

**COMMONWEALTH OF MASSACHUSETTS  
SUPREME JUDICIAL COURT**

FAR NO. \_\_\_\_\_

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**PALMER RENEWABLE ENERGY, LLC**  
*Plaintiff–Appellant*

v.

**CITY COUNCIL OF THE CITY OF SPRINGFIELD AND  
ZONING BOARD OF APPEALS OF THE CITY OF SPRINGFIELD, et al.,**  
*Defendants–Appellees.*

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APPEALS COURT NO. 24-P-136.  
LAND COURT NO. 21 PS 000331(GHP)

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**APPLICATION FOR FURTHER APPELLATE REVIEW**  
**OF DEFENDANTS–APPELLEES**

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City Council Members,  
By their attorneys,

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Dated: May 27, 2025

**TABLE OF CONTENTS**

	<b><u>Page(s)</u></b>
<b>TABLE OF CONTENTS</b> .....	2
<b>I. REQUEST FOR LEAVE TO OBTAIN FURTHER APPELLATE REVIEW</b> .....	6
<b>II. STATEMENT OF PRIOR PROCEEDINGS</b> .....	7
<b>III. STATEMENT OF RELEVANT FACTS</b> .....	9
<b>IV. STATEMENT OF POINTS WITH RESPECT TO WHICH FURTHER APPELLATE REVIEW IS SOUGHT</b> .....	9
<b>V. STATEMENT OF WHY FURTHER APPELLATE REVIEW IS APPROPRIATE</b> .....	10
1. While There is No Bright-Line Rule for When a Statute is Considered Ambiguous, When There are Two Opposite Interpretations of a Statute, and Each Interpretation is Supported by Multiple Courts, This Indicates an Ambiguous Statute. ....	10
2. The Appeals Court’s Interpretation of the Permit Extension Act Leads to an Absurd Result, which if Left As-Is, Harms the Springfield Community and Could Lead to Future Absurdly Extended Permits. ....	11
A. The Permit Extension Act is Ambiguous and the ZBA Correctly Determined that the Statutory Extension Ran Concurrently with Any Litigation Tolling. ....	11
B. The Result of the Appeals Court Interpretation of the Permit Extension Act—Creating A “Franken-Permit”—Is Absurd.....	13
C. The Legal Question of Whether Equitable and Statutory Tolling Run Consecutively or Concurrently Will Continue to be an Issue of Importance in the Commonwealth, Necessitating Clear Guidance by the Supreme Judicial Court.....	14
3. The Permit Extension Act Does Not Override G. L. c. 40A.....	15
<b>VI. CONCLUSION</b> .....	16
<b>CERTIFICATE OF COMPLIANCE</b> .....	18
<b>CERTIFICATE OF SERVICE</b> .....	19
<b>APPENDIX</b> .....	20

**TABLE OF AUTHORITIES**

<b><u>Cases</u></b>	<b><u>Page(s)</u></b>
<u>Commonwealth v. Johnson</u> , 482 Mass. 830, 835 (2019) .....	13
<u>Commonwealth v. Peterson</u> , 476 Mass. 163, 167 (2017) .....	14
<u>Fernandes v. Attleboro Hous. Auth.</u> , 470 Mass. 117, 129 (2014) .....	13
<u>Halebian v. Bery</u> , 457 Mass. 620, 628-629 (2010).....	12
<u>Hanlon v. Rollins</u> , 286 Mass. 444, 447 (1934) .....	12
<u>Industrial Fin. Corp. v. State Tax Comm’n</u> , 367 Mass. 360, 364 (1975) .....	10, 12
<u>Meyer v. Town of Nantucket</u> , 78 Mass. App. Ct. 385, 390 (2010) .....	10
<u>Milton Legion Post No. 114 v. Alves</u> , 19 LCR 311, 311, Case No. 10 MISC 427658 (2011) .....	10
<u>Palmer Renewable Energy v. Department of Environmental Protection</u> , Case No. 2284-cv-02926 2017, Docket Entry No. 20 (Mass. Sup. Ct. Jan. 28, 2025) .....	10
<u>Palmer Renewable Energy, LLC v. City Council of the City of Springfield, et al.</u> , 105 Mass. App. Ct. 518, 519 (2025) .....	6, 8
<u>Palmer Renewable Energy, LLC v. City Council of the City of Springfield, et al.</u> , 88 Mass. App. Ct. 1104 (2015) .....	7
<u>Palmer Renewable Energy, LLC v. City Council of the City of Springfield, et al.</u> , No. 21 PS 000331(GHP), 2023 WL 8271944 (Mass. Land Ct. Nov. 30, 2023) .....	8, 14

<u>Papalia v. Inspector of Bldgs. of Watertown,</u> 351 Mass. 176, 179 (1966) .....	15
<u>Rochester Bituminous Prod., Inc. v. Conservation Comm’n of Rochester,</u> 98 Mass. App. Ct. 1118 (2020) .....	10
<u>Sullivan v. Town of Brookline,</u> 435 Mass. 353, 361 (2001) .....	13
<u>Town of Wellesley Dept. of Pub. Works, Water Div. v. Mass. Dept. of Env’tl Prot.,</u> <u>Mass. Super., Nos. 140055, CV2017-1944 (May 17, 2018).....</u>	13
 <b><u>Statutes</u></b>	
G. L. c. 40A § 6.....	9, 15
G. L. c. 40A § 9.....	13
Mass. R. A. P. 27.1(b).....	6, 9
St. 2010 c. 240, § 173, as amended by St. 2012, c. 238, §§ 74, 75 .....	12, 13
St. 2024, c. 238 § 280.....	14
St. 2020, § 17(b)(iii).....	14
 <b><u>Other Authorities</u></b>	
<u>2018 Asthma Capitals Report Identifies Nation’s “Asthma Belts”, ASTHMA AND</u> <u>ALLERGY FOUND. OF AM. (May 1, 2018, 9:54AM),</u> <u><a href="https://community.aafa.org/blog/2018-asthma-capitals-report-identifies-nation-s-asthma-belts">https://community.aafa.org/blog/2018-asthma-capitals-report-identifies-</a></u> <u><a href="https://community.aafa.org/blog/2018-asthma-capitals-report-identifies-nation-s-asthma-belts">nation-s-asthma-belts</a>.....</u>	7
<u>Asthma Capitals 2019, ASTHMA AND ALLERGY FOUND. OF AM. (2019),</u> <u><a href="https://www.aafa.org/wp-content/uploads/2022/10/aafa-2019-asthma-capitals-report.pdf">https://www.aafa.org/wp-content/uploads/2022/10/aafa-2019-asthma-</a></u> <u><a href="https://www.aafa.org/wp-content/uploads/2022/10/aafa-2019-asthma-capitals-report.pdf">capitals-report.pdf</a>.....</u>	7
<u>Environmental Justice Populations in Massachusetts, EXEC. OFF. OF ENERGY AND</u> <u>ENV’T AFFAIRS (EEA), <a href="https://mass-eoeea.maps.arcgis.com/apps/MapSeries/index.html?appid=535e4419dc0545be980545a0eeaf9b53">https://mass-</a></u> <u><a href="https://mass-eoeea.maps.arcgis.com/apps/MapSeries/index.html?appid=535e4419dc0545be980545a0eeaf9b53">eoeea.maps.arcgis.com/apps/MapSeries/index.html?appid=535e4419dc0545</a></u> <u><a href="https://mass-eoeea.maps.arcgis.com/apps/MapSeries/index.html?appid=535e4419dc0545be980545a0eeaf9b53">be980545a0eeaf9b53</a> .....</u>	7

