STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: July 9, 2013)

ERNEST E. RYDEN, JR.	:	
	:	
V.	:	
	:	
THOMAS KRAIG, in his capacity as Acting Chairman of the Town of Barrington Zoning Board of Review; MARK W. FREEL, in his capacity as a member of the Town of Barrington Zoning Board of Review; IAN RIDLON, in his capacity as a member of the Town of Barrington Zoning Board of Review; DAVID RIZZULO, in his capacity as a member of the Town of Barrington Zoning Board of Review; STEPHEN VENUTI, in his capacity as a member of the Town of Barrington Zoning Board of Review; PETER DENNEHY, in his capacity as a member of the Town of Barrington Zoning Board of Review; PAUL BLASBALG, in his capacity as a member of the Town of Barrington Zoning Board of Review; and DEAN M. HUFF, JR., in his capacity as the FINANCE DIRECTOR/TAX COLLECTOR of the Town of Barrington	:	**C.A. No. PC-2010-2522**

DECISION

STERN, J. Before the Court is Ernest E. Ryden, Jr.'s (Ryden or Appellant) appeal from a decision of the Town of Barrington Zoning Board of Review (the Zoning Board), denying Ryden's application for a dimensional variance needed to construct a single-family home on Ryden's undeveloped property. This Court has jurisdiction of the Appellant's timely appeal pursuant to G.L. 1956 § 45-24-69.

I

Facts and Travel

The Appellant owns an undeveloped tract of land located at Arvin Avenue in the Town of Barrington, Rhode Island, also known as Assessor's Plat No. 32, Lot No. 237 (the Property). (R., Ex. 4.) The lot, measuring 104 feet by 101 feet for an overall area of 11,067 square feet, is located within an R-10 zoning district and a wetlands overlay district.[1] Id. at 1-2; see also Town of Barrington Zoning Ordinance (the Zoning Ordinance or BZO) §§ 185-69 through 185-75. In 2010, the Appellant sought approval from the Zoning Board to construct a two-story, single-family home, with a single-car garage, in the northeast quadrant of the Property. (R., Ex. 4; Pl.'s Mem. at 2.) Arvin Avenue, a public road, runs along the northern border of the Property, while Nahma Avenue, an unimproved road, runs along the western border of the Property. (R., Ex. 4.) A single and comparatively smaller lot abuts the eastern border of the Property and contains a residence, while two comparatively larger lots abut the southern border of the Property. (R., Ex. 4.) The southwestern portion of the Property consists of coastal wetland, with the edge of the wetland running from the northwest corner of the Property to, roughly speaking, the southeast corner of the Property. Id. In general, the Appellant has sought to locate his proposed structure as far as possible from the designated wetland. See Audio Tr., Mar. 18, 2010.

In his application to the Zoning Board, the Appellant requested relief in the form of a dimensional variance for the front yard setback requirements mandated in the Zoning Ordinance § 185-17. The proposed structure would result in a front yard setback of fifteen feet, where twenty-five feet is required, meaning that the proposed structure would be ten feet closer to Arvin Avenue on the north side of the Property than is permitted by the Zoning Ordinance. See

[1] An R-10 zoning district requires a lot size of at least 10,000 square feet for construction of a single-family dwelling. See Barrington Zoning Ordinance § 185-17.

BZO § 185-17; Barrington Mem. at 2; R., Ex. 4. It was not necessary for the Appellant to seek dimensional relief with respect to the eastern edge of the proposed structure under BZO § 185-17, as the proposed structure conforms to the side yard requirements of that section of the Zoning Ordinance. See Audio Tr., Mar. 18, 2010.

