STATE OF RHODE ISLAND

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: October 11, 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 for decision is Tech Realty, LLC's (Tech Realty) Motion for Award of Attorneys' Fees and Litigation Costs (Motion) pursuant to G.L. 1956 § 42-92-3(b) of the Equal Access to Justice Act (the Act). On April 9, 2024, this Court vacated the decision of the Town of North Smithfield Zoning Board (Zoning Board) which denied Tech Realty's application for a dimensional variance. *See Tech Realty, LLC v. The Town of North Smithfield Zoning Board of Review*, No. PC-2023-00104, 2024 WL 1607669 (R.I. Super. Apr. 9, 2024) (*Tech Realty, LLC I*). Tech Realty now argues it is entitled to attorneys' fees and costs under the Act because the Zoning Board's actions in the underlying proceedings and in this Court were not substantially justified. This Court has jurisdiction over this matter pursuant to § 42-92-3(b). For the reasons provided below, the Motion is granted in part and denied in part.

I

Facts and Travel

The facts of this case have been set forth in detail in *Tech Realty, LLC I*; thus, only those facts relevant to the instant motion will be discussed here. Tech Realty owns a tract of land at 0

Central Street, North Smithfield, Rhode Island (the Property). *See Tech Realty, LLC I* at *1. Tech Realty applied for a dimensional variance seeking relief from the maximum setback requirement of § 12.11(2) of the North Smithfield Zoning Ordinance (NSZO) for a new structure (the Facility) it planned to build on the Property. *See* Zoning Board Decision 1. After holding multiple public sessions to discuss the application and requiring Tech Realty to amend it (for reasons unrelated to this appeal), the Zoning Board ultimately denied the dimensional variance request on December 20, 2022—with two votes to approve, two votes to deny, and one abstention. *Id*. at 4.

Tech Realty then appealed the Zoning Board's decision to this Court pursuant to G.L. 1956 § 45-24-69(d). Tech Realty moved for an expedited briefing schedule on the grounds that there were two threshold issues that could resolve the appeal without the need for full briefing on the merits—namely, Tech Realty's arguments that the Zoning Board's vote was void *ab initio* due to the abstention and that § 12.11(2) of the NSZO unlawfully expanded upon the authority of the Zoning Enabling Act (ZEA). (Tech Realty's Mot. to Expedite Briefing Schedule 2.) The Zoning Board objected, and the Court denied the motion to expedite. *See* Zoning Board's Obj. Mot. to Expedite; *see also*, Docket, Order entered Feb. 17, 2023 (Cruise, J.). Next, Tech Realty moved for summary judgment and for declaratory judgment on the same two bases as the motion to expedite. (Tech Realty's Mot. for Summ. J. and/or Declaratory J. 1-2.) Again, the Zoning Board objected. *See* Tech Realty's Mot. for Attys' Fees (Tech's Mem.) Ex. 6, Emails between Joelle C. Rocha Esq., Rachel-Lyn Longo, and Timothy Robenhymer, Esq. The Court (McHugh, J.) determined the matter should be addressed on the Formal & Special Cause Calendar (*see* Docket) and the parties thereafter entered into a Consent Order establishing a briefing schedule for the appeal. *See* Docket, Order entered April 3, 2023 (Cruise, J.).

In briefing the appeal, however, the Zoning Board later conceded that the vote denying the application was illegal because only four members voted on it. (Br. of Appellees Town of North Smithfield Zoning Board of Review and Cynthia DeJesus in her capacity as Finance Director for the Town of North Smithfield 7-9.) With the Zoning Board's concession on this point, the key question for this Court was whether the case should be remanded to the Zoning Board. *Tech Realty, LLC I*, at *5. This Court ultimately held that § 12.11(2) of the NSZO was an *ultra vires* ordinance because the ZEA only allowed municipalities to set minimum setback requirements, not maximum setbacks. *Id*. at *5-6. Thus, the Court determined that no remand was necessary and vacated the decision of the Zoning Board. *Id*. at *6.

