SJC-13316

TERRENCE MARENGI, JR., & others[1] vs. 6 FOREST ROAD LLC & another.[2]

Essex. October 3, 2022. - December 14, 2022.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker, Wendlandt, & Georges, JJ.

Zoning, Comprehensive permit, Low and moderate income housing, Appeal, Bond. Bond. Practice, Civil, Bond, Costs, Standard of proof. Statute, Construction.

Civil action commenced in the Superior Court Department on September 15, 2021.

A motion for an appeal bond was considered by Jeffrey T. Karp, J.

An application for leave to prosecute an interlocutory appeal was allowed by Eric Neyman, J., in the Appeals Court. The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

Dennis A. Murphy (Daniel C. Hill also present) for the plaintiffs.

Jonathan M. Silverstein for 6 Forest Road LLC.

[1] Tiffany Marengi; George S. Mowbray, Jr.; Lori Mowbray; Stephen Pivacek; Nancy Pivacek; Lynn Welch; and Daniel Welch.

[2] Zoning board of appeals of Salisbury.

The following submitted briefs for amici curiae:
John Pagliaro & Daniel B. Winslow for New England Legal Foundation.
Karla L. Chaffee & Jeffrey W. Sacks for Citizens' Housing and Planning Association & others.
Daniel P. Dain, Nicholas S. Dorf, & Ryan D. Grondahl for Real Estate Bar Association for Massachusetts, Inc., & another.

KAFKER, J. In a recent amendment to G. L. c. 40A, § 17, enacted through legislation designed to promote economic growth and the construction of housing in the Commonwealth, the Legislature provided that "[t]he court, in its discretion, may require a plaintiff in an action under this section appealing a decision to approve a special permit, variance or site plan to post a surety or cash bond in an amount of not more than $50,000 to secure the payment of costs" (bond provision). St. 2020, c. 358, § 25.

At issue is whether the bond provision set out in G. L. c. 40A, § 17, applies to comprehensive permits issued under G. L. c. 40B, § 21, to promote low- and moderate-income housing. We conclude that it does, as such permits are reviewed pursuant to G. L. c. 40A, § 17, and necessarily include, as in this case, site plans, which are referenced explicitly in the provision.

Also at issue are what costs are recoverable under the bond provision and the standard for awarding such costs. We conclude that the costs recoverable extend beyond "taxable costs" but do not include attorney's fees or delay damages, as they are not

ordinarily considered "costs" and are not expressly referenced in the statute. As for the standard for awarding costs, it is defined, at least in part, by its purpose. As the bond provision exists "to secure the payment of costs," and costs ultimately cannot be awarded in the absence of bad faith or malice, the bond provision requires a preliminary determination regarding the "relative merits of the appeal." G. L. c. 40A, § 17, third par. Unless such preliminary determination demonstrates that the appeal appears so devoid of merit as to support an ultimate determination of bad faith or malice, no such bond should be imposed.

Finally, on the limited record before us, we are unable to determine whether the Superior Court judge in this case, who did not have the benefit of this opinion explicating the statutory requirements, abused his discretion in ordering the plaintiffs to post a $35,000 bond. We therefore vacate the order and remand for further proceedings consistent with this opinion.[3]

1. Background. a. Proposed project and comprehensive permit. On November 20, 2020, the developer, 6 Forest Road LLC, initially applied to the zoning board of appeals of Salisbury

[3] We acknowledge the amicus briefs submitted by the New England Legal Foundation; Citizens' Housing and Planning Association, the Department of Housing and Community Development, and others; and the Real Estate Bar Association for Massachusetts, Inc., and the Abstract Club.

