DISSENT FROM RESOLUTION/DECISION OF ZONING BOARD OF APPEALS APPROVING THE USE VARIANCE APPLICATION OF OAK STONE HOLDINGS, LLC, DATED OCTOER 18, 2022

DISSENTING OPINION by S. Wyner and T. Quimby:

Zoning Boards of Appeals provide a safety valve to protect landowners from unnecessary hardship imposed by local land use regulations. However, because use variances grant permission to landowners to do what the zoning laws of a town prohibit, state law imposes both uniform requirements that must be applied by zoning boards of appeals and places a heavy evidentiary burden on applicants to demonstrate unnecessary hardship. Each of the statutory requirements must be met before a zoning board of appeals can properly grant a use variance, and the failure to establish any one of the requirements precludes the proper granting of the proposed variance. See *Zoning Board of Appeals*, the Division of Local Government Services, Department of State, September 2021, p11.

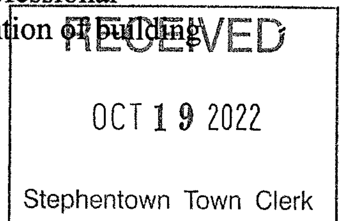
While the majority opinion lists the statutory requirements, the majority's factual findings incontrovertibly show that the applicant failed to demonstrate at least two of the required showings - that the claimed hardship was not self-created, and that the applicant could not obtain a reasonable rate of return for each of the permitted uses of the property it acquired. Either should have resulted in the denial of the application.

I. Oak Stone's Claimed Hardship is Self-Created.

An applicant is not entitled to a use variance when the complained of hardship is self-created. NYS Town Law, Section 267-b(2)(4) law.

With respect to Oak Stone Holding LLC's ("Oak Stone") contention that the claimed hardship was not self-created, the majority credited the applicant's statement that it was searching for commercially zoned property in the New Lebanon/Stephentown area to locate its affiliate's business of recycling catalytic converters. However, the parcels Oak Stone looked at were too dilapidated, would need substantial infusions of cash, were possible pollution sites and too small for its affiliates intended use intended use. Resolution/Decision, pp. 8-9, paragraph 37. It also found that Oak Stone then purchased the Stephentown property knowing that it was located in an R-1 residential zone in which the construction and operation of a recycling facility was not a permitted use, but with the hope that the property was soon to be rezoned. Resolution/Decision, P. 8, para. 36.

These findings, as a matter of well-settled law, should have precluded the majority's finding Oak Stone's claimed hardship was not self-created. In Clark v. Board of Zoning Appeals of the Town of Hempstead, 301 N.Y. 86 (1950), for example, the Court of Appeals reversed a zoning board's grant of a use variance to erect a funeral home in an area that did not permit funeral homes. The Court found that the applicant purchased the vacant parcel knowing that the permitted uses included single residences, clubhouses, schools, churches, and professional offices in dwellings. Nevertheless, the applicant purchased the lot with the intention of building



a funeral home and then applied for a variance. The Court held that the applicant's knowledge that his intended use of the parcel was not permitted precluded the granting of the use variance, stating that "... one who thus knowingly acquires land for a prohibited use, cannot thereafter have a variance on the ground of 'special hardship.'" Id. at p. 89.

Here, as Oak Stone purchased the property knowing that it was in a R-1 zone and that the construction of a catalytic converter recycling facility would not be a permitted use in the zone, its application should have been denied as a self-created hardship. See, e.g., Clark, 301 N.Y. at 89; First National Bank of Downsville, v. City of Albany Board of Zoning Appeals, 216 A.D 2d 680, 681 (3d Dept 1995) (a hardship is self-created when the applicant acquires property subject to the restrictions from which relief is sought); Khanuja v Denison, 203 A.D.2d 679, 681 (3d Dept. 1994) (actual knowledge of zoning restrictions or of the nonconforming status precludes use variance); Courtney v. City of Albany Board of Zoning Appeals, 177 A.D.2d 820,820 -21 (3d Dept. 1991) (petitioner's erroneous belief that the preexisting use of the property permitted his intended use was insufficient to show the claimed hardship was not self-created; applicant's knowledge of the zoning prior to purchase demonstrates a self-created hardship).