In this appeal, Tech Realty requested an award of reasonable litigation expenses pursuant to the Act, but at the time of the Court's *Tech Realty, LLC I* decision, neither party had briefed that issue for the Court. *Id*. at *7. The Court provided Tech Realty thirty days to file a motion regarding litigation expenses. *Id*. It timely did so on May 9, 2024, and the Zoning Board filed its response on June 10, 2024. On June 21, 2024, Tech Realty submitted its reply. The issue being fully briefed, the Motion is now ripe for decision.

II

Standard of Review

The Act "'was propounded to mitigate the burden placed upon individuals and small businesses by the arbitrary and capricious decisions of administrative agencies made during adjudicatory proceedings.'" *Tarbox v. Zoning Board of Review of Town of Jamestown*, 142 A.3d 191, 199-200 (R.I. 2016) (quoting *Krikorian v. Rhode Island Department of Human Services*, 606 A.2d 671, 673 (R.I. 1992)). The General Assembly's intention was made abundantly clear:

> "It is declared that both the state and its municipalities and their respective various agencies possess a tremendous power in their ability to affect the individuals and

> businesses they regulate or otherwise affect directly. The legislature further finds that the abilities of agencies to determine benefits, impose fines, suspend or revoke licenses, or to compel or restrict activities imposes a great, and to a certain extent, unfair, burden upon individuals and small businesses in particular. The legislature further finds that this situation often tempts state agencies to proceed against individuals or small businesses which are least able to contest the agency's actions, and that often results in actions other than those which are in the best interest of the public." Section 42-92-1(a).

Thus, the purpose of the Act is to provide individuals and small businesses the ability to challenge "arbitrary and capricious" decisions from state and municipal agencies, without necessarily needing to shoulder the expensive cost of doing so. *Id*.; *see also Tarbox*, 142 A.3d at 199-200.

The Act "provides that a prevailing party may be awarded reasonable litigation expenses where the agency was without substantial justification in actions that led to an adjudicatory proceeding or taken in the proceeding itself." *Tarbox*, 142 A.3d at 200 (internal quotations and citations omitted); *see also* §§ 42-92-2, 42-92-3. Importantly, our Supreme Court has declared "that a municipal zoning board is an agency under the act." *Tarbox*, 142 A.3d at 201. Further, a hearing for a variance application is an "adjudicatory proceeding" because it can result in what is essentially the denial of a permit. *Id*. at 201-02.

III

Analysis

A. Prevailing Party under the Act

As a prerequisite for its request for attorneys' fees to be granted, a movant must be a party as defined by the Act. *Tarbox*, 142 A.3d at 203. For Tech Realty to qualify as such it must show that it is (1) a private organization, (2) doing business and located in Rhode Island, (3) independently owned and operated, (4) not dominant in its field, and (5) it employed one hundred persons or less at the time the adjudicatory proceeding was initiated. Section 42-92-2(5).

Tech Realty has provided the Court with the affidavit of Michael J. Huber. *See* Tech Realty's Mem. Ex. 8, Michael J. Huber Aff. (Huber Aff.). Huber is a member of Tech Realty and attached to his affidavit is Tech Realty's Entity Summary from the Rhode Island Department of State, clearly identifying it as a domestic limited liability company, with an address in East Providence, Rhode Island. (Huber Aff. Ex. A.) The affidavit further provides that Tech Realty is independently owned and operated, that it "is not dominant in its field," that it has always employed fewer than one hundred persons, and that it had no employees as of May 8, 2024. (Huber Aff. ¶¶ 2-4.) It is clear to the Court that Tech Realty meets the statutory definition of a party for purposes of the Act. *See* § 42-92-2(5).