Environmental Justice Populations in Massachusetts, MASS.GOV,  
<https://www.mass.gov/info-details/environmental-justice-populations-in-massachusetts>.....7

Springfield Zoning Ordinance, Article 4, Table 4.2, Table 4.4 line 13.2.....16

## **I. REQUEST FOR LEAVE TO OBTAIN FURTHER APPELLATE REVIEW**

Pursuant to Rule 27.1 of the Massachusetts Rules of Appellate Procedure, Defendants-Appellees Springfield City Council's ("City Council") and Springfield Zoning Board of Appeals ("ZBA"), and their individual members respectively, respectfully request this Court grant further appellate review of the Appeals Court decision, Palmer Renewable Energy, LLC v. City Council of the City of Springfield, et al., 105 Mass. App. Ct. 518, 519 (2025), dated May 7, 2025.

This Court should grant this Application for Further Appellate Review to correct three errors of law that will substantially affect the public interest and interests of justice if left uncorrected. First, the Appeals Court erred by finding a statute unambiguous where multiple courts had adopted different interpretations of the statute, making it difficult to infer any type of guidance on statutory interpretation from such a decision. Second, the Appeals Court erred by concluding that the statutory extension at issue ran consecutively with litigation tolling, creating an absurd result (validating permits that were issued almost 14 years ago) not just in the instant case, but in potential cases going forward. Third, by holding that the Permit Extension Act overrode the "permit freeze provision" of the relevant zoning laws, the Appeals Court compromised the ability of municipalities to dictate the zoning requirements within their authority.

## II. STATEMENT OF PRIOR PROCEEDINGS

For over a decade, Plaintiff-Appellant Palmer Renewable Energy, LLC (“PRE”) has been attempting to build a polluting, community-opposed biomass fired energy plant (“Facility”) in the city of Springfield, Massachusetts, an environmental justice community<sup>1</sup> that suffers from disproportionately high asthma rates.<sup>2</sup>

On November 15, 2011, the Springfield building commissioner issued PRE two building permits (“Permits”) for construction of the Facility. Litigation surrounding the Permits (and other related permits) occurred over the years, terminating in 2015, Palmer Renewable Energy, LLC v. City Council of the City of Springfield, et al., 88 Mass. App. Ct. 1104 (2015), further appellate review denied, 473 Mass. 1105 (2015).

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<sup>1</sup> Environmental Justice Populations in Massachusetts, MASS.GOV, <https://www.mass.gov/info-details/environmental-justice-populations-in-massachusetts>; Environmental Justice Populations in Massachusetts, EXEC. OFF. OF ENERGY AND ENV’T AFFAIRS (EEA), <https://mass-eoeea.maps.arcgis.com/apps/MapSeries/index.html?appid=535e4419dc0545be980545a0eeaf9b53>.

<sup>2</sup> The Asthma and Allergy Foundation of America has consistently ranked the City of Springfield high in the rankings for “asthma capitals” in the country, and Springfield was ranked as the number one asthma capital in the United States in both 2018 and 2019. 2018 Asthma Capitals Report Identifies Nation’s “Asthma Belts”, ASTHMA AND ALLERGY FOUND. OF AM. (May 1, 2018, 9:54AM), <https://community.aafa.org/blog/2018-asthma-capitals-report-identifies-nation-s-asthma-belts>; Asthma Capitals 2019, ASTHMA AND ALLERGY FOUND. OF AM. (2019), <https://www.aafa.org/wp-content/uploads/2022/10/aafa-2019-asthma-capitals-report.pdf>.

On October 14, 2020, twelve members of the Springfield City Council requested that the building commissioner declare the Permits expired. On February 23, 2021, the building commissioner denied the city council's request.

On March 25, 2021, the city council filed an appeal of the building commissioner's denial of their request with the ZBA. On April 28, 2021, and May 5, 2021, the ZBA held public hearings and determined that the Permits were invalid. On May 28, 2021, the ZBA filed its written decision ("2021 ZBA Decision") with the city clerk.

On June 17, 2021, PRE appealed the 2021 ZBA Decision to the Massachusetts Land Court.

On November 30, 2023, the Land Court ruled in favor of the city council and ZBA, concluding that PRE's Permits had expired and that the ZBA's decision should be upheld. Palmer Renewable Energy, LLC v. City Council of the City of Springfield, et al., No. 21 PS 000331(GHP), 2023 WL 8271944 at 7 (Mass. Land Ct. Nov. 30, 2023).

PRE appealed the decision to the Massachusetts Appeals Court, who on May 7, 2025, reversed the Land Court's decision and remanded the case for entry of new judgment, concluding that PRE's Permits are still valid. Palmer Renewable Energy, LLC v. City Council of the City of Springfield, 105 Mass. App. Ct. 518, 520 (2025).

### **III. STATEMENT OF RELEVANT FACTS**

Per Rule 27.1(b) of the Massachusetts Rules of Appellate Procedure, we acknowledge that the Appeals Court correctly stated the relevant facts in their decision, and we need not restate those facts in this Application for Further Appellate Review.

### **IV. STATEMENT OF POINTS WITH RESPECT TO WHICH FURTHER APPELLATE REVIEW IS SOUGHT**

Further appellate review is sought with respect to three points: (1) whether a statute can be considered unambiguous when multiple courts have reached different conclusions on its application; (2) as a case of first impression before the Supreme Judicial Court, whether the tolling provided by the Permit Extension Act runs consecutively with equitable tolling from litigation so as to turn 180-day building permits into decade-plus “franken-permits,” creating an absurd result; and (3) as a case of first impression, whether the Permit Extension Act and G. L. c. 40A § 6 (the “permit freeze provision”) are so incompatible that the Permit Extension Act overrides the latter, restricting the rights of local municipalities.

