STATE OF RHODE ISLAND

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: April 9, 2024)

TECH REALTY, LLC	:	
	:	
v.	:	
	:	**C.A. No. PC-2023-00104**
THE TOWN OF NORTH SMITHFIELD ZONING BOARD OF REVIEW and CYNTHIA DEJESUS, in her capacity as Finance Director for the Town of North Smithfield	:	

DECISION

M. DARIGAN, J. Before this Court is the appeal by Tech Realty, LLC (Tech Realty) from the December 20, 2022 decision of the North Smithfield Zoning Board of Review (the Zoning Board) denying Tech Realty's application for the dimensional variances needed to construct a 23,700 square foot single-story light industrial building on its undeveloped property. This Court has jurisdiction of Tech Realty's timely appeal pursuant to G.L. 1956 § 45-24-69. For the reasons set forth herein, this Court vacates the decision of the Zoning Board.

I

Facts and Travel

Tech Realty owns an undeveloped tract of land located at 0 Central Street, North Smithfield, otherwise known as North Smithfield Tax Assessor's Plat I, Lot 461 (the Property). (R., Ex. P5, at 1.) The Property is comprised of 9.7 acres and is located in an MU-2 zoning district adjacent to and abutting another property owned by Tech Realty. *Id*. The Property is encumbered by significant wetland features on the sides and rear of the lot. (R., Ex. P6, App. A.)

In 2022, Tech Realty applied for dimensional variances seeking relief from the setback requirements for the Property so that it could build a light industrial facility thereon without encroaching upon the wetlands. *See generally* R., Zoning Board Meeting Aug. 23, 2022, Ex. 4. Specifically, Tech Realty sought relief from the requirements of § 12.11(2) of the North Smithfield Zoning Ordinance (Zoning Ordinance or NSZO) relative to "maximum setbacks." (R., Zoning Board Meeting Aug. 23, 2022, Ex. 4, App. A, at 2-3.) This Zoning Ordinance establishes a seventy foot maximum setback on the front, sides, and rear of the lot, meaning that no structure may sit more than seventy feet inward from the property line on any side without obtaining maximum setback variances. *Id.*; NSZO § 12.11(2). In other words, absent setback relief, any structure in an MU-2 zone must span nearly the entire tract upon which it is built because no side can be more than seventy feet removed from the property line. NSZO § 12.11(2). This is not possible on Tech Realty's 9.7-acre tract because of the protected wetland features. (R., Ex. P6, App. A.) As such, Tech Realty sought front, side, and rear maximum setback relief. (R., Zoning Board Meeting Aug. 23, 2022, Ex. 4, App. A, at 2-3.) Tech Realty's proposal was compliant with all minimum setback requirements. (R., Ex. P9, at 3-4.)

On August 23, 2022, the Zoning Board held its first hearing regarding Tech Realty's dimensional variance application. (R., Zoning Board Meeting Aug. 23, 2022, Ex. 9, at 2.) At the start of this hearing, two members of the Zoning Board recused themselves from consideration of Tech Realty's application. *Id*. at 2. In turn, two alternate Zoning Board members temporarily sat on the Board to consider Tech Realty's application. *Id*. During the hearing, the Zoning Board heard testimony from Tech Realty's registered professional engineer, Joseph Casali (Mr. Casali), regarding the site design, landscaping, and permitting aspect of the proposal. (R., Zoning Board Meeting Aug. 23, 2022, Ex. 10 (Aug. Tr.).) Mr. Casali explained that the wetland jurisdictional

buffers as well as an intermittent stream rendered maximum setback relief necessary for the project to move forward. Aug. Tr. at 36:9-39:20. During Mr. Casali's testimony, the Zoning Board recognized that in order to comply with the maximum setback requirements, the building would have to be massive and span most of the 9.7 acre lot, which is not feasible under the circumstances. *Id*. at 40:1-42:23. After Mr. Casali's testimony, the Zoning Board heard comments from three members of the public before unanimously voting to continue consideration of the application to September 27, 2022. *Id*. at 60-86. On September 27, 2022, Tech Realty requested that the hearing once again be continued, so the Zoning Board unanimously voted to continue the hearing to October 25, 2022. (R., Zoning Board Meeting Sept. 27, 2022, Ex. 2 (Sept. Tr.), 5:6-8:3.)