However, the Zoning Board argues that Tech Realty is not the actual party-in-interest in this matter because of a few sparse references to Material Sampling Technologies, Inc. (MST) in an expert report submitted to the Zoning Board with Tech Realty's initial application for the variance.[1] (Zoning Board's Obj. to Tech's Mot. for Award of Attys' Fees (Zoning Board's Mem). 5-9.) The Zoning Board notes that MST also does business as Q Tech, LLC (Q Tech), which described itself as having a global market for its products in a previous application to the Rhode Island Department of Environmental Management. *Id*. at 7-8.; *see also*, Zoning Board's Mem. Ex. E, MST Application to DEM. Because the Zoning Board alleges that MST and Q Tech are the companies benefiting from the dimensional variance—through future utilization of the Facility to perform their work—the Zoning Board argues that MST and Q Tech should be deemed the real parties-in-interest under the Act. *Id*. at 8-9.

[1] Attached to its application was an expert report from Joe Casali Engineering Inc., the cover letter of which stated it was being presented "[o]n behalf of Tech Realty LLC and Material Sampling Technologies, Inc." (Zoning Board's Mem. Ex. C, Joe Casali Engineering Zoning Board of Review Filing Dimensional Variance.)

That argument is unavailing. Whether a third party may be considered "a real party-in-interest" has not been examined in Rhode Island previously. This Court must determine if the General Assembly intended to impose a real party-in-interest test when determining if a litigant is a party pursuant to the Act. "'It is well settled that when the language of a statute is clear and unambiguous, this Court must interpret the statute literally and must give the words of the statute their plain and ordinary meanings.'" *Newport and New Road, LLC v. Hazard*, 296 A.3d 92, 94 (R.I. 2023) (quoting *Waterman v. Caprio*, 983 A.2d 841, 844 (R.I. 2009)). The Court "'must consider the entire statute as a whole; individual sections must be considered in the context of the entire statutory scheme, not as if each section were independent of all other sections.'" *Id*. (quoting *Beagan v. Rhode Island Department of Labor and Training*, 253 A.3d 858, 861-62 (R.I. 2021)). "'[W]hen [the Court] examine[s] an unambiguous statute, there is no room for statutory construction and [the Court] must apply the statute as written.'" *In re Block Island Power Company*, 288 A.3d 589, 596 (R.I. 2023) (quoting *Morel v. Napolitano*, 64 A.3d 1176, 1179 (R.I. 2013)). However, the Act is modeled on the federal Equal Access to Justice Act (EAJA), and, "[w]hen a Rhode Island statute is modeled on a federal statute, this court 'should follow the construction put on it by the federal courts, unless there is strong reason to do otherwise.'" *Krikorian*, 606 A.2d at 674 (quoting *Laliberte v. Providence Redevelopment Agency*, 109 R.I. 565, 575, 288 A.2d 502, 508 (1972)).

In *Nail v. Martinez*, 391 F.3d 678, 681 (5th Cir. 2004), the plaintiff—a company which managed several properties—was debarred by the United States Department of Housing and Urban Development (HUD) due to the plaintiff's failure to maintain certain properties. The plaintiff successfully had its debarred status reversed by bringing action against HUD in federal district court; however, the district court denied its motion for attorneys' fees under the federal

EAJA statute because it determined that the real party-in-interest was the plaintiff's alter-ego—its president and sole stockholder, J. Stephen Nail (Nail), who received all the profits of the plaintiff for tax purposes. *Nail*, 391 F.3d at 683. As Nail did not meet the federal statutory criteria to be eligible as an individual under the federal EAJA statute, the district court held that the plaintiff could not receive attorneys' fees in that matter, notwithstanding that the plaintiff met the qualifications for a corporation under the federal EAJA statute. *Id*.

The United States Court of Appeals for the Fifth Circuit overturned that decision. *Id*. at 683-84. The court explained that the federal EAJA statute is unambiguous and that Congress was clearly concerned that "large entities capable of purchasing legal services might inappropriately recover fees and costs under the [federal] EAJA." *Id*. at 683. However, that concern was reflected by Congress limiting corporations who could recover under the statute by including "net-worth and employee-number limitations." *Id*. The court noted that if Congress had intended to incorporate a "real party in interest test" to the federal EAJA, it would have done so and because the statute was unambiguous, the Court refused to impose such a test. *Id*. at 683-84.

