

RESOLUTION/DECISION OF ZONING BOARD OF APPEALS
APPROVING THE USE VARIANCE APPLICATION OF OAK STONE HOLDINGS,
LLC

WHEREAS, the Town of Stephentown Zoning Board of Appeals has received a Use Variance Application from OAK STONE HOLDINGS, LLC to operate what the Town Code Enforcement Officer has determined to be a “Retail” use in an R-1 Residential Land Use District;

APPLICANT’S NAME AND ADDRESS: OAK STONE HOLDINGS, LLC, 4821 South Stephentown Road, East Nassau, NY 12062.

PROPERTY OWNER’S NAME AND ADDRESS: OAK STONE HOLDINGS, LLC, 4821 South Stephentown Road, East Nassau, NY 12062.

LOCATION: North Corner of NY Route 22 and Cemetery Hill Road, Stephentown, NY 12168.

ZONING DISTRICT: R-1 LOT SIZE: +/-4.39 acres

NOW THEREFORE BE IT RESOLVED:

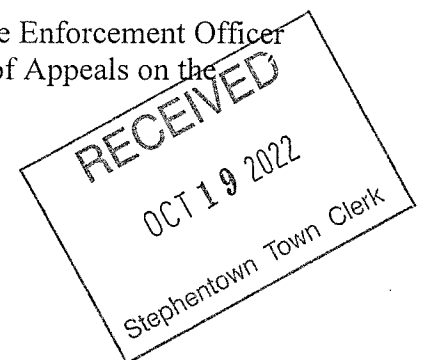
1. This matter, which is one of the more extensively studied matters by this Board in the last decade, including a public hearing that spanned three meetings over the course of three months, began with the filing of a Permit Application, dated February 16, 2022, by Applicant Oak Stone Holdings, LLC. It sought therein a building permit to construct and operate an 80’ x 100’ “Open Span Shop” with the address of the work/construction being “Property on North Corner of NY-22 and Cemetery Hill Road” and identified as tax map parcel 196.-1-36.3, in the Town of Stephentown.

2. In an accompanying submission, Applicant states, in part, that it desires to construct the subject building because:

Oak Stone Holdings, LLC will be renting the property to its sister companies, Capital Core Recycling, LLC in conjunction with Bullocks Auto Salvage, LLC which specialize in the recycling and reprocessing of catalytic converters and other automobile cores. The processed material is sold to companies who repurpose the materials into emission control assemblies of new vehicles to provide for cleaner emissions to meet today’s standards.

(Applicant’s February 17, 2022 letter).

3. Thereafter, by decision dated February 21, 2022, the Code Enforcement Officer formally denied the permit and referred the matter to the Zoning Board of Appeals on the grounds that “Article III Use Regulation Retail Business Prohibited.”



4. Applicant then filed a “Notice of Appeal” of said determination and applied for a use variance, both received and the fee paid on March 1, 2022. Both Applicant and its engineer have submitted several items both in support of, and to supplement, their application in the ensuing months.

The Subject Property

5. As noted above, the property that is the subject of the Applicant’s use variance application is a +/- 4.69 acre parcel located on New York State Route 22 and also borders Cemetery Road, all in the Town of Stephentown (interchangeably referred to herein as “the property” and “the subject property” and “the parcel). As noted by Applicant in #9 in its FAQ, received July 20, 2022:

this parcel borders a state highway. It is .02 miles from a restaurant, .28 from a fiberglass manufacturing facility, .25 from an automotive repair shop, .31 miles from another restaurant and bar, .39 miles from a retail store, .33 miles from a fuel company and a gas station, .41 miles from a fabricator of heavy machinery, generator components, and equipment fabrications. This business [is] a similarly beneficial addition to the current commercial activities in the area.

6. The property is located down the road from the intersection of New York Routes 22 and 43 which is effectively the main commercial section of the town and a regional thoroughfare.

7. Applicant purchased the property in November 2021. (Bond Letter, February 15, 2022).

8. As noted above, the Code Enforcement Officer (“CEO”) determined that the subject lot is located in an R-1 Residential District and that the subject use is a “Retail” use, a use which per the “Amended Land Use Regulations of the Town of Stephentown,” is not allowed in an R-1 district.