At the third Zoning Board hearing, on October 25, 2022, Tech Realty's expert, Mr. Casali, once again testified regarding the landscape of the lot and that maximum setback relief was necessary to avoid the Property's wetland features. (R., Zoning Board Meeting Oct. 25, 2022, Ex. 2 (Oct. Tr.), 23:5-39:23.) Further, Tech Realty's counsel clarified that Tech Realty was not seeking any relief pertaining to the "use" of the Property, rather it merely sought maximum setback relief. *Id*. at 15:9-21:22. Thereafter, the Zoning Board passed a motion to open public comments again, and the President of the North Smithfield Town Council spoke in opposition to Tech Realty's application on behalf of the residents of Central Street. *Id*. at 44:23-51:13. These remarks did not address the merits of Tech Realty's request for a dimensional variance but rather the proposed use of the Property, a matter not before the Zoning Board. *Id*.

At the conclusion of the public comments, the North Smithfield Solicitor called for a five-minute recess to discuss something with the Zoning Board off the record. *Id*. at 87:5-9. When the Zoning Board went back on the record, the Solicitor explained that he interpreted

NSZO § 12.11(14)(a)(iv), which regulates outside storage, as applying to Tech Realty's loading dock. *Id.* at 88:15-90:4. Thus, Tech Realty had to amend its zoning application to include an additional variance for its proposed loading dock, which allegedly violated NSZO § 12.11(14)(a)(iv). *Id*. at 126:15-133:11. The Zoning Board continued the hearing to November 22, 2022 to require Tech Realty to address the new loading dock variance issue. *Id*.

In preparation for the next hearing, Tech Realty submitted a supplemental memorandum on November 17, 2022 addressing the loading dock variance issue. *See generally* R., Ex. P14. However, at the beginning of the meeting on November 22, 2022, the Zoning Board withdrew its requirement that Tech Realty seek additional variance relief relating to the loading dock pursuant to NSZO § 12.11(14)(a)(iv). (R., Zoning Board Meeting Nov. 22, 2022, Ex. 2 (Nov. Tr.), at 21:20-28:16.) During the November hearing, the Zoning Board discussed Tech Realty's application for the maximum setback relief once more before Member Christopher Deziel made a motion to grant the application. *Id*. at 40:10-22. Notably, only four members of the Zoning Board voted on the motion. *Id*. at 41:17-42:4. Members Christopher Deziel and Michael Marston voted in favor of the motion, while Members Scott Martin and Paul Pasquariello voted against the motion. *Id.* Member Vincent Marcantonio abstained from the vote. *Id*. As a result, Tech Realty's application was denied. *Id*.

The Zoning Board's decision denying the application was recorded on December 20, 2022. (Zoning Board Decision, 1.) Tech Realty timely appealed the decision to the Superior Court on January 9, 2023. *See* Compl. Tech Realty subsequently filed an Amended Complaint on January 30, 2023 in which it requested that the Court reverse the decision of the Zoning Board because (1) it was made in excess of the authority granted to the Zoning Board; (2) it was tainted by an illegal vote; (3) the Town Council President exerted undue influence over the Zoning

Board members; and (4) the bases given for the denial were unrelated to the actual relief sought. *See* Am. Compl. Tech Realty also requested that the Court award litigation expenses pursuant to G.L. 1956 chapter 92 of title 42 and make a declaration concerning the Town of North Smithfield's authority to establish maximum setbacks. *Id*.