## V. STATEMENT OF WHY FURTHER APPELLATE REVIEW IS APPROPRIATE

1. While There is No Bright-Line Rule for When a Statute is Considered Ambiguous, When There are Two Opposite Interpretations of a Statute, and Each Interpretation is Supported by Multiple Courts, This Indicates an Ambiguous Statute.

While courts first look to a statute’s plain language to determine its meaning, if there is reasonable disagreement about what that language means, the statute will be considered “ambiguous,” thus allowing the court to consider additional information. Industrial Fin. Corp. v. State Tax Comm’n, 367 Mass. 360, 364 (1975). “When a statute is capable of being understood by reasonably well-informed persons in two or more different senses, it is ambiguous.” Meyer v. Town of Nantucket, 78 Mass. App. Ct. 385, 390 (2010). Here, the Appeals Court overlooked the cases supporting the Land Court’s decision, declaring the Permit Extension Act unambiguous. However, given the difference between the conclusion of the ZBA and the Land Court, supported by two additional courts, see Rochester Bituminous Prod., Inc. v. Conservation Comm’n of Rochester, 98 Mass. App. Ct. 1118 (2020) and Milton Legion Post No. 114 v. Alves, 19 LCR 311, 311, Case No. 10 MISC 427658 (2011), and the conclusion of the Appeals Court here, supported by one superior court decision, Palmer Renewable Energy v. Department of Environmental Protection, Case No. 2284-cv-02926 2017, Docket Entry No. 20 (Mass. Sup. Ct. Jan. 28, 2025), one thing becomes clear: there is reasonable disagreement about the meaning of the statutory language presented here, and therefore because this affects

the public interest, the Supreme Judicial Court should review this case to correct a substantial error of law and reaffirm the long-held standard of determining whether a statute is ambiguous.

2. The Appeals Court’s Interpretation of the Permit Extension Act Leads to an Absurd Result, which if Left As-Is, Harms the Springfield Community and Could Lead to Future Absurdly Extended Permits.

The Appeals Court decision is incorrect and leads to an absurd result—180-day building permits issued in 2011 being extended more than twenty-four times their original lifespan—which in this case seriously threatens the health and safety of an environmental justice community and goes against the interest of justice. The central legal question here concerns the interaction between a statutory permit extension and the equitable tolling of a permit due to litigation, and whether these two types of tolling run consecutively or concurrently. The language of the relevant statute is ambiguous as to how it should interact with litigation tolling, and therefore the ZBA and Land Court’s determination that the tolling periods ran concurrently and the Permits expired is correct and should be upheld.

A. The Permit Extension Act is Ambiguous and the ZBA Correctly Determined that the Statutory Extension Ran Concurrently with Any Litigation Tolling.

The Permit Extension Act was created by § 173 of Chapter 240 of the Acts of 2010 (“An Act Relative to Economic Development Reorganization”) and subsequently extended by §§ 74 and 75 of Chapter 238 of the Acts of 2012. The operative clause of the Permit Extension Act states: “Notwithstanding any general

or special law to the contrary, an approval in effect or existence during the tolling period shall be extended for a period of 4 years, **in addition to the lawful term of the approval.**” St. 2010 c. 240, § 173, as amended by St. 2012, c. 238, §§ 74, 75 (emphasis added). There is no dispute that the Permits were in effect during this time period; the issue turns on the interpretation of the phrase “in addition to the lawful term of the approval.” As noted above, this language is ambiguous and readily susceptible to two different interpretations, thus allowing the court to look to additional sources to determine the legislature’s intent when creating the statute. Halebian v. Berv, 457 Mass. 620, 628-629 (2010).

The ZBA, affirmed by the Land Court, correctly concluded that the Permit Extension Act runs concurrently with the equitable tolling to which PRE was entitled due to the litigation that followed immediately after the issuance of the Permits. Palmer Renewable Energy, LLC v. City Council of the City of Springfield, No. 21 PS 000331(GHP), 2023 WL 8271944, at 7 (Mass. Land Ct. Nov. 30, 2023). The Permit Extension Act is silent on the question of how it operates in relation to other types of tolling; it is therefore up to the court to look to “the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished” by the statute. Industrial Fin. Corp. v. State Tax Comm’n., 367 Mass. 360, 364 (1975) (quoting Hanlon v. Rollins, 286 Mass. 444, 447 (1934)). The Permit Extension Act was passed to provide relief to businesses in Massachusetts during a

period of economic downturn, and provided a four-year extension to permits in effect during a specified period of time. Town of Wellesley Dept. of Pub. Works, Water Div. v. Mass. Dept. of Env't'l Prot., Mass. Super., Nos. 140055, CV2017-1944, at 3 (May 17, 2018).

When considering the meaning of the statute, the court should look to the statute as a whole and can compare the statutory language to the language in other statutes, to inform their understanding of legislative intent, particularly concerning the omission of statutory language. See, i.e., Sullivan v. Town of Brookline, 435 Mass. 353, 361 (2001). Courts may engage in such statutory comparisons and conclude therefrom that “[t]he omission of particular language from a statute is deemed deliberate where the Legislature included the omitted language in related or similar statutes.” Commonwealth v. Johnson, 482 Mass. 830, 835 (2019) (quoting Fernandes v. Attleboro Hous. Auth., 470 Mass. 117, 129 (2014)). Here, looking at the preamble of the omnibus bill that included the Permit Extension Act, St. 2010 c. 240, and comparing the language to that in G. L. c. 40A § 9, it is clear that the ZBA and Land Court had the proper interpretation, and the Appeals Court erred in its analysis.

B. The Result of the Appeals Court Interpretation of the Permit Extension Act—Creating A “Franken-Permit”—Is Absurd.

The absurdity doctrine counsels courts “not [to] adhere blindly to a literal reading of a statute if doing so would yield an absurd or illogical result.”