9. Applicant also asserts that the “property does border the Commercial (C) district in the Town” and “lies adjacent to the existing ‘commercial’ corridor in the Town” and that “it is compliant with the Town’s Comprehensive Plan. The Comprehensive Plan promotes the creation of a business district along NYS Route 22 as far north as Grange Hall Road, which includes this parcel of land.” (Bond letter, dated February 15, 2022).

10. As noted above, according to the aforementioned Amended Land Use Regulations, retail uses are a “prohibited use” in R-1 zones. However, such uses are allowed with site plan approval only in commercial and industrial zones and only with a special permit in RU- Rural Use Districts.

11. Article II of the Amended Land Use Regulations allow the following uses in an R-1 zone:

“Residential Uses” in an R-1 District: One Family Dwelling; Two Family Dwelling; Multi-Family Dwelling (special use permit required); Residential Cluster (site plan approval required); and Individual Manufactured Home Manufactured and the following

General Uses: Agricultural Uses and Conservation Uses, Forestry Uses (special use permit required), Institutional & Cultural Facilities (site plan approval required), Day Camp (special use permit required); Day Care (site plan approval required); Roadside Stand; Public Utility Structures. (special use permit required; Farms; Religious, Educational & Non Profit Recreational Uses (site plan approval required); Municipal Uses (special use permit required); and the following Commercial: Personal Services or Professional Offices (site plan approval required); Restaurant (site plan approval required); Bed and Breakfast or Tourist House (site plan approval required) and the following

Accessory Uses: Home Occupation and Professional Offices Including One Sign Not to Exceed 6’ x 6’.

12. Applicant and his engineer repeatedly discussed challenges that any owner of the subject property will face as a result of the topography, location and size of the subject parcel. Among other things, they noted how the property, which is located at the effectively the foot of the nearby mountain range that separates New York from Massachusetts, is significantly sloped.

13. Applicant and its engineer also made considerable effort to note that the proposed operation is to be fully screened, including from nearby properties, noting in its February 17, 2022 submission that “Furthermore, the site is to be bordered on all sides by forest and evergreens to maintain an attractive look to the building site. Appropriate landscaping and parking is provided for in the plans submitted.” (February 17, 2022 letter-submission). In its Frequently Asked Questions submission, received July 20, 2022, it also made the following representation: “The entire facility has been designed to merge in with the landscape. The building is colored gray and brown. It is designed to be built on a plateau, with vegetation surrounding it so that it cannot be seen from the road or from its neighbors. It is intended to have a minimal impact on the visual environment ...” *Id.* at para. 6. Applicant’s engineer represented that the nearest house is 500 feet away and is separated by a 200-foot wooded area and will not be able to be seen by the houses located above it. Applicant has represented that no signage will be placed.

14. Applicant and its engineer also noted that the building was to be fully insulated and its doors closed during operations, helping to confine any noise inside the building.

15. Additionally, Applicant discussed the document entitled “Stephentown Comprehensive Plan,” dated 2018, and how it contains the recommendation of the Business Subcommittee to: “Create a business district along NY 43 from Garfield Road to East Road and along NY 22 from Wyomanock Road to Grange Hall Road ...” (Comprehensive Plan, p. 48). It

should be noted that the Board does not find same determinative because it finds it simply undeniable that the area near the subject parcel has incontrovertibly developed into the main, and only, commercial section of the town with, as noted above, several non-residential uses located nearby, as listed above.

16. In order to operate as intended, in addition to a use variance from this Board, site plan review and approval is required from the Town Planning Board and a NYSDEC SPDES permit during the construction phase is needed for stormwater discharge and water and septic systems approvals are needed from the Rensselaer County Department of Health. However, Applicant's Conceptual Layout Plan contemplates the building being constructed in a manner that meets all required setbacks, thereby not requiring the grant of an area variance and covering only a small portion of the lot.

The Intended Operation at the Property

17. As to the intended operation at the property, Applicant represents that:

The proposed building will be used for the processing of catalytic converters to obtain the component elements ready for smelting. Note the elements will then be transported to smelting plants elsewhere. The operations are entirely indoor for such material collection as processing requires a clean and contained environment. The building will include all amenities necessary for a clean and secure facility”

(Applicant's February 17, 2022 letter).