The Appellant also sought relief from BZO § 185-22 and BZO, Art. XXV, §§ 185-169 through 185-175. (R., Ex. 4; Pl.'s Mem. at 2.) BZO § 185-22 provides for a setback requirement from wetlands and water bodies, stating that unless otherwise provided, "no building, structure or sign may be located within 100 feet of any wetland." Similarly, Article XXV of the Zoning Ordinance concerns the local rules governing the "Wetlands Overlay District" in the Town of Barrington. Thereunder, BZO § 185-173 ostensibly requires a special use permit for construction of the Appellant's proposed structure, in addition to the requested dimensional relief.[2] See BZO § 185-173; Barrington Mem. at 2. It is evident that the Appellant requested relief from the Zoning Board, at least in part, at the urging of the Rhode Island Coastal Resources Management Council (the CRMC), whose supplementary permission will be required for the Appellant to build on the Property, even if the Appellant obtains local approval from the Zoning Board.[3] See Audio Tr., Mar. 18, 2010.

On March 18, 2010, the Zoning Board held a properly advertised hearing on the Appellant's request for relief. (R., Exs. 1-3.) As required by § 45-24-56, all seven members of

[2] The Zoning Ordinance, § 185-73, states that any use not specifically prohibited may be "allowed in the Wetlands Overlay District, or within 100 feet thereof, only as a special use pursuant to the provisions of Article XIV of this chapter."

[3] At present, the CRMC has taken no official position on the Appellant's plans, but in a preliminary determination dated December 3, 2009, the CRMC found that "there appears to be an area of upland on this lot which could support development, however the proposed design does not appear to be a minimization of potential impacts and will be unlikely to receive staff support at this time." (R., Exs. 5, 10.) It appears from the transcript of the Zoning Board's March 18, 2010 hearing that the Appellant has made changes in his proposed structure in response to the CRMC's preliminary determination.

the Zoning Board sat for the hearing, including the Zoning Board's two alternate members. At the hearing, the Chairman of the Zoning Board, Thomas Kraig (Chairman Kraig), read into the record a report from the Barrington Conservation Commission (the Conservation Commission) that expressed disapproval of the Appellant's plans for the Property.[4] (R., Ex. 12.) The Conservation Commission's report, citing BZO §§ 185-22 and 185-174(a), stated the Conservation Commission's majority opinion was that the Appellant's lot is not developable because the entire lot is within one hundred feet of wetland, with a small portion of the proposed structure being within fifty feet of wetland.[5] (R., Ex. 6.) Notwithstanding the Conservation Commission's majority opinion, a minority of the Conservation Commission approved of the Appellant's plans because the Appellant had "purchased the property prior to the 100-foot setback adoption, [and] has made best effort to place [the] house away from wetland."[6] Id. Chairman Kraig also read into the record a letter from abutting property owners in opposition to the Appellant's application for relief from the Zoning Ordinance. (R., Ex. 12.) The letter referenced several pieces of documentary evidence indicating that the CRMC had previously

[4] Section 185-73 of the Zoning Ordinance also requires the Zoning Board to refer all applications for a special use permit within the Wetlands Overlay District to the Barrington Conservation Commission, which must then "review the application and submit a report and recommendations thereon to the Zoning Board . . . prior to the hearing on the application."

[5] The Zoning Ordinance § 185-174 states, in relevant part:

> "[t]he Zoning Board . . . may grant a special use permit only if it determines, taking into full consideration the report of the Conservation Commission, that the application minimizes, to the degree possible, any negative impacts to the wetlands values described in § 185-170, and meets the following development standards:
>
> A. All new structures and expansions, paved areas and land disturbances will be set back at least 100 feet from the wetland edge."

[6] The minority opinion for approval also noted that "[t]he portion of the lot where [the] house is proposed has already been filled." (R., Ex. 6.)

denied an application to construct a one-family home on undeveloped land that abuts the Appellant's property to the west on Arvin Avenue, across Nahma Avenue. (R., Exs. 4, 7.)