Considering the statutory scheme of the Act in its entirety, the General Assembly was clearly concerned about protecting the interests of "individuals or small businesses which are least able to contest [an] agency's actions" and not large corporations that can afford to contest an adverse decision of such an agency. Section 42-92-1(a). That concern is unambiguously addressed by the definition of a corporate party under the Act, in which the General Assembly limited the statute's application to "any individual, partnership, corporation, association, or private organization doing business and located in the state, which is independently owned and operated, not dominant in its field, and which employs one hundred (100) or fewer persons at the time the adversary adjudication was initiated." Section 42-92-2(5). Just as in *Nail,* 391 F.3d at

684, the intent of the General Assembly to limit the eligibility of a corporation to receive attorneys' fees under the Act by its size is clear, and the criteria for the Court to determine such eligibility is unambiguous. *See* §§ 42-92-1(a), 42-92-2(5).

The Zoning Board does not argue that the statute is ambiguous, rather it argues that applying a real party-in-interest test would serve to further the intent of the General Assembly. *See* Zoning Board's Mem. 5-9. This Court will not apply a real party-in-interest test to the current matter in place of the criteria unambiguously specified by the Legislature and will instead "apply [that] statute as written." *In re Block Island Power Company*, 288 A.3d at 596.

Even if the Act were somehow read to include a real party-in-interest test under certain circumstances, the Zoning Board has failed to show that such test would be applicable in the instant matter. The United States Court of Appeals for the District of Columbia held that a real party-in-interest analysis may be appropriate when deciding whether to award attorneys' fees under the federal EAJA statute in *Unification Church v. I.N.S.*, 762 F.2d 1077 (D.C. Cir. 1985), yet that case is factually distinguishable from the current matter. In that case, Unification Church (Church) agreed to pay the fees of the attorneys that represented a group of individual appellants. *Unification Church*, 762 F.2d at 1082. The court reasoned that if it granted the individual appellants' EAJA request then the appellee would be required to pay their fees; if it denied the request, then the Church would pay the fees. *Id*. In either scenario, the individual appellants making the EAJA request would not be required to pay any attorneys' fees, and, thus, the real party-in-interest was the Church. *Id*.

In the instant matter, the Zoning Board neither argues, nor provides evidence, that MST or Q Tech has agreed to pay for Tech Realty's attorneys' fees associated with its application for the dimensional variance from the Zoning Board or its appeal from the same. *See* Zoning Board's

Mem. 5-9. Additionally, in *Nail*, the Fifth Circuit commented on the decision in *Unification Church*, noting that the D.C. Circuit had "unnecessary[ily]" examined the legislative history of the federal EAJA statute to determine that it was Congress's intent that a real party-in-interest test could appropriately be applied without first finding that the statute was ambiguous. *Nail*, 391 F.3d at 683.

Regardless of the tension between *Nail* and *Unification Church*, the General Assembly was unambiguous when it drafted the Act, and the Court cannot graft a real party-in-interest test to its provisions as a result. Additionally, even if this Court were inclined to adopt such a test, the Zoning Board's argument would fail absent a showing that either MST or Q Tech would pay Tech Realty's fees. *See Unification Church*, 762 F.2d at 1082. Further, the Court need not decide here if such a fee arrangement serves as a "special circumstance" that would allow it to use its discretion to deny attorneys' fees, § 42-92-3(a), because such an arrangement is not presented before it. Instead, the Court is presented with the facts that Tech Realty is the only appellant in this action, that it was the only applicant in its request for a dimensional variance from the Zoning Board, and that it is the only party seeking to be awarded attorneys' fees under the Motion. As shown by the Huber Affidavit, Tech Realty meets the requirements laid out by the General Assembly in the text of the Act itself, and, thus, it qualifies for relief under the Act regardless of MST or Q Tech's potential future use of the Property.