II

Standard of Review

This Court's review of a zoning board's decision is governed by § 45-24-69(d), which provides that:

> "The court shall not substitute its judgment for that of the zoning board of review as to the weight of the evidence on questions of fact. The court may affirm the decision of the zoning board of review or remand the case for further proceedings, or may reverse or modify the decision if substantial rights of the appellant have been prejudiced because of findings, inferences, conclusions, or decisions which are:
>
> > "(1) In violation of constitutional, statutory, or ordinance provisions;
> > "(2) In excess of the authority granted to the zoning board of review by statute or ordinance;
> > "(3) Made upon unlawful procedure;
> > "(4) Affected by other error of law;
> > "(5) Clearly erroneous in view of the reliable, probative, and substantial evidence of the whole record; or
> > "(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."

When reviewing the action of a zoning board of review with respect to questions of fact, this Court '"must examine the entire record to determine whether 'substantial' evidence exists to support the board's findings."' *Salve Regina College v. Zoning Board of Review of City of Newport*, 594 A.2d 878, 880 (R.I. 1991) (quoting *DeStefano v. Zoning Board of Review of City of Warwick*, 122 R.I. 241, 245, 405 A.2d 1167, 1170 (1979)). Substantial evidence is '"such relevant evidence that a reasonable mind might accept as adequate to support a conclusion, and means [an] amount more than a scintilla but less than a preponderance."' *Lischio v. Zoning*

Board of Review of the Town of North Kingstown, 818 A.2d 685, 690 n.5 (R.I. 2003) (quoting *Caswell v. George Sherman Sand & Gravel Co.*, 424 A.2d 646, 647 (R.I. 1981)).

However, questions of law are not binding upon this Court and "may be reviewed to determine what the law is and its applicability to the facts." *Narragansett Wire Co. v. Norberg*, 118 R.I. 596, 607, 376 A.2d 1, 6 (1977). "[A] dispute involving statutory interpretation is a question of law to which [the Court] appl[ies] *de novo* review." *Rossi v. Employees' Retirement System of the State of Rhode Island*, 895 A.2d 106, 110 (R.I. 2006) (citing *In re Advisory Opinion to the Governor*, 732 A.2d 55, 60 (R.I. 1999)).

III

Analysis

A

Illegal Decision

At the start, it must be noted that both parties agree that the Zoning Board's November 22, 2022 vote on Tech Realty's zoning application is illegal because the vote was not in compliance with the voting requirements of the Zoning Enabling Act (ZEA) at G.L. 1956 § 45-24-57(2).[1] *See* Appellant's Mem. in Supp. of Appeal (Appellant's Mem.) at 19-22; Brief of Appellees (Appellees' Mem.) at 7-9.

The version of § 45-24-57(2) that was in effect at the time of the vote on Tech Realty's application dictated that:

> "A zoning ordinance adopted pursuant to this chapter shall provide that the zoning board of review shall:

[1] The applicable language of G.L. 1956 § 45-24-57(2) was amended by the General Assembly in the 2022 legislative session. *See* § 45-24-57(2). The amended language went into effect on January 1, 2023. However, as the Zoning Board's vote on Tech Realty's application occurred in November 2022, the old version of the statute governs this matter. *See* § 45-24-57(2) (2009 Re-enactment) & 2021 Cum. Supp.

> "(2) Be required to vote as follows:
>
> "(i) Five (5) active members are necessary to conduct a hearing. As soon as a conflict occurs for a member, that member shall recuse himself or herself, shall not sit as an active member, and shall take no part in the conduct of the hearing. Only five (5) active members are entitled to vote on any issue;
>
> ". . .
>
> "(iii) The concurring vote of four (4) of the (5) members of the zoning board of review sitting at a hearing are required to decide in favor of an applicant on any matter within the discretion of the board upon which it is required to pass under the ordinance, including variances and special use permits." *See* § 45-24-57(2) (2009 Re-enactment) & 2021 Cum. Supp.

Thus, five active members were necessary for a municipal zoning board to permissibly hold a hearing, and each of those five members had to vote in order to vest the Zoning Board with jurisdiction to rule on the matter at hand. Further, active members were not permitted to abstain from voting as they were required to recuse at the earliest sign of a conflict.