The Zoning Board also heard testimony from Attorney Joelle Sylvia (Attorney Sylvia) as counsel for the Appellant, and from Richard Lipsitz (Mr. Lipsitz), an engineer and professional land surveyor with Waterman Engineering Company of East Providence, Rhode Island. (R., Ex. 12.) Attorney Sylvia explained the history and background of the Appellant's application. (R., Ex. 12.) Attorney Sylvia noted that the Appellant's family had owned the Property since 1970, which was "prior to the 100-foot setback requirement." Id. Attorney Sylvia also stated that the Appellant's family had been granted approval to build on the Property in 1976, but that they had never moved forward with those plans. (Barrington Mem. at 2.) Attorney Sylvia further noted that the Appellant had again applied, in 1996, to build a home on the Property. Id. Although the Appellant's application was denied at that time, the Superior Court reviewed the Zoning Board's denial and remanded the matter for a new hearing because the original hearing had not been "fully transcribed by a stenographer or audiotape recording."[7] Id.; Ryden v. Barrington Zoning Bd. of Review, No. PC-1996-1800, 2002 WL 1804542, at *9 (R.I. Super. Ct. Aug. 5, 2002). Subsequently, no further action was taken in response to the court's decision until the Appellant filed his current application for relief from the Zoning Ordinance in 2010. (R., Ex. 12.)

In addition, Mr. Lipsitz testified as to the nature of relief sought given the Appellant's plans and the proposed structure on the Property. Mr. Lipsitz established that under the Zoning Ordinance, the entire Property is located within one hundred feet of a wetland body and that the Property is entirely within the Town of Barrington's Wetlands Overlay District. (Audio Tr.,

[7] The Zoning Board has provided an audio recording of the March 18, 2010 hearing for the present appeal. The Court notes that such a transcript or recording is required under § 45-24-61(a), and that zoning boards must endeavor to produce recordings that are readily audible.

Mar. 18, 2010.) Mr. Lipsitz also testified that no portion of the Appellant's proposed structure would, under any circumstance, be closer than thirty-five feet to the edge of the denominated wetland edge. Id. In addition, Mr. Lipsitz provided some insight into the CRMC's involvement in the Appellant's building plans, indicating that the CRMC had requested that the proposed structure be located closer to the street than permitted by the front yard setback requirements of the Zoning Ordinance. Id. Mr. Lipsitz acknowledged that the CRMC had made no final determination concerning the Appellant's proposed structure, but he indicated that the Appellant formulated his current proposal in a manner that responds to the CRMC's preliminary determination as comprehensively as possible.[8] Id.

In addition, the Zoning Board heard testimony in opposition to the Appellant's application for relief from five nearby property owners, including the abutters owning the lots on the eastern and southern borders of the Property. Id.; R., Ex. 12. The neighbors who testified in opposition to the Appellant's proposed structure expressed concern with flooding from the designated wetland area that forms a portion of the Property, with drainage issues affecting the street, and with the impact of the proposed construction on wildlife. Id. In addition, it was the consensus of those opposed that the proposed structure would be too close to Arvin Avenue and therefore not in keeping with the general character of the neighborhood. Id. There were also questions regarding the overall impact, both financially and environmentally, on the surrounding properties. Id. Some neighbors noted that they would not be opposed to a house located further

[8] Specifically, the CRMC's preliminary report stated that "[i]n order to minimize construction impacts staff recommends redesigning the project to include a smaller development footprint (no garage?), relocation of the residence landward (which may require local zoning variances), reconfiguration of the proposed driveway, reduction and/or elimination of the proposed deck and inclusion of areas of compensatory buffer zone where possible." (R., Ex. 5.)

from Arvin Avenue, while others felt that no construction should be permitted on the property at all. Id.

After the conclusion of the public participation period of the Zoning Board's March 18, 2010 hearing, the Zoning Board first deliberated on the application. (Pl.'s Mem. at 3; Barrington Mem. at 4; Audio Tr., Mar. 18, 2010.) Several members of the Zoning Board expressed the concern that a denial of the Appellant's application would amount to denying the Appellant any potential beneficial use of the Property. (Audio Tr., Mar. 18, 2010.) Several Zoning Board members also appeared to concur that under the current zoning and regulatory framework, none of the residences in the vicinity of the Appellant's Property could have been built. Id.