Ignoring this dispositive case law, the majority opinion appears to rely on the applicant's statement that it "started out with the intention" of building a log cabin or a small house,[1] and that "without a use variance, this parcel is a merely an undevelopable piece of land" to find that the claimed hardship was not self-created. The majority also finds that Oak Stone was aware at its time of purchase that the parcel was relatively small, heavily sloped (4.4 acres), fronted by a major north-south highway, and located adjacent to the town's commercially zoned area. Oak Stone's own evaluation of its investment decision is discussed by in its

July 20, 2022, FAQ, stating:

> This parcel of land ... maintains undesirable characteristic that would inhibit any owner or investor to build a residence on this land given its topography and size. The construction of a residence on this parcel would be a poor business choice given the analysis presented in the application materials.

Similarly, the majority opinion accepts applicant's engineer statement that that property's characteristics makes it a costly piece of property to develop for residential use. (Resolution/Determination, p.7, paras. 29 - 31).

The recitation of the applicant's evaluation of the investment potential of this property for the construction and sale of a one family house wholly undermines the basis for a finding that the

[1] At the first hearing held on this matter, the applicant, having failed to provide any information on its application about hardship, was asked for an explanation of the hardship. The applicant provided an extensive testimony about its efforts to find a suitable development site in a commercially zoned area for its affiliate's recycling business both in New Lebanon and Stephentown. It was unable to find a suitable location in a commercially zoned area but purchased the Stephentown parcel because it was adjacent to the commercially zoned area in Stephentown. Significantly, no mention was made any interest is developing the property for residential use. Moreover, Oak Stone offers no explanation as to why it would purchase the property to construct a log home or small house on this parcel, having searched for a commercial property in the area for its affiliate.

property's claimed acquisition was for residential development was not a self-created hardship. The characteristics of this property were obvious features known to Oak Stone when it bought the property and, if Oak Stone actually intended to build a log cabin or small house on the property, that decision, as it concedes, was a poor investment choice. Bad investment decisions, however, are self-created hardships. See, e.g., Carriage Works Enterprises, Ltd. v. Siegal, 118 A.D.2d 568, 570 (2d Dept. 1986) (a party who overpays for property suffers self-inflicted hardship; use variances are not available to applicants to protect the investments of careless purchasers of property); Wyrostok v. Town of Hempstead, 116 Misc.2d 554, 555 (Nassau Co. 1958) (hardships are self-imposed because plaintiffs purchased the property with knowledge of its physical condition and at least constructive knowledge of the existing zoning restrictions).

In short, the Resolution/Decision determination that the hardship claimed by Oak Stone was not self-created is without a legal or evidentiary basis.

II. Oak Stone Failed to Prove Unnecessary hardship for each and every permitted use under the R-1 Zone.

An applicant's failure to demonstrate an inability to realize a reasonable return from each use permitted in the zoning district in which one's property is located requires the denial of a requested use variance. See, e.g., Forrest v. Evershed, 7 N.Y.2d 256, 262 *(1959)* (4th Dept. 2020); Edwards v. Davison, 94 A.D.3d 883, 884 (2d Dept. 2001) *;* Crossroads Recreation v. Broz, 4 N.Y.2d 39, 44 (1958); P.M.S. Assets, Ltd. v. Zoning Board of Appeals of the Village of Pleasantville, 303 A.D.2d 411, 411-12 (2d Dept. 2003). In Dean v Town of Poland Zoning board of Appeals, 185 A.D.3d 1485, 1487 (4th Dept. 2020), for example, the applicant provided evidence of the cost of removing a decrepit 19th-century house from the two-acre parcel, including the costs of asbestos remediation and air monitoring, which would be required to sell the property as vacant land, but the applicant's expert produced no evidence as to the other permitted uses. Without those proofs, the court held that the applicant failed to make the statutorily required showing of its inability to realize a reasonable return if the property were to be used for any conforming use.