Commonwealth v. Peterson, 476 Mass. 163, 167 (2017). Yet, that is exactly the outcome of the Appeals Court decision: two 180-day permits developing into almost 14-year-old permits. As the Land Court concluded, this was not the intent of the legislature; the Permit Extension Act “was meant to operate as a solution to a discreet and time-bound problem: The Great Recession. It was not intended to be cobbled together with other legal theories to create a franken-permit that would stubbornly persist for more than a decade after passage of the Act.” Palmer Renewable Energy, LLC v. City Council of the City of Springfield, et al., No. 21 PS 000331(GHP), 2023 WL 8271944, at 5 (Mass. Land Ct. Nov. 30, 2023). The Supreme Judicial Court should grant further appellate review of this case to correct this absurd result in the interest of justice, and to prevent further instances of such absurd results occurring in the future, to the detriment of public interest.

C. The Legal Question of Whether Equitable and Statutory Tolling Run Consecutively or Concurrently Will Continue to be an Issue of Importance in the Commonwealth, Necessitating Clear Guidance by the Supreme Judicial Court.

Massachusetts has passed three different types of permit extension laws in recent history: (1) the Permit Extension Act in 2010; (2) an amendment to the Permit Extension Act in 2012; and (3) more recently, a Permit Extension Act in 2024. St. 2010 c. 240, § 173, as amended by St. 2012, c. 238, §§ 74, 75; St. 2024, c. 238 § 280. And in 2020, Massachusetts passed a COVID-19 Emergency Act, which included provisions that tolled permits due to the COVID-19 pandemic. St. 2020, §

17(b)(iii). Looking at this pattern, it is possible that statutory permit extensions are becoming more common in Massachusetts. Thus, this issue of equitable and statutory tolling and how they interact with each other may have greater implications going forward and could impact the permitting of other facilities, especially polluting facilities in environmental justice communities in the Commonwealth, as it is in this case.

3. The Permit Extension Act Does Not Override G. L. c. 40A § 6; the Purpose of § 6—to Allow for Changes in Local Zoning Regulations—Can Be Implemented Simultaneously with the Permit Extension Act.

The Appeals Court’s reading of the Permit Extension Act and G. L. c. 40A § 6, known as the “permit freeze provision,” is incorrect and treads on the ability of municipalities to create and enforce their own ordinances. G. L. c. 40A § 6 requires construction under a building permit to conform to any subsequent amendment of the relevant ordinance or by-law unless construction is commenced “not more than 12 months after the issuance of the permit and in cases involving construction, unless such construction is continued through to completion as continuously and expeditiously as is reasonable.” G. L. c. 40A, § 6. “The apparent purpose of the statute is to prevent the existence of a permanent license to construct a building for a non-conforming use.” Papalia v. Inspector of Bldgs. of Watertown, 351 Mass. 176, 179 (1966). However, by choosing to read the Permit Extension Act and G. L. c. 40A § 6 as contradictory, the outcome of the Appeals Court decision is essentially

to grant PRE a permanent license for what would now be a non-conforming use,<sup>3</sup> and to establish precedent that prioritizes developers over municipalities, going against the public interest.

## **VI. CONCLUSION**

This case has clear implications on public interest and the interests of justice and therefore warrants further appellate review. It defies logic that a 180-day permit from 2011 can still be in effect a decade or more later. The decision of this case allows business interests to override municipal and community input. And here, at the expense of the residents of the city of Springfield, an environmental justice community, who could be forced to live with the dire health and environmental consequences. The Supreme Judicial Court should grant further appellate review to correct the above-described errors of law and to support the public interest and interests of justice.

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<sup>3</sup> The Springfield Zoning Ordinance was amended effective August 26, 2013. Under the amended ordinance, an industrial facility such as the one proposed by PRE is required to undergo City Council Special Permit Review. Springfield Zoning Ordinance, Article 4, Table 4.2, Table 4.4 line 13.2. PRE did not move forward diligently or expeditiously and must now comply with the current Springfield Zoning Ordinance.

Respectfully Submitted,

Dated: May 27, 2025

Springfield City Council and  
City Council Members,  
By their attorneys,

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**CERTIFICATE OF COMPLIANCE  
PURSUANT TO MASS. R. A. P. 16(k)**

I, Alexandra Enríquez St. Pierre, hereby certify that pursuant to Mass. R. A. P. 16(k), this Application for Further Appellate Review complies with the rules of court that pertain to the filing of applications for further appellate review, including, but not limited to:

Mass. R. A. P. 20(a); and  
Mass. R. A. P. 27.1(b).

I further certify that this Application for Further Appellate Review complies with the applicable length limitation in Mass. R. A. P. 20(a) and Mass. R. A. P. 27.1(b) because it is produced in a proportionally spaced font, Times New Roman, at size 14 point font, and the brief statement consists of not more than 2,000 words.

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## CERTIFICATE OF SERVICE

I, Alexandra Enríquez St. Pierre, hereby certify that a true copy of this Application for Further Appellate Review was served upon the following persons through the Court's electronic filing system, or otherwise by email, on May 27, 2025:

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Dated: May 27, 2025

**APPENDIX**

	<b><u>Page</u></b>
<u>Palmer Renewable Energy, LLC v. City Council of the City of Springfield, et al.,</u> Mass. App. Ct., 24-P-136, order (May 7, 2025) .....	21
<u>Palmer Renewable Energy, LLC v. City Council of City of Springfield et al.,</u> Mass. App. Ct., 24-P-136, slip op. (May 7, 2025) .....	22

# Commonwealth of Massachusetts

Appeals Court for the Commonwealth

At Boston

In the case no. 24-P-136

PALMER RENEWABLE ENERGY, LLC

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vs.

ZONING BOARD OF APPEALS OF SPRINGFIELD & another.

---

Pending in the Land Court

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Ordered, that the following entry be made on the docket:

The judgment affirming the board's revocation of the building permits is reversed. The case is remanded for entry of a new judgment instructing the board to reinstate the building permits and further orders, if necessary, consistent with this opinion.

By the Court,

 , Clerk

Date May 7, 2025.

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NOTICE: All slip opinions and orders are subject to formal revision and are superseded by the advance sheets and bound volumes of the Official Reports. If you find a typographical error or other formal error, please notify the Reporter of Decisions, Supreme Judicial Court, John Adams Courthouse, 1 Pemberton Square, Suite 2500, Boston, MA, 02108-1750; (617) 557-1030; SJCRreporter@sjc.state.ma.us

24-P-136

Appeals Court

PALMER RENEWABLE ENERGY, LLC vs. ZONING BOARD OF APPEALS OF SPRINGFIELD & another.<sup>1</sup>

No. 24-P-136.

Suffolk. October 9, 2024. - May 7, 2025.

Present: Meade, Walsh, & Smyth, JJ.