18. Most notably, Applicant and its engineer have represented that there will be no noise, water or air pollution emanating onto adjoining properties as it is an entirely self-contained operation. Notably, in responses #2 and #3 of Applicant's "Frequently Asked Questions," received July 20, 2022, Applicant makes the following representations which the Board accepts: "Any particles ... are collected by a large dust collector, which is directly attached to the sheer. This vacuum system collects 99.999% of particulate matter during the process." Additionally, Applicant notes as to the process that will be undertaken inside its building: "[t]his step in the recycling process does not emit any waste of any kind in the water, soil, or air ..." Id.

19. Additionally, other than vehicles exiting and entering the property Applicant and its engineer represent that no noise will be generated that will be heard beyond the property boundaries. ("We anticipate that there will be a normal volume of noise from this facility, i.e., pickup trucks entering and exiting the property. However, the sheering process and all ancillary activities will take place inside the building which will be insulated for heat retention and noise reduction"). Id. The Board heard the comments of a neighbor at the June 28, 2022 public hearing about Applicant's existing facility that Applicant has a "very quiet" operation.

20. As to traffic, which relates to the above paragraph as noted, when asked at the August 30, 2022 meeting how much traffic would be generated, Applicant's engineer responded: "20-25 vehicles per week." Consistent therewith, in the Frequently Asked Questions the answer was "three to five deliveries a day." Id. at para. 8. Moreover, Applicant represented that deliveries and pick-ups to the facility would be limited to trucks and vans and not tractor trailers.

21. Prior to the adoption of this resolution the Board adopted a Negative Declaration, the contents of which are incorporated herein by reference and will therefore not be repeated.

22. At each meeting of this Board that this application was discussed, the applicable statutory criteria to be applied, which is set forth in New York State Town Law § 267-b(2), was read to the Board. It states:

Use variances. (a) The board of appeals, on appeal from the decision or determination of the administrative official charged with the enforcement of such ordinance or local law, shall have the power to grant use variances, as defined herein.

(b) No such use variance shall be granted by a board of appeals without a showing by the applicant that applicable zoning regulations and restrictions have caused unnecessary hardship. In order to prove such unnecessary hardship the applicant shall demonstrate to the board of appeals that for each and every permitted use under the zoning regulations for the particular district where the property is located, (1) the applicant cannot realize a reasonable return, provided that lack of return is substantial as demonstrated by competent financial evidence; (2) that the alleged hardship relating to the property in question is unique, and does not apply to a substantial portion of the district or neighborhood; (3) that the requested use variance, if granted, will not alter the essential character of the neighborhood; and (4) that the alleged hardship has not been self-created.

(c) The board of appeals, in the granting of use variances, shall grant the minimum variance that it shall deem necessary and adequate to address the unnecessary hardship proven by the applicant, and at the same time preserve and protect the character of the neighborhood and the health, safety and welfare of the community.

(NYS Town Law § 267-b(2)).

23. The Town Planning Board considered this matter and recommended approval of the sought after use variance.

24. As more fully detailed below, it is the determination of the Zoning Board of Appeals that there has been a “showing by the applicant that applicable zoning regulations and restrictions have caused unnecessary hardship. In order to prove such unnecessary hardship the applicant shall demonstrate to the board of appeals that for each and every permitted use under the zoning regulations for the particular district where the property is located.” Id. The Board will further analyze such factors, below:

(1) the applicant cannot realize a reasonable return, provided that lack of return is substantial as demonstrated by competent financial evidence;

25. Applicant detailed for the Board how it has obtained from a contractor projected excavation and building costs and detailed how, because of the topography of the site, that extensive excavation would be required. Notably, Applicant detailed how “[t]his site gains elevation significantly from the western boundary of the property to the eastern boundary, with an average 16 percent slope and a gain of more than 70 feet elevation. The contractor estimated initial site preparation would cost approximately \$106,205.” (Applicant’s March 29, 2022 submission).

26. Specifically, as to the construction of a residence, Applicant noted that “The parcel would have to be recontoured with a plateau for the house site and septic.” Applicant further detailed, and the Board has received no proof discrediting, that the only level portion of the property (which Applicant notes still has a 13% slope) would not be able to be used for house construction because of its proximity to the road.