Zoning Board Member Mark W. Freel (Member Freel) then made a motion to approve the Appellant's application with conditions, and Zoning Board Member Stephen Venuti (Member Venuti) seconded the motion.[9] The Zoning Board collectively determined that votes would be cast first solely on the issue of approving the Appellant's request for a dimensional variance to the front yard setback requirement under BZO § 185-17. (Audio Tr., Mar. 18, 2010.) Member Freel, Member Venuti, and Chairman Craig all voted in favor of approving the Appellant's application. Id.. Zoning Board Member David Rizzulo (Member Rizzulo) voted against approving the application, stating that the proposed structure was not in conformity with the general characteristics of the surrounding area. Id. Zoning Board Member Ian Ridlon (Member Ridlon) chose to abstain from voting, with the record indicating that Member Ridlon "did not feel that he had enough information upon which to make a decision." Id.; R., Ex. 12. As a result, the final tally of votes as to the Appellant's application for dimensional relief from

[9] The conditions were that, "[1] Adequate erosion control must be in place prior to and during installation (hay bales/silt fences[,] [2] The driveway must be constructed of pervious material[,] [and] [3] All storm water runoff must be directed to drywells[.]" (R., Ex. 12.)

the front yard setback requirement was three to one in favor of approval, with one abstention. Id. However, the Appellant's application was effectively denied because of the statutory requirement that "[t]he concurring vote of four (4) of the five (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." Id.; see § 45-24-57. Because the front yard setback dimensional relief was effectively denied, there was no further motion for relief concerning the wetland-related aspects of the Appellant's application. (R., Ex. 12; Audio Tr., Mar. 18, 2010.)

The decision of the Zoning Board — stating that the motion to approve the Appellant's application for relief did not receive the number of votes and therefore, that the application failed — was treated as a denial of the Appellant's application and recorded in the Land Evidence Record of the Town of Barrington on April 8, 2010. (R., Ex. 13.) The Appellant timely filed his appeal with this Court on April 28, 2010, in accordance with § 45-24-69, which grants this Court jurisdiction over the matter. Pursuant to the notice requirements of § 45-24-69.1, Attorney Sylvia filed an affidavit of notice on April 28, 2010.

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:
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> (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 Bd. of Review of Newport, 594 A.2d 878, 880 (R.I. 1991) (citing DeStefano v. Zoning Bd. of Review 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 Bd. of Review of the Town of North Kingstown, 818 A.2d 685, 690 n.5 (R.I. 2003) (citing 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] appli[ies] de novo review." Rossi v. Emps.' Ret. Sys. 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)). This Court may remand the case for further proceedings if there is "a genuine defect in the proceedings in the first instance, which defect was not the fault of the parties seeking the remand." Roger Williams College v. Gallison, 572 A.2d 61, 63 (R.I. 1990) (citing Kraemer v. Zoning Bd. of Review of Warwick, 98 R.I. 328, 201 A.2d 643 (1964)). This Court may also remand to a zoning board if "there is no record of the proceedings

upon which a reviewing court may act." Id. (citing Holliston Sand Co. v. Zoning Bd. of Review of North Smithfield, 98 R.I. 93, 200 A.2d 9 (1964)).

III

Analysis

The Appellant primarily argues that the Zoning Board's denial of his application for relief was procedurally flawed, and therefore, the Zoning Board's decision must be reversed. Specifically, the Appellant argues that the Zoning Enabling Act, §§ 45-24-27 et seq., requires five members of the Zoning Board to vote on each application or appeal before the Zoning Board. The Appellant contends that in the absence of a vote by a valid alternate member of the Zoning Board, the abstention by Member Ridlon, in this case, rendered the decision of the Zoning Board a legal nullity. Moreover, the Appellant claims that because the Zoning Board has denied the Appellant a fair hearing by violating statutory and ordinance provisions to his detriment, this Court should reverse the decision of the Zoning Board and grant the Appellant's application on the merits. Finally, the Appellant contends that he should be entitled to recover reasonable attorneys' fees and litigation expenses pursuant to the Equal Access to Justice for Small Businesses and Individuals Act (the Equal Access to Justice Act or the Act).