Building Permit. Permit. Notice, Timeliness. Zoning, Building permit, Appeal, Board of appeals: decision, Timeliness of appeal. Land Court, Judicial discretion, Jurisdiction. Jurisdiction, Zoning. Statute, Construction, Emergency law. Practice, Civil, Zoning appeal, Summary judgment.

Civil action commenced in the Land Court Department on June 17, 2021.

The case was heard by Gordon H. Piper, J., on motions for summary judgment.

Peter F. Durning (Thomas A. Mackie also present) for the plaintiff.

Alexandra E. St. Pierre (Suhasini Ghosh also present) for city council of Springfield.

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<sup>1</sup> City council of Springfield.

WALSH, J. In response to the Great Recession,<sup>2</sup> in 2010 the Legislature enacted the so-called "permit extension act," St. 2010, c. 240, § 173, an emergency act designed to "provide forthwith a business-friendly environment that [would] stimulate job growth and improve the ease with which businesses can operate in the markets they serve." St. 2010, c. 240, preamble. One of the measures in the act, as amended in 2012, extended the expiration date of permits and other local and State approvals issued between August 15, 2008, and August 15, 2012 (the qualifying period), for four years "in addition to the lawful term of the approval" (emphasis added). St. 2010, c. 240, § 173 (b) (1), as amended by St. 2012, c. 238, §§ 74, 75. It is undisputed that the plaintiff, Palmer Renewable Energy, LLC (Palmer), was granted two building permits by the city of Springfield's building commissioner (building commissioner) in 2011, during the qualifying period, that were thereafter the subject of lengthy litigation. At the heart of this dispute is whether the building permits have expired. That determination turns on whether the phrase "in addition to the lawful term of the approval" means that the four-year extension contained in

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<sup>2</sup> "The Great Recession was an economic downturn and financial crisis that began in late 2007," Hartnett v. Contributory Retirement Appeal Bd., 494 Mass. 612, 613 n.2 (2024), and led to a precipitous fall in the real estate market, see Caveney v. Caveney, 81 Mass. App. Ct. 102, 107 (2012).

the 2012 amendment of the permit extension act runs concurrently with or consecutively from any equitable tolling period due to litigation (litigation tolling period).

A judge of the Land Court determined that the litigation tolling period and the four-year extension period run concurrently and invalidated the permits on the grounds that they had expired; we conclude, to the contrary, that the four-year extension of the building permits began to run after the term of the permit as extended by litigation tolling. We also conclude that the litigation tolling period began in this case when the city council (city or city council) and other opponents appealed to the zoning board of appeals (board) from the building commissioner's decision to issue the permits.<sup>3</sup> Accordingly, we reverse the judgment.

Background. The background facts are undisputed. On November 15, 2011, the building commissioner granted building permits to Palmer to begin construction of a biomass-fired power plant on industrially zoned property in the city of Springfield.<sup>4</sup>

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<sup>3</sup> The parties also make certain procedural challenges to the board's decision. The city argues that Palmer did not file a timely appeal from the board's modified decision and Palmer contends the board lacked a supermajority for its modified decision. We address these issues infra.

<sup>4</sup> The parties agree that the two building permits at issue in this case authorized (1) "'site grading for storm drainage control in preparation for construction' of the Facility"; and (2) "install[ation of a] reinforced concrete foundation for [the

We discern no expiration date on the face of the building permits themselves. The judge and all of the parties have treated the permits as having a term of 180 days and we shall do so as well.<sup>5</sup>

Within a month of the issuance of the permits, the city and other opponents filed separate appeals with the board on December 12, 2011. The board voted to revoke the building permits on January 25, 2012, issued a written decision of the vote on February 27, 2012, and filed it with the city clerk on March 8, 2012. Palmer filed an appeal with the Land Court on March 26, 2012. On August 14, 2014, the Land Court reversed the board's decision and reinstated the building permits. The city and other opponents appealed and on September 8, 2015, a panel

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Facility's] future 275' tall steel power stack." The record indicates that in 2013, after the building permits were issued, the city adopted a change to its zoning ordinance that would require a special permit for projects of the size proposed. Thus, it appears that if the building permits at issue have expired, Palmer would need to obtain a special permit for the project. Whether, even if the two building permits at issue are still viable, Palmer nonetheless needs a special permit, see Smith v. Board of Appeals of Brookline, 366 Mass. 197, 200-201 (1974) (questioning whether excavation permits were sufficient to merit protection of G. L. c. 40A), is not before us and we do not address that issue.

<sup>5</sup> The parties have not provided the version of either the local zoning ordinance or the State building code in effect when the permits were granted. We note that pursuant to the 8th edition of the State building code, building permits generally lapse unless work is commenced within 180 days of issuance. See 780 Code. Mass. Regs. § 105.5 (2009).

of this court affirmed the decision of the Land Court. See Palmer Renewable Energy, LLC v. Zoning Bd. of Appeals of Springfield, 88 Mass. App. Ct. 1104 (2015). The application of the city and other opponents for further appellate review was denied on October 30, 2015. See 473 Mass. 1105 (2015). Thus, the initial phase of litigation over the building permits ended on October 30, 2015.<sup>6</sup>

Five years later, on October 14, 2020, twelve members of the city council requested for the second time, see note 5, supra, that the building inspector issue a cease and desist order on Palmer's construction of the biomass facility, contending that the building permits had expired (2020 enforcement request). The building commissioner denied the request, reasoning that the permits had not expired and attached a copy of Palmer's continuous construction report as of February 22, 2021.<sup>7</sup> Members of the city council appealed to the board and

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<sup>6</sup> On January 7, 2019, members on the city council asked that the building commissioner revoke the building permits on the grounds that Palmer lacked a special permit required under a 2013 amendment to the city's zoning ordinance. The building commissioner denied the request on January 17, 2019, reasoning that "the 2013 zoning amendment did not apply because [Palmer] had received Building Permits that were still valid by operation of the tolling afforded by appeals of the Building Permits, by the Permit Extension Act, and by G. L. c. 40A, § 6." There was no appeal from the building commissioner's decision.

<sup>7</sup> Palmer's report provided "an update on construction progress with supporting documentation."

on May 5, 2021, the board voted to grant the city's petition and once again revoked the building permits. On May 28, 2021, the board issued a written decision revoking the building permits.