Furthermore, Tech Realty is the prevailing party in this matter as it successfully persuaded this Court to reverse the Zoning Board's denial of its application for a dimensional variance. *See* Black's Law Dictionary, 1349 (12th ed. 2024) (defining a "prevailing party" as "[a] party in whose favor a judgment is rendered, regardless of the amount of damages awarded"). Because

this Court determines that Tech Realty is the prevailing party as defined in the Act, it is of no moment whether MST or Q Tech is dominant in its field.

B. Substantial Justification

Under the Act, there are two circumstances where the Court may not award fees to a prevailing party. The first is mandatory: the Court "will not award fees or expenses if [it] finds that the agency was substantially justified in actions leading to the proceedings and in the proceeding itself." Section 42-92-3(a). The second is discretionary: the Court "may, at [its] discretion, deny fees or expenses if special circumstances make an award unjust." *Id*. The Zoning Board does not argue that there are any special circumstances in existence that should persuade the Court not to award fees and costs; rather, it argues that it acted with substantial justification in rendering its decision and in defending the same on appeal. (Zoning Board Mem. 9-11.)

"'Substantial justification' means that the initial position of the agency, as well as the agency's position in the proceedings, has a reasonable basis in law and fact." Section 42-92-2(7). The agency has the burden of proving that its position was substantially justified—"'not merely that its position was marginally reasonable; its position must be clearly reasonable, well founded in law and fact, solid though not necessarily correct.'" *Taft v. Pare*, 536 A.2d 888, 893 (R.I. 1988) (quoting *United States v. 1,378.65 Acres of Land*, 794 F.2d 1313, 1318 (8th Cir. 1986)). The Court first will determine whether the agency had a reasonable basis in law before determining whether the agency had a reasonable basis in fact. *See Taft*, 536 A.2d at 893 (declining to determine whether the agency had a reasonable basis in fact after concluding it lacked a basis in law).

The Zoning Board avers that it acted with substantial justification in the instant matter because it simply was enforcing § 12.11(2) of the NSZO, and that, although the Court found that

ordinance to be an impermissible expansion of the Town of North Smithfield's (the Town) authority to regulate setback requirements, the issue of whether the Town could regulate maximum setbacks is a novel issue. (Zoning Board Mem. 10-11.) It relies on *Michel v. Mayorkas*, 68 F.4th 74, 78 (1st Cir. 2023), for the notion that, if an issue is novel, a court should be hesitant to find an agency's position is not substantially justified. (Zoning Board Mem. 10.)

While there is no precedent specifically as to whether a municipality may set a maximum setback requirement, there is a plethora of authority to suggest that a municipality may not act pursuant to the ZEA without "a clear delegation to municipalities of a regulatory right[.]" *Champlin's Realty Associates, L.P. v. Tillson*, 823 A.2d 1162, 1168 (R.I. 2003). Essentially, municipalities do not hold plenary powers when drafting their ordinances; rather, the authority of a municipality to draft and enforce ordinances must be enumerated from within the ZEA itself—if the ZEA does not confer such authority then the ordinance is void. *See id.*; *see also, e.g.*, *Hartunian v. Matteson*, 109 R.I. 509, 515-16, 288 A.2d 485, 489 (1972) ("Moreover, when an ordinance sets out to restate that for which provision is made in the enabling act, any purported expansion or abridgment 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."); *Reynolds v. Zoning Board of Review of Town of Lincoln*, 96 R.I. 340, 343, 191 A.2d 350, 353 (1963) (citing *Mello v. Board of Review of City of Newport*, 94 R.I. 43, 177 A.2d 533 (1962)) (providing "the well-settled rule that the jurisdiction of zoning boards of review is that prescribed in the enabling act and that the jurisdiction therein vested in such boards can neither be enlarged nor restricted by enactments contained in a zoning ordinance").

