning Board's] discretionary powers' " (*Morgan v Town of W. Bloomfield*, 295 AD2d 902, 903). Thus, section 200-93 (C) does not impermissibly delegate legislative power (see generally *Matter of Levine v Whalen*, 39 NY2d

510, 516). We further conclude that the Wal-Mart respondents properly sought waivers from dimensional requirements under Town Law § 274-a (5), and were not required instead to seek variances pursuant to Town Law § 274-a (3) (see *Real Holding Corp.*, 2 NY3d at 302). Similarly, we conclude that section 274-a (5) does not preempt local law, and that the "extreme difficulties" standard employed here does not conflict with that section. In addition, we conclude that the Planning Board's finding that the Wal-Mart respondents encountered "extreme difficulties" was not arbitrary and capricious. We agree with the court that the Planning Board took a "rational, measured approach to the reality of the project," and that the record contained sufficient detail to determine whether the Planning Board's determination had a rational basis (cf. *Matter of Fleck v Town of Colden*, 16 AD3d 1052, 1053).

We further note that Town Code § 200-94 (J) (2), concerning parking lot locations, expressly allows for a deviation from its requirements if a developer demonstrates a "practical difficulty." In our view, the record demonstrates that the Wal-Mart respondents in fact demonstrated that they would face a practical difficulty in the event that strict compliance with section 200-94 (J) (2) was required. Petitioners' contention that the Wal-Mart respondents were required to obtain a variance for section 200-94 (M) (5), concerning landscaping, is belied by the record inasmuch as the project includes the construction of a three-foot berm and the project's landscaping plan makes clear that, other than the entranceway, the project's western boundary does not abut Transit Road. Also, although the project includes a concrete wall, no variance from section 200-94 (M) (5) (b) was required because the wall will be treated, painted, and maintained by the Wal-Mart respondents.

Finally, we conclude that the ZBA did not improperly treat the project site as a single lot, rather than two separate lots, in granting the required variances. The variances were necessary because strict compliance with the Town Code's area requirements was impractical based on the proximity of the project to existing retail and commercial businesses (see *Matter of Cohalan v Schermerhorn*, 77 Misc 2d 23, 25, citing *Matter of Levy v Board of Stds. & Appeals*, 267 NY 347), and the ZBA's determination granting the variances did not "invade the zoning province of the legislative body" (*Matter of Giuntini v Aronow*, 92 AD2d 548). Moreover, although the ZBA determined that "the parcels should be considered together as one site," it nevertheless "individually addressed" the variances required for each parcel.