Palmer appealed to the Land Court, naming the city and the board as defendants. A judge of the Land Court affirmed the board's decision on summary judgment,<sup>8</sup> reasoning (1) that the phrase "lawful term of the approval" is ambiguous whether it includes litigation tolling periods; (2) the purpose of the permit extension act was to respond in an immediate way to the Great Recession; and (3) interpreting the statute to allow litigation tolling to further extend the four-year extension is contrary to the "immediate" need sought to be met. The judge concluded that, despite the language "in addition to," the permit extension act ran concurrently with any litigation tolling and the permits had expired no later than May 13, 2016. Because of the result he reached, understandably the judge did not consider whether the building permits were equitably tolled. Palmer and the city cross-appeal.

Discussion. This case turns on principles of statutory interpretation and the interplay between (1) the extension provided in the permit extension act, (2) the litigation tolling

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<sup>8</sup> The appeal included a brief remand to allow the board to more fully explain its reasoning in revoking the permits, which we will discuss in more detail below.

period recognized when permits affecting land are challenged at the local level and litigated in our courts, and (3) the permit extension provided in response to the COVID-19 pandemic and resulting state of emergency, see St. 2020, c. 53, § 17 (COVID-19 emergency act).

1. Lawful extensions of building permits. We first comment briefly on some of the recognized ways the original term of a building permit may lawfully be extended. Courts consistently have applied principles of equitable tolling to ensure that a permit holder is not forced to make difficult economic decisions when litigation "clearly attributable to others" has the effect of eating up the time a permit remains valid. See Belfer v. Building Comm'r of Boston, 363 Mass. 439, 444-445 (1973) (appeal from variance creates real practical impediments to use of benefit and unless appeal tolls time period variance remains effective, many variances would be meaningless); M. DeMatteo Constr. Co. v. Board of Appeals of Hingham, 3 Mass. App. Ct. 446, 458 (1975) (duration of zoning freeze paused when building commissioner ordered plaintiff to cease operations, noting "common sense practical consideration militating against a course of action under attack, until the doubts were resolved" [quotation and citation omitted]). Indeed, while the statutory provision directed to special permits specifically provides for a term of no more than three

years "which shall not include such time required to pursue or await the termination of an appeal referred to in section seventeen," G. L. c. 40A, § 9, courts have applied principles of equitable tolling even in the absence of statutory authority. See Belfer, supra; M. DeMatteo Constr. Co., supra. Here, although they may disagree as to when the tolling began, neither party disputes that the term of the permits was tolled during the legal challenges to the building permits. See Cape Ann Land Dev. Corp. v. Gloucester, 371 Mass. 19, 23 n.5 (1976), S.C., 374 Mass. 825 (1978) (Cape Ann) (zoning freeze in effect from date city denied building permit until disposition of all bona fide appeals from denial or grant). Cf. Smith v. Board of Appeals of Brookline, 366 Mass. 197, 201 (1974) ("there must be relief" from six-month limitation to commence construction when "real practical impediments to the use of a benefit" arise [citation omitted]).

In addition to tolling due to litigation, some permits and approvals may be extended beyond their original term by complying with certain statutory or local regulations. See G. L. c. 40A, § 10 (providing that permit granting authority may extend variance for period up to six months on timely application for extension); Woods v. Newton, 351 Mass. 98, 103-104 (1966) (local ordinance granted city right to extend time for exercising rights under building permit). In fact, both the

current version of the State building code and the version in effect when the permits were granted authorized the building official to grant one or more extensions of time for periods of not more than 180 days each on demonstrated justifiable cause. See 780 Code Mass. Regs. § 105.5 (2009 & 2017).

"In interpreting a statute, we presume that when the Legislature enacts a law it is aware of the statutory and common law that governed the matter in which it legislates." Globe Newspaper Co., petitioner, 461 Mass. 113, 117 (2011). See Providence & Worcester R.R. Co. v. Energy Facilities Siting Bd., 453 Mass. 135, 144 (2009) (Legislature presumed to be aware of our prior decisions). Here, we presume, therefore, that the Legislature was aware when it enacted the permit extension act that the original term of a permit or approval may be extended in a variety of ways -- including by litigation tolling.

2. The permit extension act. The permit extension act provides, "Notwithstanding any general or special law to the contrary, certain regulatory approvals are hereby extended as provided in this section." St. 2010, c. 240, § 173. Pursuant to St. 2012, c. 238, §§ 74, 75, the tolling period for permits issued between August 15, 2008, and August 15, 2012, was extended from two years to four years "in addition to the lawful term of the approval" (emphasis added). St. 2010, c. 240, § 173 (b) (1). There is no dispute that the permit extension

act applies to the building permits at issue -- that is, that they qualify as "certain regulatory approvals." St. 2010, c. 240, § 173. The dispute is centered on whether the phrase "in addition to the lawful term of the approval" means that the four-year extension provided in the permit extension act runs concurrently with or consecutive to any period of litigation tolling.

When interpreting a statute, "we begin with the language of the statute, [which] . . . 'is the principal source of insight into legislative purpose'" (citation omitted). Local 589, Amalgamated Transit Union v. Massachusetts Bay Transp. Auth., 392 Mass. 407, 415 (1984). By statute, we must construe words and phrases "according to the common and approved usage of the language." G. L. c. 4, § 6. Moreover, "[a] basic tenet of statutory construction requires that a statute 'be construed "so that effect is given to all its provisions, so that no part will be inoperative or superfluous.'" Wolfe v. Gormally, 440 Mass. 699, 704 (2004), quoting Bankers Life & Cas. Co. v. Commissioner of Ins., 427 Mass. 136, 140 (1998).

While the city contends that the phrase in the statute referring to "in addition to the lawful term of the approval" is ambiguous, statutes are not ambiguous "simply because the parties have developed different interpretations of them," Basis Tech. Corp. v. Amazon.com, Inc., 71 Mass. App. Ct. 29, 36

(2008); rather, "[g]enuine ambiguity requires language 'susceptible of more than one meaning [so that] reasonably intelligent persons would differ as to which meaning is the proper one'" (citation omitted). Id. at 36-37. Examining the language of the statute, we are not convinced that it is ambiguous.