In *Kent v. Zoning Board of Review of the City of Cranston*, 102 R.I. 258, 262-64, 229 A.2d 769, 771-72 (1967), the Supreme Court found that five members of a municipal zoning board of review were required to cast votes on an application in order for that board to render a valid decision in the matter. Moreover, the Court determined that a statutory provision providing for the appointment of alternate zoning board members "resulted in eliminating . . . the implied right of a member to abstain from voting." *Kent*, 102 R.I. at 264, 229 A.2d at 772. The *Kent* Court ultimately held that an abstention by a member of the Zoning Board of Review of the City of Cranston rendered the board's decision "illegal." *Id*. Thereafter, in 2013, the Superior Court held that both the five-vote requirement and the abstention prohibition established in *Kent* continued to apply under the pre-2023 version of § 45-24-57(2), which governs this matter. *See Ryden v. Kraig*, No. PC-2010-2522, 2013 WL 3491368, at *5-7 (R.I. Super. July 9, 2013) ("[T]he [C]ourt finds that Member Ridlon's decision to abstain from voting, coupled with the

Zoning Board's failure to secure the vote of an alternate member in his place, rendered the Zoning Board's decision of April 8, 2010 a nullity.").

Here, two members of the Zoning Board recused at the start of the hearings on Tech Realty's application in August 2022 thereby allowing for two alternate members to sit in their stead in accordance with the proper procedure called for by the ZEA. *See* § 45-24-57(2) (2009 Re-enactment) & 2021 Cum. Supp. However, another member of the Zoning Board sat in on all the hearings and deliberations on Tech Realty's proposal and only abstained at the end of the process when it came time to vote in November 2022. Consequently, only four votes were cast on Tech Realty's application because it was too late for the Zoning Board to provide for an additional alternate member. The parties agree that the Zoning Board's decision is illegal by virtue of the fact that only four votes were recorded.

Despite their agreement as to the illegality of the vote, the parties disagree on the appropriate remedy. The Zoning Board asserts that, in light of *Kent*, this matter must be remanded for a full *de novo* hearing on Tech Realty's application. In *Kent*, all four of the recorded votes were "cast in favor of the relief sought," therefore, the Court held that "merely remanding the cause to the respondent board for the recording of the [abstaining member]'s vote would constitute an idle gesture" because it could not change the outcome. *Kent*, 102 R.I. at 264, 229 A.2d at 772.

Here, the operative, pre-2023, version of § 45-24-57(2)(iii) required four out of five concurring votes to grant a zoning variance, and the vote on Tech Realty's application was split two to two. Accordingly, as in *Kent*, remanding the matter merely to record the vote of the abstaining member would constitute an "idle gesture" because the fifth vote cannot affect the outcome; the application will fail regardless of how Member Marcantonio votes. Thus, it is the

Zoning Board's position that a remand for a full *de novo* hearing on Tech Realty's application is required.

Tech Realty, on the other hand, argues that a remand would be futile in this instance because the maximum setback requirement imposed by § 12.11(2) of the NSZO, from which it sought relief, exceeds the authority granted by the ZEA and therefore must be deemed to be a nullity. Tech Realty contends that the ZEA does not authorize the creation of maximum setback lines. Tech Realty further asserts that, because the maximum setback variance was the only relief it sought and was the sole basis for the Zoning Board's denial of its application, its proposed development should be permitted to move forward without the need for a remand or any further proceedings before the Zoning Board.

B

Illegal Ordinance

The Supreme Court has established that "the authority of a zoning board and the validity of zoning ordinances are circumscribed by the Zoning Enabling Act." *Cohen v. Duncan*, 970 A.2d 550, 563 (R.I. 2009). "[Absent] a clear delegation to municipalities of a regulatory right," a municipality cannot act pursuant to the ZEA. *Champlin's Realty Associates., L.P. v. Tillson*, 823 A.2d 1162, 1168 (R.I. 2003) (citing *Town of Warren v. Thornton-Whitehouse*, 740 A.2d 1255, 1260 (R.I. 1999)). The Court has further stated:

> "It is well settled that rights prescribed by the enabling act are derived from said act and the repetition thereof in a zoning ordinance is mere surplusage. Moreover, when an ordinance sets out to restate that for which provision is made in the enabling act, *any purported expansion or abridgement by the zoning ordinance of rights granted by the enabling act is ultra vires of the jurisdiction conferred on the municipal legislature by the General Assembly, hence void*." *Hartunian v. Matteson*, 109 R.I. 509, 515-16, 288 A.2d 485, 489 (1972) (citing *Coderre v. Zoning Board of Review*, 102 R.I. 327, 230 A.2d 247 (1967)) (emphasis added).