The Resolution/Decision sets forth the many possible uses in the R-1 zone, among them, one- and two-family dwellings, multi-family dwellings, individual manufactured homes, agricultural uses, forestry uses, institutional facilities, day care facilities, roadside stands, public utility structures, personal services or professional offices, restaurants, and bed and breakfasts. (Resolution/Decision, p. 3, para 11).

The absence of any proofs by the applicant or discussion with respect to each and every other permissible use -- of which there are many -- should have precluded the granting of this application. In fact, given the wide variety of possible uses, one would have expected the applicant to provide and the majority to address the reasonable rate of return that could be generated by the many permitted uses of property in this zone. The record is devoid of any submissions on the economic return that could have been generated by, among other permitted uses, a restaurant, professional offices, or residential rentals, all of which would have required to be demonstrated through the submission of competent financial evidence and expert testimony. Oak Stone made no attempt to proffer evidence on each of the possible permitted uses of the property, leaving the majority to address what little was provided and ignore the huge and fatal gaps in applicant's proofs. That analysis could not be done because the record provides no

competent evidence or dollars and sense analysis of the numerous permissible uses – a fundamental and incurable defect in appellants proofs that should have precluded the granting of a use variance. In fact, the applicant did not even provide the purchase price of the parcel, making it impossible for the Board to form any evidence-based conclusion on whether any of the permissible uses could have generated a reasonable rate of return on the investment.

The majority's entire analysis of applicant's reasonable rate of return is contained in four paragraphs, which repeats the contentions of the applicant with respect to the estimated cost of constructing a single-family home on the site, and the median sales' price for homes in the area, and five sample sales pulled from the realator.com website. However, these "proofs" are neither competent evidence nor sufficient to satisfy the heavy burden placed on applicants for use variances. See, e.g., Village Board of the Village of Fayetteville v. Jarrold, 53 N.Y.2d 254, 257 (1981); Dreikausen v. Zoning Board of Appeals of City of Long Beach, 287 A.D.2d 453, 456 (2d Dept. 2001), appeal dismissed, 98 N.Y.2d 165 (2002); Khanuja v. Denison, 203 A.D.2d 679, 680 (3d Dept. 1994) (raw data without required expert analysis is insufficient to satisfy an applicant's burden of proof).

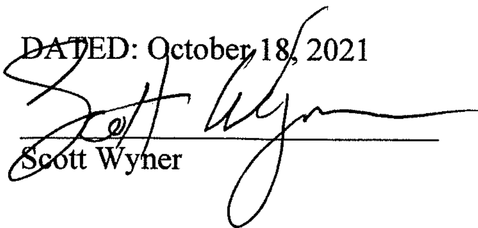
The failure of the opinion to offer the required analysis is caused by the applicant's failure to make the required statutory showing, which should have resulted in the denial of the application.

Conclusion

Residents of this town should be able to rely on its Zoning Board of Appeals to follow the laws governing use variances. The majority's failure to do so frustrates the reasonable expectations of those living in this R-1 zone, suggests to potential applicants that the requirements for obtaining a use variance can easily be avoided, and places the town as risk of costly litigation should the Board's actions be challenged in an Article 78 proceeding.

For these reasons, we dissent.

DATED: October 18, 2021



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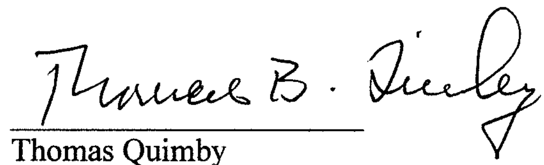

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