In response, the Zoning Board argues that Member Ridlon was not statutorily prohibited from abstention because the Zoning Enabling Act envisions situations in which members of zoning boards of appeal fail to vote. In addition, the Zoning Board argues that Member Ridlon's abstention did not affect the statutory "quorum" requirement of a five-member participating board such that the Zoning Board's jurisdiction would be rendered deficient. The Zoning Board claims that the Appellant's arguments to the contrary are based on case law that has been superseded by the Zoning Enabling Act, which was passed into law in 1991. Moreover, the

Zoning Board contends that Member Ridlon's abstention did not automatically require one of the two alternate members of the Zoning Board, who were also present at the hearing of March 18, 2010, to vote in his place. The Zoning Board also argues that the Appellant is not entitled to a reversal of the Zoning Board's decision because, in abstaining, Member Ridlon effectively voted against approval of the Appellant's application on the grounds that the Appellant had failed to satisfy his evidentiary burden. Additionally, the Zoning Board argues that no error of law on the part of the Zoning Board can be alleged that would require the Zoning Board to approve the dimensional variance in this case because the Zoning Board does not have the authority to grant a dimensional variance in conjunction with the requested special use permit. Finally, the Zoning Board argues on various grounds that the Appellant is not qualified to recover litigation expenses pursuant to the Equal Access to Justice Act.

A

Abstention Issue

Among other requirements, the Zoning Enabling Act of 1991 mandated that all towns and municipalities in the State of Rhode Island create a zoning board of review. See § 45-24-56(a). The composition of a municipality's zoning board of review must likewise conform to the requirements of § 45-24-56(b), as follows:

> "The zoning board of review consists of five (5) members, each to hold office for the term of five (5) years . . . . The zoning board of review also includes two (2) alternates to be designated as the first and second alternate members, their terms to be set by the ordinance, but not to exceed five (5) years. These alternate members shall sit and may actively participate in hearings. The first alternate shall vote if a member of the board is unable to serve at a hearing and the second shall vote if two (2) members of the board are unable to serve at a hearing."

In addition, the powers and duties of a town or municipality's zoning board of review are set forth in § 45-24-57. That section mandates that:

> "A zoning ordinance adopted pursuant to this chapter shall provide that the zoning board of review shall:
> [. . .]
> (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." (Emphasis added.)

The Appellant argues that these statutes do not permit the Zoning Board to allow one of its members to abstain from voting unless it substitutes one of the Zoning Board's statutorily required alternate members for the abstaining member. Moreover, the Appellant argues that five voting members on a zoning board of review has long been a prerequisite to a zoning board's jurisdiction, citing cases that predate the Zoning Enabling Act of 1991. Specifically, the Appellant points to Kent v. Zoning Bd. of Review of the City of Cranston, 102 R.I. 258, 262-264, 229 A.2d 769, 771-772 (1967), which held that the abstention by a member of a zoning board of review in that case rendered the board's decision "illegal" or "jurisdictionally fatal." In Kent, the Supreme Court quashed the zoning board's decision and remanded the matter for a new hearing in spite of the fact that four votes had been cast in favor of granting the relief sought. Id. (finding that "merely remanding the cause to the respondent board for the recording of the chairman's vote would constitute an idle gesture").

At least under the pre-1991 case law, zoning boards of review within the State of Rhode Island were required to cast five votes in order to render a valid decision, and abstentions by zoning board members did not qualify as "votes." However, the Zoning Board here argues that the Zoning Enabling Act of 1991 effected a change in the law that permits an abstention by a member of a zoning board of review even in the absence of that member's replacement for voting purposes by one of the zoning board's required alternate members. The Zoning Board's primary statutory authority for this proposition is § 45-24-61(a), which states in relevant part:

> "Following a public hearing, the zoning board of review shall render a decision within a reasonable period of time. The zoning board of review shall include in its decision all findings of fact and conditions, showing the vote of each participating member, and the absence of a member or his or her failure to vote. [. . .] The zoning board of review shall keep written minutes of its proceedings, showing the vote of each member upon each question, or, if absent or failing to vote, indicating that fact[.]" (Emphasis added.)