The instant dispute concerns § 12.11(2) of the NSZO, which in pertinent part provides that "[t]he maximum front, side or rear setback [for developments in the MU-2 zone] shall be 70ft." NSZO § 12.11(2). The ZEA defines "setback line or lines" as "[a] line, or lines, parallel to a lot line at the minimum distance of the required setback for the zoning district in which the lot is located that establishes the area within which the principal structure must be erected or placed." Section 45-24-31(60). Notably, the setback definition contained in the ZEA only contemplates the possibility of *minimum* setback lines – there is no mention of *maximum* setbacks. *Id.* Additionally, the setback definition included in the NSZO is identical to the one provided by the ZEA. *See* NSZO § 20.1.

The ultimate goal of statutory interpretation "'is to give effect to the purpose of the act as intended by the Legislature."' *Finnimore & Fisher Inc. v. Town of New Shoreham*, 291 A.3d 977, 983 (R.I. 2023) (quoting *Butler v. Gavek*, 245 A.3d 750, 754 (R.I. 2021)). "'If the language of a statute or ordinance is clear and unambiguous, it is given its plain and ordinary meaning."' *Id.* (quoting *City of Woonsocket v. RISE Prep Mayoral Academy*, 251 A.3d 495, 500 (R.I. 2021)). Applying these principles to the ZEA's § 45-24-31(60), the Court finds the language of the setback definition to be clear and unambiguous. Section 45-24-31(60) unambiguously limits the concept of setback lines to minimum setbacks. Further, nothing in the ZEA otherwise contradicts § 45-24-31(60)'s limited setback definition by providing for maximum setbacks. Thus, the language of the ZEA expressly authorizes municipalities to establish minimum setback lines but not maximum setback lines.

Despite the ZEA's silence regarding maximum setback lines, the Zoning Board claims that § 12.11(2) constitutes a valid exercise of municipal authority. The Zoning Board argues that § 12.11(2) does not expand nor diminish maximum setbacks as established in the ZEA because

there is no mention of maximum setbacks in the ZEA, therefore the ordinance is valid. This argument ignores the great weight of authority to the contrary. The Supreme Court has consistently stated that the jurisdiction of zoning boards of review conferred by the ZEA "can neither be expanded nor diminished by the terms of an ordinance" and if an ordinance "purports to authorize something more or something less [than that provided by the ZEA], it is a nullity." *Lincourt v. Zoning Board of Review of the City of Warwick*, 98 R.I. 305, 309, 201 A.2d 482, 485 (1964) (citing *Mello v. Board of Review of the City of Newport*, 94 R.I. 43, 177 A.2d 533 (1962)).

The ZEA unequivocally does not, by its express terms, confer upon municipalities the authority to establish maximum setback lines. Therefore, it necessarily follows that any municipal zoning ordinance purporting to establish a maximum setback is "authorizing something less" than what is provided for in the ZEA by imposing greater restrictions on property owners as to where they may position the sides of their buildings. To find that a municipality is not expanding or diminishing the authority granted by the ZEA solely because the ZEA does not expressly address the subject matter of the contested ordinance would defy logic as well as decades of Supreme Court precedent. Moreover, such a finding would implicitly authorize municipalities to freely impose whatever regulations they desire with respect to matters not expressly provided for in the ZEA. As such, Rhode Island courts have repeatedly stated that municipalities can only regulate pursuant to an affirmative grant of authority under the ZEA, not that they can freely regulate all matters that the ZEA does not expressly address, as the Zoning Board claims. *See Champlin's Realty Associates, L.P.*, 823 A.2d at 1168; *Hartunian*, 109 R.I. at 515-16, 288 A.2d at 489; *Reynolds v. Zoning Board of Review of Town of Lincoln*, 96 R.I. 340, 343, 191 A.2d 350, 353 (1963).