Here, as determined in *Tech Realty, LLC I*, the ZEA contemplates municipalities having the authority only to regulate the *minimum* distance of required setbacks in a zoning district; it

makes no mention of *maximum* setbacks. Section 45-24-31(60).[2] As the ZEA is silent on maximum setbacks, the Zoning Board lacked a legal basis to enforce such a requirement, and, therefore, it was not substantially justified in doing so, as discussed in a litany of previous cases. *See, e.g., Champlin's Realty Associates, L.P.*, 823 A.2d at 1168; *Hartunian*, 109 R.I. at 515-16, 288 A.2d at 489; *Reynolds*, 96 R.I. at 343, 191 A.2d at 353. Although the specific factual issue surrounding the permissibility of maximum setback ordinances has not been previously addressed, that is of little consequence when the overriding legal principle is clear and not novel: without express authority granted by the ZEA, a municipality cannot regulate. *See, e.g., Champlin's Realty Associates, L.P.*, 823 A.2d at 1168; *Hartunian*, 109 R.I. at 515-16, 288 A.2d at 489; *Reynolds*, 96 R.I. at 343, 191 A.2d at 353. Having determined that the Zoning Board was not substantially justified in law, the Court need not determine if it was substantially justified in fact. *See Taft*, 536 A.2d at 893.

C. Entitlement to Fees for the Hearing Before the Board and Appeal to Superior Court

The Act enables this Court to award "reasonable litigation expenses" when a state or municipal agency renders an adverse decision that is without substantial justification. Section 42-92-3(a). "Reasonable litigation expenses" are defined as:

> "those expenses which were reasonably incurred by a party in adjudicatory proceedings, including, but not limited to, attorney's fees, witness fees of all necessary witnesses, and other costs and expenses as were reasonably incurred, except that:
> "(i) The award of attorney's fees may not exceed one hundred fifty dollars ($150) per hour, unless the court determines that special factors justify a higher fee;

[2] This citation refers to the operative statute at the time this matter was before the Zoning Board and on appeal for disposition before this Court. That statute has since been amended, effective as of January 1, 2024. However, that amendment does not affect the substance of § 45-24-31(60); the only change pertinent to this matter is that the provision is now located at § 45-24-31(61) [Effective January 1, 2024].

> "(ii) No expert witness may be compensated at a rate in excess of the highest rate of compensation for experts paid by this state." Section 42-92-2(6).

Tech Realty requests an award of costs and attorneys' fees associated with both the hearing before the Zoning Board and its appeal to this Court. Specifically, it requests $6,237.91 in costs associated with the hearing before the Zoning Board and filing its appeal to this Court. (Tech Realty's Mem. 25-26.) It further seeks $30,495 in attorneys' fees, representing 203.3 total hours of work billed at the $150-per-hour rate set by the Act, for work on the application, the Zoning Board hearing, and the appeal. *Id*. at 28-35. The total amount requested at the Act's rate is $37,239.95. *Id*. at 36.

Notably, the Zoning Board concedes that Tech Realty is entitled to fees associated with the hearing before the Zoning Board. (Zoning Board Mem. 12.) However, it argues that Tech Realty is not entitled to costs and attorneys' fees associated with the appeal to this Court. *Id*. at 11-15. Specifically, the Zoning Board relies on *Campbell v. Tiverton Zoning Board*, 15 A.3d 1015 (R.I. 2011) for the proposition that an action in Superior Court is not an adjudicatory proceeding under the Act, and thus Tech Realty is not entitled to fees associated with the appeal. (Zoning Board Mem. 11-12.) It further argues that, under § 42-92-3(a), an agency itself is allowed to award fees for an "adjudicatory proceeding," whereas when this Court, under § 42-92-3(b), reviews an "adversary adjudication," it may only award fees associated with the hearing before the agency. *Id*. at 12-13.