The Zoning Enabling Act, the Zoning Board further argues, in contemplating the possibility that a member of a zoning board may "fail to vote," permits abstentions and does not require alternate zoning board members to vote in place of absent members unless the absent member is "unable to serve at a hearing." See § 45-24-56 (stating that "[t]he first alternate shall vote if a member of the board is unable to serve at a hearing" (emphasis added)). The Zoning Board thus contends that abstention is not equivalent to inability to serve at a hearing and that a vote by an alternate member in place of the abstaining member is not required by § 45-24-56. With respect to pre-1991 case law, the Zoning Board argues that the distinguishing characteristic of cases predating the Zoning Enabling Act of 1991 is the rule that "the board must consist of five participating members — no more and no less." Because § 45-24-56 expressly allows alternate members to participate at zoning board hearings alongside a zoning board's ordinary members,

the Zoning Board argues that the presence of a validly constituted board at a zoning board hearing is sufficient to confer jurisdiction on the Zoning Board, even when five votes have not been recorded. To that extent, the Zoning Board argues that the pre-1991 case law prohibiting fewer than five votes is inapplicable under the current statutory scheme. The Zoning Board's argument is, in part, premised on the contention that "[t]he pre-1991 Zoning Enabling Act did not account for the participation of alternates during a hearing." Id. at 9.

This Court begins by examining the relevant language of the current statute. "[W]hen the language of a statute is clear and unambiguous, [the] Court must interpret the statute literally and must give the words of the statute their plain and ordinary meanings." Iselin v. Ret. Bd. of the Emps.' Ret. Sys. of Rhode Island, 943 A.2d 1045, 1049 (R.I. 2008) (citing Accent Store Design, Inc. v. Marathon House, Inc., 674 A.2d 1223, 1226 (R.I. 1996)). The Court finds that the language of the current statute is clear and unambiguous. Section 45-24-57(2) unambiguously states that "the zoning board of review shall . . . [b]e required to vote as follows," and then goes on to clarify required recusal procedures as well as the number of votes necessary for reversing determinations by zoning administrative officers and the number of votes necessary for deciding in favor of an applicant on any matter within a zoning board's discretion. (Emphasis added.) Nothing in § 45-24-57 inherently contradicts § 45-24-57(2)'s straightforward mandate that a zoning board of review is "required to vote." Moreover, § 45-24-56 is unambiguous in requiring alternate members of a zoning board to vote whenever a non-alternate member is "unable to serve at a hearing." See § 45-24-56(b) (stating that "the first alternate shall vote if a member of the board is unable to serve at a hearing and the second shall vote if two (2) members of the board are unable to serve at a hearing (emphasis added)). It would serve cross-purposes to maintain that a non-alternate member may "serve at a hearing" by abstaining from voting, when

it is clear that an alternate zoning board member is required to vote in the non-alternate's absence. "A statute may not . . . be construed in a way that would result in 'absurdities or would defeat the underlying purpose of the enactment.'" Matter of Falstaff Brewing Corp. re: Narragansett Brewery Fire, 637 A.2d 1047, 1050 (R.I. 1994) (citing Brennan v. Kirby, 529 A.2d 633, 637 (R.I. 1987)). Allowing ordinary zoning board members to abstain from voting without regard for the number of overall votes underlying a valid zoning board decision would likewise be inconsistent with the statutory requirement that alternate zoning board members must vote in an ordinary zoning board member's absence. Moreover, the fact that the statute provides for the possibility that a zoning board member might "fail to vote" does not necessarily imply that a zoning board member may abstain from voting without being replaced by an alternate zoning board member. Given that the Zoning Enabling Act of 1991 requires the presence of alternate zoning board members, allows their participation, and explicitly requires them to vote on zoning board matters in the absence or "failure to serve" of ordinary zoning board members, the fact that § 45-24-61(a) envisions ordinary zoning board members "failing to vote" does not imply that unmitigated abstentions by ordinary zoning board members are permitted.