Consequently, this Court finds that, by establishing maximum setback lines, NSZO § 12.11(2) impermissibly expanded the authority to regulate setbacks as conferred by the ZEA and is therefore void and unenforceable.

C

Remedy

In light of the fact that the denial of Tech Realty's application was based solely on the Zoning Board's enforcement of an illegal zoning ordinance, this Court finds that a remand is unnecessary and inappropriate under the narrow circumstances of this case.

Our Supreme Court has "'acknowledge[d] that there are instances in which a remand to an administrative agency may not be the most appropriate remedy[,]' including those cases in which a remand would not 'further the interests of justice . . . [or] provide decisive new information.'" *Kyros v. Rhode Island Department of Health*, 253 A.3d 879, 887 (R.I. 2021) (quoting *Champlin's Realty Associates v. Tikoian*, 989 A.2d 427, 449 (R.I. 2010)).

This is one of those situations in which a remand to the administrative body would not further the interest of justice because here the only relief sought by Tech Realty was a variance from an illegal ordinance. Aside from the maximum setback requirements, Tech Realty's proposal was fully compliant with the NSZO. To that end, Tech Realty's zoning application, the denial of which forms the basis for this appeal, is effectively moot.

The Zoning Board did correctly note that, pursuant to *Kent*, a remand is the ordinary remedy in cases where a zoning board of review's decision is tainted by illegality. *See Kent*, 102 R.I. at 264, 229 A.2d at 772. However, the Zoning Board's reliance on *Kent* is misplaced in this instance because the municipal zoning board of review's decision in *Kent* was not based on the enforcement of an illegal zoning ordinance, as is the case here. Remanding this matter for further

hearings based on the Zoning Board's violation of the five-vote requirement would only serve to tacitly allow the Zoning Board to continue enforcing the unsanctioned maximum setback rule. Accordingly, the Zoning Board's decision in this matter is hereby vacated.

IV

Conclusion

Because § 12.11(2) of the NSZO has been determined herein to be a nullity, this Court finds that the Zoning Board was without authority to require Tech Realty to seek a dimensional variance from said ordinance and lacked jurisdiction to issue a decision on Tech Realty's application, which exclusively sought relief from the maximum setback requirements contained in § 12.11(2). Tech Realty's appeal is granted on the basis that the Zoning Board's decision was made in excess of the authority granted to the Zoning Board and is affected by other error of law. The Zoning Board's decision is hereby vacated. In light of this ruling, the Court need not reach Tech Realty's other arguments made in support of its appeal.

In this appeal, Tech Realty seeks an award of litigation expenses pursuant to G.L. 1956 chapter 92 of title 42. *See* §§ 42-92-1 to 42-92-3. However, neither Tech Realty nor the Zoning Board address this request for relief in their respective briefs. To the extent Tech Realty wishes to pursue an award of litigation expenses, it shall file an appropriate motion with supporting memorandum and affidavits within thirty days of the filing of this Decision. The Zoning Board shall have thirty days from Tech Realty's filing to respond. An order will thereafter enter addressing this Decision as well as the ruling on litigation expenses. Should Tech Realty elect not to pursue such an award, it shall file a stipulation to this effect within thirty days of the filing of this Decision and shall submit an appropriate order for entry in accordance with this Decision.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**Tech Realty, LLC v. Town of North Smithfield Zoning Board of Review, et al.**
CASE NO:	**PC-2023-00104**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**April 9, 2024**
JUSTICE/MAGISTRATE:	**M. Darigan, J.**
ATTORNEYS:	
For Plaintiff:	**Joelle C. Rocha, Esq.** **Andrew Blais, Esq.**
For Defendant:	**Timothy J. Robenhymer, Esq.** **Stephen R. Archambault, Esq.**