Rather than limiting the application of the permit extension act to extend from the "original term of the permit," the Legislature chose to use the modifier "lawful." "Our responsibility is to interpret the [statute] as written, assigning to each word and phrase its ordinary meaning unless the context requires otherwise and attaching significance to every word unless it produces an irrational result." Hassey v. Hassey, 85 Mass. App. Ct. 518, 525 (2014). When we consider whether a term of approval that has been extended, whether by equitable tolling due to litigation or by exercising a statutory or regulatory mechanism to extend an approval, falls within the broad phrase "lawful term of the approval," the answer is an unequivocal yes. There is no language in the statute that would allow us to read into the phrase "lawful term of the approval" an exception for terms that have been extended by the equitable concept of "litigation tolling." In the absence of any provision to the contrary, the broadly termed phrase "lawful term of the approval" plainly includes a term of approval that

has been extended by litigation; and the plain language provides that the four-year extension is "in addition" to the lawful term. St. 2010, c. 240, § 173 (b) (1). Here, the judge (and presumably the board) viewed the statute as ambiguous rather than "very sweeping," but we discern nothing in the statute that warrants such an interpretation. Ayers v. Massachusetts Blue Cross, Inc., 4 Mass. App. Ct. 530, 534 (1976).<sup>9</sup>

To the extent we owe deference to the board's interpretation of the statutes it enforces, an "incorrect interpretation of a statute . . . is not entitled to deference" (citation omitted). Shirley Wayside Ltd. Partnership v. Board of Appeals of Shirley, 461 Mass. 469, 475 (2012). If a statute is unambiguous, "we enforce the statute according to its plain wording 'unless a literal construction would yield an absurd or unworkable result,'" id. at 477, quoting Adoption of Daisy, 460 Mass. 72, 76 (2011), and we reject the city's contention that an absurd result occurs here. We recognize that the length of time that the permits have been valid is extraordinary. However, it must also be recognized that the lengthy validity of the building permits at issue is the consequence of the city's

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<sup>9</sup> That the permit extension act was enacted on an emergency basis informed developers and municipalities promptly that certain permits that otherwise might have expired were still valid. Yet, the four-year length of the extension belies the idea that the Legislature expected "shovels in the dirt" immediately.

unsuccessful challenges to the permits, the statutorily imposed length of the extension under the permit extension act, and the Legislature's response to a worldwide health emergency. While we agree that few could have anticipated the compilation of events that have extended the validity of the 2011 building permits to the time this appeal was sought, under these extraordinary circumstances Palmer is entitled to the benefits of the statutory scheme the Legislature enacted. Had it chosen to do so, the Legislature could have placed a definitive end date on the extensions under the permit extension act; it did not do so. Because the permit extension act is not ambiguous and its plain language provides that the extension period contained in the permit extension act is "in addition to" the lawful term of a permit that has been extended by litigation, we need go no further in examining the Legislature's intent.

3. When does litigation tolling begin? In the unusual circumstances of this case, when the equitable tolling of the 180-day term of the building permits is deemed to have begun has a significant impact on the expiration date of the permits. See Cape Ann, 371 Mass. at 23 n.5 (recognizing importance of date from which zoning freeze was suspended). That is because if, as Palmer argues, the tolling started when the city filed its appeal to the board from the grant of the building permits, then with application of litigation tolling, the permit extension

act, and the COVID-19 emergency act, the building permit had not lapsed when the city asked the building inspector to enforce the zoning ordinance and revoke the permits. If, as the city argues, tolling started when the board revoked the permits, then they would have expired before the city asked the building inspector to enforce the zoning bylaw and revoke the permits.

Our cases have limited relief from time limitations to instances when "there are 'real practical impediments to the use of a benefit.'" Smith, 366 Mass. at 201, quoting Belfer, 363 Mass. at 444. Indeed, not "every inconvenience or risk" extends the relevant period. Smith, supra at 202. But an appeal from the grant of a permit has been recognized consistently as a real practical impediment, provided there is no showing that the appeal "was collusively made for the purpose of extending the life of the" permit. Belfer, supra at 445. See Cape Ann, 371 Mass. at 23 n.5. In Belfer, supra, legal challenges to a variance were at issue. The board makes decisions regarding variances at the local level such that there is no intermediate step, unlike this case, in which the building commissioner granted the permit, but an appeal to the board resulted in revocation of the permits. Contrast id. at 440. Thus we must consider whether the city's appeal from the building commissioner's decision in 2011 actually constituted a practical impediment or whether the impediment did not begin until the

permit was revoked. In other words, is an appeal at the local level of the approval of a permit enough to cause a real impediment to use of the permit?

Cape Ann instructs that, in circumstances where a building permit was denied by the building commissioner and the developer appealed to the zoning board and then to the Superior Court, the suspension of the running of the three-year zoning freeze runs "from the date of the denial of the building permit until the disposition of all bona fide appeals from the denial (or granting) of a special permit from the city council." 371 Mass. at 23 n.5. Thus, the running of the zoning freeze was suspended from the first decision at the local level even though an appeal to the local board followed. We recognize that the denial of a building permit is obviously different from the grant of a building permit and because the permit was denied, it makes sense to start the suspension from denial of the building permit. Nonetheless, Cape Ann at least stands for the proposition that there is no blanket prohibition from suspending a time period from the date of a decision at the local level. Moreover, Cape Ann also recognized that there may be circumstances where the suspension would start even earlier than the date of the denial. See id.

The "'common sense practical consideration' militating against a course of action under attack, until the doubts were

resolved," M. DeMatteo Constr. Co., 3 Mass. App. Ct. at 458, quoting Woods, 351 Mass. at 104, that forms the foundation of litigation tolling suggests that practical considerations dictate the start of tolling. The Supreme Judicial Court in Smith, 366 Mass. at 202, recognized that tolling allows the plaintiff to "retain the benefit of [the permit] if the appeal resulted in a determination that it was properly granted," and recognized that the type of "impediment" necessary to toll a term of a permit is not one that the plaintiff had the power to remove at will. There is no suggestion here that Palmer could have done anything to avoid the city's appeal. In the context of this case where the city challenged the biomass-fired power plant, a large and expensive project, by contending that the project required a special permit because it entailed "incineration," see Palmer Renewable Energy, LLC, 88 Mass. App. Ct. 1104, we conclude that the city's appeal of the permit to the board of appeals suspended the running of the term of the permit.

Where the building permits were issued on November 15, 2011, and the city filed its appeal with the board from that decision on December 12, 2011, only twenty-seven days had run on the 180-day term of the building permits and 153 days were remaining. The litigation finally terminated on October 30, 2015; adding 153 days to that date meant the permits' lawful

term would have ended on March 31, 2016. The permit extension act adds four years to that date, extending the permits' validity through March 31, 2020. In response to the COVID-19 pandemic, the Legislature enacted a statute that tolled permits that were in effect on March 10, 2020.<sup>10</sup> Thus, the permits were still valid on October 14, 2020, when the city made its 2020 enforcement request that spurred the instant litigation. The judgment affirming the invalidation of the permits must be reversed.