27. Applicant also detailed how, in terms of residences, that its research revealed that a 2,400 square foot single-family residence would be most appropriate in terms of construction given the limitation of the subject lot and considering the nearest residences. In furtherance thereof, Applicant detailed how “the construction of a single-family dwelling on this parcel would be \$420,000 in addition to the excavation costs of \$106,205 making the total costs to construct a single-family dwelling on this site to be approximately \$525,205.” (Applicant’s March 29, 2022 submission).

28. Applicant also provided the also un rebutted assertion that “[a]ccording to realtor.com, the current median sold home price in this area is \$242,500” and also detailed five similar homes on the market “with sales prices ranging from \$274,900, \$270,000, \$250,000, \$239,900 and \$105,000.” Applicant concludes that the projected return “on this property for the construction and sale of a single-family residence with a negative return of -48.7%” which it detailed was much less than the 10.3% average annualized return on residential and diversified real estate investments ...” (Applicant’s March 29, 2022 submission).

(2) that the alleged hardship relating to the property in question is unique, and does not apply to a substantial portion of the district or neighborhood;

29. The Board also credits Applicant and its engineer's assertion that "there are truly unique issues that inhibit this parcel's developmental desirability as a residential lot. It is unique in that its (1) size, (2) location, and (3) topography make it a costly piece of property to develop into its intended purpose under the current zoning classification, R-1." (Applicant's March 29, 2022 submission).

30. As noted by Applicant, the subject parcel was the last parcel sold off of what had been part of, for about a century, a local family's large farm. Applicant also noted that the property had been listed for sale many times in recent years without success, even in the seller-friendly market of recent years. Additionally, the Board finds that a substantial portion of the residential properties in the subject R-1 district are not plagued by the degree of topographical issues that the subject parcel has, which are more fully detailed above.

31. Applicant also noted how the property uniquely borders the commercial district in the town, and at one point had been used for the commercial storage of vehicles sold at a now defunct auto dealership that had been located in town. Additionally, a substantial number of properties in the district are not located directly on the major highway and/or do not have the amount frontage thereon that the subject parcel has. Additionally, many other parcels are larger than the +/- 4.26 acre size of the subject parcel and therefore have a better ability to combat any topography issues, and if they too are located on a highway, those larger parcels have the ability of residences to be located further back from the highway, thereby mitigating the impact of being located next to a busy highway.

(3) that the requested use variance, if granted, will not alter the essential character of the neighborhood; and

32. As noted above, there was discussion of determinations as contained in the Town's Comprehensive Plan. However, the Board's determination does not rest on the assertion made in said document, the relevant portion of which is quoted above.¹ This is because the Board believes it is an inescapable fact that the subject lot is located bordering the commercial zone, is on a historic and well-traveled state highway (NYS Route 22) and has a plethora of nonresidential uses located and operating nearby. As stated by Applicant in its July 20, Frequently Asked Questions:

this parcel borders a state highway. It is .02 miles from a restaurant, .28 from a fiberglass manufacturing facility, .25 from an automotive repair shop, .31 miles from another restaurant and bar, .39 miles from a retail store, .33 miles from a fuel company and a gas station, .41 miles from a fabricator of heavy machinery, generator components, and equipment fabrications. This business

¹ It should be noted that the Board has considered Applicant's argument that the property is a "de facto" commercial zone because of the aforementioned language and does not agree with Applicant's assertion.

[is] a similarly beneficial addition to the current commercial activities in the area.

Id. at #9.

33. The Board also notes how Applicant and its engineer have represented that the operation will have no noise or air pollution or dust that will travel outside of the subject lot, and also that traffic, as noted above, will be minimal. These items, as well as the hours of operation, are requirements set forth in the conditions of approval of the use variance as set forth below.

34. Moreover, the subject property requires site plan review and approval by the Town's Planning Board (which at the time of the adoption of this resolution has been granted) and receive a NYS DEC SPDES permit for stormwater discharges during construction as well we obtain well and septic approval from the Rensselaer County Department of Health before it can operate all of which will further protect the community character.