The Zoning Board's reliance on *Campbell* is misplaced. *Campbell* dealt with an abutter to the Tiverton Yacht Club (TYC), which had previously burned down and was being rebuilt. *Campbell*, 15 A.3d at 1019. As part of the rebuilding process, the TYC submitted building plans to the Tiverton Zoning Board (Tiverton Board), which was approved by an individual official, without a hearing, who then issued the TYC a permit. *Id*. The abutters then filed a complaint

directly to the Superior Court seeking declaratory relief that the permit should not have been issued. *Id*. The Superior Court granted the abutters declaratory relief but refused to award the abutters attorneys' fees pursuant to the Act because the action was not an appeal from an administrative agency. *Id*. at 1019-20. The Rhode Island Supreme Court affirmed the denial of those fees, reasoning that the decision by the individual official was not an adjudicatory proceeding under the Act. *Id*. Additionally, it held that the action that originated in Superior Court was itself not an adjudicatory proceeding under the Act because it was not reviewing an underlying decision of an agency. *Id*. at 1025. Absent a review of an adjudicatory proceeding, the Act does not apply. *Id*.

Here, Tech Realty's action did not originate in this Court; it stems from the Zoning Board's previous determination. This action required the Court to review that underlying determination, which is an adjudicatory proceeding, and thus the Court may award fees for the appeal pursuant to § 42-92-3(b). *See Tarbox*, 142 A.3d at 201-02 (holding that a hearing before a zoning board for a variance request is an adjudicatory proceeding).

Additionally, Tech Realty argues for fees to be awarded under § 42-92-3(b), not § 42-92-3(a), and the Zoning Board's argument regarding the different use of terms between §§ 42-92-3(a) and 42-92-3(b) is less than clear. What is clear, however, is that those two provisions provide two different avenues a litigant may pursue to be awarded fees under the Act. The first avenue, § 42-92-3(a), allows for a party to request reasonable litigation expenses from an officer of the agency itself when that party is successful at the agency level. *Rollingwood Acres, Inc. v. Rhode Island Department of Environmental Management*, 212 A.3d 1198, 1204 (R.I. 2019). The second avenue, § 42-92-3(b), allows a party to request fees from a court when it is unsuccessful at the

agency level. *Id*. at 1205. Thus, Tech Realty's Motion is properly before this Court pursuant to § 42-92-3(b).

What is equally clear is that this Court may award reasonable litigation expenses for the appeal before it. In *Taft*, a motorist was charged with driving under the influence in Massachusetts, to which he pleaded the functional equivalent of nolo contendere. *Taft*, 536 A.2d at 889. Later, the Rhode Island Registry of Motor Vehicles (Registry) notified the motorist that his driver's license was suspended due to that plea. *Id*. The motorist requested a hearing to argue against his suspension, but that request was denied, and the motorist appealed the suspension directly to the state District Court. *Id*. The District Court sustained the appeal, quashed the suspension of the motorist's license, and granted him fees for the proceedings before it under the Act. *Id*. The Registry then appealed that decision, and our Supreme Court affirmed that those fees were properly granted by the District Court because the Registry had no process in place for it to consider the motorist's request for attorneys' fees under the first avenue described by § 42-92-3(a). *Id*. at 892; *see* § 42-92-4 (requiring administrative agencies authorized to conduct adjudicatory proceedings to establish procedures for parties to request fees under the Act). Our Supreme Court then remanded the matter to District Court with instructions to further award the motorist fees associated with the Registry's appeal to the Supreme Court. *Taft*, 536 A.2d at 893.

Here, Tech Realty was unsuccessful at the agency level, and, thus, the Zoning Board could not consider whether to award Tech Realty attorneys' fees and costs. Tech Realty then appealed the decision of the Zoning Board denying its dimensional variance application to this Court, which vacated the Zoning Board's decision after reviewing it. *See Campbell*, 15 A.3d at 1025 (requiring that a court must review an underlying agency decision as a prerequisite for it to award fees under the Act). Therefore, Tech Realty's success in this appeal made it a prevailing party,

which allows this Court to consider whether litigation expenses should be granted for the appeal pursuant to § 42-92-3(b). The Zoning Board's construction of the Act, that this Court cannot award fees relating to an appeal, would result in an absurdity when the purpose of the Act is to provide individuals and small businesses the ability to appeal arbitrary decisions of state and municipal agencies without necessarily needing to shoulder the costs associated with such challenges. Section 42-92-1. The Court finds that Tech Realty's request for costs and attorneys' fees—at the statutorily prescribed $150 per hour rate—relating to the hearing before the Zoning Board and this appeal, are reasonable litigation expenses. Thus, the Court awards Tech Realty those expenses, amounting to $37,239.95.[3]