(board) for a comprehensive permit to build seventy-six condominium units at 6 Forest Road in Salisbury. The proposal included site plans, which were revised as the permitting process proceeded, with the final plan featuring fifty-six condominium units, including fourteen affordable units (project). After ten days of public hearings, on July 27, 2021, the board, in a twenty-eight page decision, approved the application and granted the developer a comprehensive permit, subject to ninety-six conditions. The board found that, with these conditions, the project "promote[s] affordable housing while taking into consideration [l]ocal [c]oncerns," such as ensuring public health and safety, preserving "the natural environment" and "[o]pen [s]paces," and promoting local planning goals. As part of the approval process, the board also granted various waivers.

b. Procedural history. On September 15, 2021, the plaintiffs filed a complaint in the Superior Court, pursuant to G. L. c. 40A, § 17, and G. L. c. 40B, § 21, challenging the board's approval of the comprehensive permit. The plaintiffs included direct abutters and two non-abutters who claimed to be aggrieved by the permit approval. They argued that the board acted arbitrarily and capriciously and abused its discretion by granting a comprehensive permit for the project when (1) the developer did not have a valid purchase and sale agreement to

establish site control; (2) the developer lacked economic justification for constructing sixteen additional housing units beyond the forty originally stipulated in the purchase and sale agreement; (3) the town had already exceeded the statutory minimum requirement to allot ten percent of its housing stock to subsidized units prior to granting the permit, and the board did not address the issue when they approved the construction of additional subsidized units; and (4) the board failed to vet fully the proposed impact of the project on the plaintiffs' abutting properties. More specifically, the complaint alleged water quality and quantity issues affecting at least one of the plaintiffs' properties as reflected in a condition to the permit requiring water quality testing, public safety issues arising from the project being situated along a dead-end road that is more than three times the length ordinarily allowed under the town's subdivision rules and regulations, "and environmental impacts to the extensive wetlands on the [p]roject [s]ite."

In response, the developer[4] filed a motion for the plaintiffs to post a $50,000 surety or cash bond, pursuant to G. L. c. 40A, § 17, "to secure the payment of costs owing to the

[4] The defendants to the lawsuit include the developer, members of the board in their official capacity, and the board, but only the developer as the private defendant brought the motion.

harm to the public interest" and to the developer "caused by the delays occasioned by this appeal." In a supporting memorandum,[5] the developer argued that the maximum bond was necessary to protect the public interest in additional affordable housing units in Salisbury and counterbalance the costs incurred by the developer due to the appeal, estimated at $250,000. This figure included price increases for lumber and framing materials; attorney's fees that "could be $75,000 or more"; the costs of traffic, engineering, and environmental experts that "could easily exceed $50,000"; and interest rate increases raising the cost of financing, with "[e]ven a one percent increase" costing $90,000. The developer also contended that a $50,000 bond would not pose a significant financial burden to the plaintiffs, who owned real property with a collective assessed value of roughly $2.3 million.

The developer also addressed the merits of the plaintiffs' arguments as presented in the complaint. The developer explained that a purchase and sale agreement was in full effect when the permit decision issued and that the State subsidizing

[5] In further support of the motion, the developer included the following exhibits: the comprehensive permit decision from the board; a bond order from a separate case, Anderson vs. Community Hous. Resources, Inc., Mass. Land Ct., No 21 PS 000324 (Nov. 9, 2021); an affidavit from Steven Paquette, a principal of the developer, calculating the estimated costs from the delay due to the appeal; and the unofficial municipal tax records for plaintiffs' real property, featuring assessment values.

agency had properly determined the site control issue when issuing the project eligibility letter, which allowed the developer to apply for the comprehensive permit. The developer also noted that the comprehensive permitting process allows for the overriding of local zoning requirements for the reasons stated by the board in its decision, even when the town has met the ten percent minimum requirement for subsidized units, and that the board, in its decision, considered and addressed the impacts on the plaintiffs and the public.