35. Although a building is to be constructed and a commercial operation will be operating therein, it is noted that the building is to be tucked into the hillside and will wholly contain the operating company's intended operation. Moreover, as Applicant notes, which the Board credits: "It is not the intention of the new owner to change the character of the area. In fact, the intent is to maintain a natural wooded border and buffer to the uphill residential properties by transplanting screening trees along this western property boundary as well as the eastern boundary, along NY Route 22. Furthermore, all commercial activity is proposed to take place within the building. Thus, the essential character of the area will not be affected by a use variance granted for this particular parcel by the Board." (Applicant's March 29, 2022 submission).

(4) that the alleged hardship has not been self-created.

36. Applicant asserts, and the Board also credits, that the hardships detailed above were not created by Applicant. The Board credits the assertion by Applicant that he started out with the intention, as he represented to the Board at the May 25, 2022 meeting, to build a log cabin or a small house and also his assertion that "[w]ithout a use variance, this parcel is merely an undevelopable piece of land in the center of the economic corridor of the Stephentown, NY." (Applicant's March 29, 2022 submission). Additionally, Applicant notes that he purchased the property with the hope that the property was soon to be rezoned commercial. (July 20, 2022 FAQ, #9). The Board finds the many unique characteristics of the subject lot, which are detailed above, created a hardship that is not the creation of Applicant.

37. Applicant has detailed its unsuccessful attempt to locate an acceptable commercially zoned location in town. It states:

We did review other property opportunities for Capital Core Recycling, LLC both in Stephentown and in other local communities. We found the following issues: (1) parcels were too expensive, (2) buildings were too dilapidated and would need substantial infusions of cash, (3) the properties were potential

environmental pollution sites, and (4) properties were too small of a parcel for our intended use.

The most significant issue we were concerned about was the potential for liability for historical pollutants on the properties. It is our understanding that there are EPA pollution issues, which may exist at a local vacant commercial piece of property currently for sale, an auto repair shop site that is currently for sale and an old manufacturing plant in an adjacent community that is currently for sale. We decided that given the law that legal liability for environmental pollution falls on the owner of the property, we wanted to avoid such liability as much as possible. Given the fact that this business will not be polluting the property, we did not wish to take on another's responsibility.

(July 20, 2022 FAQ #11).

38. As quoted above, NYS Town Law § 267-b(2)(c) provides that "The board of appeals, in the granting of use variances, shall grant the minimum variance that it shall deem necessary and adequate to address the unnecessary hardship proven by the applicant, and at the same time preserve and protect the character of the neighborhood and the health, safety and welfare of the community." The Board finds that upon application of the conditions set forth below that the subject use variance further meets that criteria.

NOW THEREFORE BE IT FURTHER RESOLVED THAT THE USE VARIANCE IS GRANTED SUBJECT TO THE FOLLOWING CONDITIONS:

1. parking on the subject property shall only be for employees;
2. there shall be no outside storage;
3. as Applicant has represented, there shall be no noise, nor air or ground pollution (does not include stormwater discharge and/or DEC SPDES permitted discharges), nor any dust, that goes outside of the boundaries of the subject property;
4. the hours of recycling operation shall be confined to 8 a.m. to 5 p.m. Monday through Friday;
5. all operations and usage of the subject property shall be consistent with Applicant's application and its and its engineer's additional submissions and representations to the Board.

BE IT RESOLVED THAT the voting as to this decision is as follows:

<u>Board Member</u>	<u>Grant Use Variance s/t conditions</u>	<u>Deny Use Variance</u>	<u>Recuse</u>
R. Barth	X		
D. Cass	X		
T. Quimby		X	
R. Sime	X		

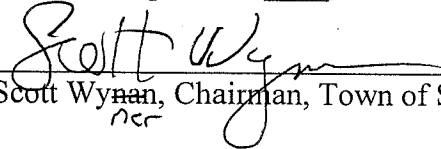
S. Wynn^{ner}

X

PLEASE NOTE, the Zoning Board of Appeals has no authority to alter or determine the ownership of property and that the decision of the Board herein is not a determination of the underlying ownership of the subject property/ies.

OCTOBER 18

DATED: ~~September~~ _____, 2021



Scott Wynn^{ner}, Chairman, Town of Stephentown Zoning Board of Appeals