D. Enhanced Fees

Although § 42-92-2(6)(i) limits reasonable attorneys' fees to $150 per hour, it also allows the Court to award higher fees upon the determination that "special circumstances" justify doing so. Tech Realty claims that it is entitled to an additional $9,162 in fees, in addition to the fees it requested at the Act's defined rate. (Tech Realty's Mem. 32-35.) It argues the Zoning Board acted in bad faith when it objected to Tech Realty's motions to expedite and for summary judgment, especially considering that the Zoning Board later conceded one of the two potentially dispositive legal issues advanced by Tech Realty; that is, that the Board's two-to-two vote was unlawful. *Id*. at 34. Tech Realty seeks an award for the *actual* costs it incurred with respect to the full briefing

[3] The Court accepts the unrebutted expert opinion of Attorney Kelley Morris Salvatore that the fees and costs incurred by Tech Realty in the proceedings before the Zoning Board and in this appeal are reasonable and appropriate. *See* Tech Realty's Mem. Ex. 11, Kelley Morris Salvatore, Esq. Aff., ¶¶ 11-24. Having carefully reviewed the affidavit of Tech Realty's attorney concerning the fees and costs, this Court concurs with the expert opinion. *See generally,* Tech Realty's Mem. Ex. 10, Joelle C. Rocha, Esq. Aff.

of the appeal and oral argument. *Id*. The Zoning Board argues that its objection to those motions is common in litigation and cannot maintain a finding of bad faith to justify an award of enhanced fees. (Zoning Board Mem. 14-15.)

Under the federal EAJA statute, enhanced fees may be awarded when an agency's decision was "not merely without substantial justification but was undertaken in bad faith." *Brown v. Sullivan*, 724 F. Supp. 76, 78 (W.D.N.Y. 1989). An action is in bad faith when it is "'entirely without color and made for reasons of harassment or delay or for other improper purposes.'" *Wells v. Bowen*, 855 F.2d 37, 46 (2d Cir. 1985) (quoting *Sierra Club v. U.S. Army Corps of Engineers*, 776 F.2d 383, 390 (2d Cir. 1985)). As noted above, the Act allows for an enhanced fee when special circumstances are present. Section 42-92-2(6)(i).

This Court neither finds that the Zoning Board acted "entirely without color" when it objected to Tech Realty's motions nor that such objections were undertaken for "reasons of harassment or delay or for other improper purposes." *Wells*, 855 F.2d at 46 (internal quotation omitted). The Court acknowledges Tech Realty's frustration with the pace of this appeal and appreciates that it sought to streamline and advance the appeal by focusing on two threshold legal arguments, which this Court ultimately found to be dispositive of the appeal. However, it is a fact that objecting to motions such as those presented by Tech Realty is common practice in litigation, particularly where the Zoning Board relied on established rules, practices, and procedures as grounds for its objections. Further, two justices of the Superior Court agreed with the Zoning Board's positions relative to the motions and declined to follow the procedural path advocated by Tech Realty. For these reasons, this Court cannot and does not find that the Zoning Board acted in bad faith and denies Tech Realty's request for enhanced fees.

IV

Conclusion

For the foregoing reasons, Tech Realty's request for reasonable litigation expenses is **GRANTED**. However, its request for enhanced fees is **DENIED**. Counsel shall submit an appropriate order for entry addressing the Court's decision in *Tech Realty, LLC I* and 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:	**October 11, 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.**