4. Requirements of G. L. c. 40A, § 6. The city argues that even if the statutory extension and the litigation tolling period run consecutively, the permits expired because G. L. c. 40A, § 6, requires construction pursuant to a building permit to begin within one year of the date of issuance and to continue "through to completion as continuously and expeditiously as is reasonable." In addition, the city notes that the State building code requires commencement of construction within 180 days and no pauses of work of 180 days or more after

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<sup>10</sup> On April 3, 2020, the Legislature enacted St. 2020, c. 53, § 17 (b) (iii), which tolled the expiration of "a permit in effect or existence as of March 10, 2020, including any deadlines or conditions of the permit, . . . during the state of emergency." See generally Lynn v. Murrell, 489 Mass. 579, 579-580 (2022) (state of emergency ended on June 15, 2021). Aside from its argument that the building permits had expired prior to March 10, 2020, the city makes no argument the statute for other reasons does not apply to the building permits at issue.

commencement. The consequence of Palmer's failure to comply with § 6, the city contends, is that Palmer had to comply with the 2013 zoning amendment that requires a special permit for projects as large as the project at issue.

It is settled that at the very least, relief from such a time limitation applies during litigation of the building permits that were the subject of an appeal. See Smith, 366 Mass. at 201 (six-month limitation to commence construction tolled during litigation of permit). Importantly, the permit extension act specifically provides that it applies to extend certain approvals, "[n]otwithstanding any general or special law to the contrary." St. 210, c. 240, § 173. Thus, to the extent that the provisions of G. L. c. 40A, § 6, and the State building code conflict with the permit extension act as to the expiration of the building permits at issue, the permit extension act prevails.<sup>11</sup>

While we are not insensitive to the important goals of the continuous construction provision contained in G. L. c. 40A, § 6, particularly with regard to compliance with subsequent changes in the local zoning regulation, the Legislature saw fit

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<sup>11</sup> We do not read St. 2010, c. 240, § 173 (b) (3), of the permit extension act, which preserves a municipality's right to modify or revoke a permit if so authorized by "the law or regulation under which the permit . . . was issued," as inconsistent with our decision.

to extend the permits at issue for an additional four years from what otherwise would have been the lawful term of the permit and it did so notwithstanding G. L. c. 40A, § 6. The Legislature granted an additional extension due to the COVID-19 emergency. It is not for us to question or undermine the Legislature's response to the Great Recession or to the COVID-19 emergency.

5. Jurisdiction. The city argues that the judge lacked jurisdiction to consider Palmer's appeal because Palmer did not file a timely notice of appeal from the board's modified decision. At the first case management conference on July 12, 2021, the judge invited the parties to move before July 31, 2021, for remand for the limited purpose of allowing the board to explain its reasoning. After the board filed a motion to remand, the judge ordered a limited remand and indicated that a public meeting, but not a public hearing, was warranted. The judge further ordered

"that the court [shall] retain jurisdiction over this case, including over any appeals which may be taken (or other actions brought) from or relating to the Board's further proceedings pursuant to this Order. No party currently a party to this litigation who is aggrieved by the Board's decision on remand need initiate in this court a new lawsuit appealing the Board's decision on remand, but any such aggrieved party shall, within twenty (20) days of the filing of the Board's decision with the City Clerk, (a) file with the court (and serve on all parties) a proper motion for leave to amend the pleadings to assert a right to judicial review of the Board's decision on remand, with the form of the proposed amendment annexed, and (b) file with the City Clerk written notice of having filed the

motion to amend, accompanied by true copies of the moving papers."

The board's decision after remand was filed with the court on September 22, 2021. In March of 2022, Palmer filed a motion for leave to amend the complaint to include the board's postremand decision. Palmer filed notice with the city clerk of the motion to amend on March 25, 2022. The judge allowed the motion.

The city argued below and in a cross appeal that, after remand, the judge lacked jurisdiction to allow Palmer to serve a motion to amend the complaint with the city clerk after the time period set forth in the judge's order. The city likened the requirement to the jurisdictional filing requirements in G. L. c. 40A, § 17. We agree with the judge that where he retained jurisdiction over the case after remand, and did not "annul[] the original decision nor call[] for an entirely new, independent decision," the deadline he imposed on Palmer to serve a motion to amend the complaint did not arise from the jurisdictional requirements of G. L. c. 40A. In light of this ruling, the judge implicitly denied the city's motion to dismiss. The judge also found that there was no prejudice to the defendants. In these circumstances, where the judge's remand order was limited, no public hearing was conducted, the board explained its prior decision, and the judge expressly directed that the parties were not required to initiate a new

lawsuit, the judge was within his discretion to extend the judicially imposed deadline. Cf. 311 W. Broadway LLC v. Zoning Bd. of Appeal of Boston, 90 Mass. App. Ct. 68, 73-74 (2016).

6. Super majority vote. As described in the original decision, the city council sought a favorable finding on its administrative appeal, asserting that "the time to act on the building permits . . . has expired." The original vote of the board was four to one to grant the city council's petition. Thus, the board concluded that the building permits had expired.

On remand, only four of the original five members who voted were present at the hearing conducted on September 2, 2021. Each of the four members explained on the record his reason for voting: two explained that they agreed with the timeline presented by an opponent of the project; one said his decision "was based on his doubts about the project and its associated health impacts"; and one said he agreed with Palmer's timeline showing that the permit had not expired. The four members then voted to "adopt the reasons stated on the record" and instructed the associate city solicitor to file its supplemental statement of reasons with the Land Court. Palmer contends that in the vote on remand, the board did not have the supermajority of four out of five votes. See G. L. c. 40A, § 15 ("The concurring vote of all members of the board of appeals consisting of three members, and a concurring vote of four members of a board

consisting of five members, shall be necessary to reverse any order or decision of any administrative official under this chapter").

We agree that the decision after remand lacked a supermajority. However, as the judge noted in response to the city's argument that the judge lacked jurisdiction, his remand order neither "annulled the original decision nor called for an entirely new, independent decision to be issued"; instead, the remand took place simply "to allow the Board to amplify the reasons for its initial decision." The first decision contained a four to one vote and we do not view it as so lacking in detail that it was ineffective or unlawful. Four members voted that the permits had expired; "it is inconsequential that they came to that conclusion via various routes." Security Mills Ltd. Partnership v. Board of Appeals of Newton, 413 Mass. 562, 567 (1992).

Conclusion. For all of the foregoing reasons, the judgment affirming the board's revocation of the building permits must be reversed. We remand the case for entry of a new judgment instructing the board to reinstate the building permits and further orders, if necessary, consistent with this opinion.

So ordered.