In addition, there is no reason to believe that the Zoning Enabling Act of 1991 effected a change in the law such that abstention by a zoning board member would not require a substitute vote by an alternate zoning board member. Our Supreme Court has held that the Zoning Enabling Act of 1991 supersedes prior case law only to the extent that the prior case law is inconsistent with the new statute. See Newton v. Zoning Bd. of Review of the City of Warwick, 713 A.2d 239, 241 (R.I. 1998) ("There is no question that the amended Zoning Enabling Act would supersede case law in so far as such case law would be inconsistent with the amended statute. . . . However, our [1987] opinion . . . is not superseded by the amended statute."). This

is in keeping with general principles of statutory construction governing construction of amendatory acts. 1A Norman J. Singer, Sutherland Statutory Construction § 22:30 at 363-64 (2009) ("Courts adopt a conservative attitude and presume that amendatory acts do not change existing law further than is expressly declared or necessarily implied."). It is also consistent with the principle that legislation "'in derogation of the common law' is subject to strict construction." Providence Journal Co. v. Rodgers, 711 A.2d 1131, 1134 (R.I. 1998) (quoting Kelly v. Marcantonio, 678 A.2d 873, 876 (R.I. 1996)); see also Pastore v. Samson, 900 A.2d 1067, 1078 (R.I. 2006).

The Zoning Board's finding that the Zoning Enabling Act of 1991 declares or implies that five votes are no longer necessary to confer jurisdictional validity on the decision of a zoning board of review is effectively error of law and in violation of statutory and ordinance provisions. The five-vote requirement was established clearly in Kent when our Supreme Court reviewed the statutes then in effect, as well as past case law, and determined that an amendment that provided for the naming of an "auxiliary" zoning board member "resulted in eliminating . . . the implied right of a member to abstain from voting." Kent, 102 R.I. at 264, 229 A.2d at 772 (citing P.L. 1949, ch. 2293, which provided for the creation of "an auxiliary or sixth member . . . who shall sit as an active member when and if a member of said board is unable to serve at any hearing"). Contrary to the Zoning Board's assertion that "[t]he pre-1991 Zoning Enabling Act did not account for the participation of alternates during a hearing," the holding in Kent relies on the fact that "auxiliary" members were contemplated by the pre-1991 act. See id.; P.L. 1949, ch. 2293. As such, the presence of "auxiliary" members in the statutory scheme reinforced the position that the unmitigated abstention of a zoning board member should result in an invalid zoning board decision. Id. As with the Zoning Enabling Act of 1991, the pre-1991 statute

contemplated the possibility that ordinary members of a town's zoning board might "fail[] to vote." Kent, 102 R.I. at 264, 229 A.2d at 772 (quoting the now repealed § 45-24-15).[10] Because a pre-1991 zoning board was not thereby permitted abstentions without replacement votes, the Zoning Board's strong reliance on § 45-24-61(a) is greatly undermined.

For the foregoing reasons, the Court 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. See Kent, 102 R.I. at 264, 229 A.2d at 772 (finding that the zoning board's decision was "illegal and should be quashed"). The Zoning Board's decision is quashed and the matter is remanded to record the vote of Member Ridlon or any alternate member of the Zoning Board who could have voted in his place on April 8, 2010, should Member Ridlon continue to abstain. See § 45-24-56(b). Upon remand, the Zoning Board must resolve this matter post-haste. Should it be impossible for the Zoning Board to record the five votes necessary for a valid decision because Member Ridlon or the alternates no longer sit on the Zoning Board, see id., then there must be a hearing de novo, also to be conducted as quickly as possible. See Kent, 102 R.I. at 264, 229 A.2d at 772. With respect to the Zoning Board's argument that this Court may not properly require the Zoning Board to approve the dimensional variance at issue in this case because of an alleged error of law — as the ordinance might not permit the granting of a variance in conjunction with a special use — this remand includes no such requirement.

[10] Section 45-24-15 under the pre-1991 zoning act is remarkably similar to the current § 45-24-61(a). It stated that "[t]he board shall keep minutes of its proceedings, showing the vote of each member upon each question or, if absent or failing to vote, indicating such fact, and shall keep records of its examinations and other official actions." Kent, 102 R.I. at 264, 229 A.2d at 772.

B

Equal Access to Justice Act

The Appellant requests that this Court award reasonable attorneys' fees and litigation expenses pursuant to the Equal Access to Justice Act, §§ 42-92-1, et seq., asserting that the Zoning Board's action was not substantially justified. In response, the Zoning Board asserts that the Appellant is not entitled to recovery of fees and expenses because the Zoning Board's decision, although "procedurally flawed," was not arbitrary, capricious, and clearly erroneous. Moreover, the Zoning Board contends that the Appellant has failed to show that he qualifies as a "party" under the Equal Access to Justice Act because the record is devoid of any indication that his net worth is less than $500,000, as required by § 42-92-2(5).

The Rhode Island Legislature enacted the Equal Access to Justice Act "to mitigate the burden placed upon individuals and small businesses by the arbitrary and capricious decisions of administrative agencies made during adjudicatory proceedings." Taft v. Pare, 536 A.2d 888, 892 (R.I. 1988) (citing §§ 42-92-1 et seq. (1985, as amended 1994)).

The Act's stated purpose is to "encourage individuals and small businesses to contest unjust actions by the state and/or municipal agencies." Sec. 42-92-1(b). Under the Act, an award of reasonable litigation expenses will be made to the prevailing party if the Court finds that the agency's action was not substantially justified. See § 42-92-3; Taft, 536 A.2d at 892. The term "agency" under the Equal Access to Justice Act includes "any state and/or municipal board, commission, council, department, or officer, other than the legislature or courts" that is authorized by law "to make rules or to determine contested cases, to bring any action at law or in equity . . . or to initiate criminal proceedings." Sec. 42-92-2(3). Additionally, to be considered a "party" eligible to collect reasonable litigation expenses under the Act, an individual must

demonstrate that his or her "net worth [was] less than five hundred thousand dollars ($500,000) at the time the adversary adjudication was initiated." Id. § 42-92-2(5).

Our Supreme Court has not yet determined that the Equal Access to Justice Act applies to the actions of zoning boards. See Campbell v. Tiverton Zoning Bd., 15 A.3d 1015, 1025 (R.I. 2011) (assuming only "arguendo" that a building official may be deemed an "agency" under the act and affirming denial of litigation expenses on other grounds). Lower court decisions on the issue of whether the Act applies to the actions of zoning boards are mixed.[11]

Nevertheless, in the present case, it is unnecessary for this Court to determine whether or not the Act applies to the Zoning Board's action at this juncture. If applicable, § 42-92-3 of the Act states that an "adjudicative officer" of the Zoning Board may only award reasonable litigation expenses to a "prevailing party." See § 42-92-3(a). As the Zoning Board has not yet produced a valid decision on the merits of the Appellant's application for relief, any award of fees or expenses is not appropriate at this time.

IV

Conclusion

For the foregoing reasons, the Court determines that the Zoning Board's decision in this case was made upon unlawful procedure, affected by error of law, and in violation of statutory or ordinance provisions. In permitting Member Ridlon to abstain from voting without requiring an eligible alternate member to vote in his place, the Zoning Board clearly erred. As the defect in the proceedings was not the fault of the Appellant, the Zoning Board's decision is quashed and

[11] Compare J. Class Management, Inc. v. McSweeny, No. NC-2008-0521, 2010 WL 1536238 (R.I. Super. Ct. Apr. 9, 2010) (Clifton, J.) (finding the Act inapplicable to zoning boards) with Ray Reedy, Inc., et al. v. Town of North Kingstown, No. WC-2007-0664, 2009 WL 3328519 (R.I. Super. Ct. June 8, 2009) (Thompson, J.) (awarding attorneys' fees on account of zoning board's denial of application).

the matter is remanded to record the fifth vote or hold a new hearing, consistent with this Decision. The Court need not rule on the Appellant's recovery of reasonable litigation expenses pursuant to the Equal Access to Justice Act at this time. Counsel shall submit the appropriate order for entry.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**Ernest E. Ryden, Jr., v. Thomas Kraig, et al.**
CASE NO:	**PC-2010-2522**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**July 9, 2013**
JUSTICE/MAGISTRATE:	**Stern, J.**
ATTORNEYS:	
For Plaintiff:	**Anthony DeSisto, Esq.**
For Defendant:	**Nancy E. Letendre, Esq.**