The plaintiffs opposed the motion, arguing that the bond provision does not apply to appeals of comprehensive permits but that, even if the provision does apply, they did not bring the appeal in bad faith or with malice; any harm to the developer or public interest was not outweighed by the financial imposition on them to post the bond; and, in the alternative, the $50,000 bond as requested by the developer was unreasonable. In further support of the merits of their appeal, the plaintiffs averred that the project would cause "unique harms that threaten the health, safety and quiet enjoyment of [their] properties," as documented in a single affidavit from one of the abutters. That affidavit only provided the following conclusory statement: "I am actually aggrieved because the project will cause unique harms to my property, including public health and safety impacts, as alleged in the [c]omplaint."

In a margin endorsement order dated March 17, 2022, the Superior Court judge granted in part the developer's motion,[6] reducing the requested bond from $50,000 to $35,000. The judge allowed the bond "substantially for the reasons argued by the [developer] in [its] memorandum and reply brief" and found persuasive "the reasoning of the Land Court . . . in [Anderson vs. Community Hous. Resources, Inc., Mass. Land Ct.], No 21 PS 000324 [(Nov. 9, 2021),] . . . regarding the applicability of G. L. c. 40A, § 17, third [par.,] to appeals of comprehensive permits under G. L. c. 40B, § 21."

A single justice of the Appeals Court granted the plaintiffs leave to file an interlocutory appeal, pursuant to G. L. c. 231, § 118, seeking review of the bond order. The plaintiffs filed their notice of appeal on May 19, 2022. We transferred the case sua sponte from the Appeals Court to address whether the bond provision of G. L. c. 40A, § 17, applies to appeals of comprehensive permits issued pursuant to G. L. c. 40B, § 21.

2. Discussion. We begin our discussion with the relevant statutory language at issue. General Laws c. 40A, § 17, provides:

> "Any person aggrieved by a decision of the board of appeals . . . may appeal to the land court department . . . [or]

[6] The Superior Court judge did not hold a hearing on the motion.

> the superior court department in which the land concerned is situated . . . .
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> ". . .
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> "The court, in its discretion, may require a plaintiff in an action under this section appealing a decision to approve a special permit, variance or site plan to post a surety or cash bond in an amount of not more than $50,000 to secure the payment of costs if the court finds that the harm to the defendant or to the public interest resulting from delays caused by the appeal outweighs the financial burden of the surety or cash bond on the plaintiffs. The court shall consider the relative merits of the appeal and the relative financial means of the plaintiff and the defendant."

This section is expressly cross-referenced in G. L. c. 40B, § 21, which provides: "Any person aggrieved by the issuance of a comprehensive permit or approval may appeal to the court as provided in [G. L. c. 40A, § 17]."

The plaintiffs challenge the bond order on four grounds. First, they allege that the bond provision in G. L. c. 40A, § 17, does not apply to appeals of comprehensive permits issued under G. L. c. 40B, § 21. Second, they argue that, even if the bond provision applies, issuing a bond requires a finding that the appeal has been brought in bad faith or with malice, which the Superior Court judge did not find in this case. Third, even if no such finding is required, then the bond amount in this case impermissibly included nontaxable costs. Fourth and finally, the plaintiffs contend that, even if the judge included the appropriate costs under the statute, he abused his

discretion by improperly balancing the relevant statutory considerations. We address each argument in turn.

a. Statutory interpretation. "A fundamental tenet of statutory interpretation is that statutory language should be given effect consistent with its plain meaning and in light of the aim of the Legislature unless to do so would achieve an illogical result." Sullivan v. Brookline, 435 Mass. 353, 360 (2001). We ascertain such meaning "by the ordinary and approved usage of the language, considered in connection with the cause of [the statute's] enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated." 81 Spooner Rd. LLC v. Brookline, 452 Mass. 109, 113 (2008), quoting Hanlon v. Rollins, 286 Mass. 444, 447 (1934). "Where possible, we seek to harmonize the provisions of a statute with related provisions that are part of the same statutory scheme so as to give full effect to the expressed intent of the Legislature" (quotation and citation omitted). Chin v. Merriot, 470 Mass. 527, 537 (2015). When the statute's plain language suggests ambiguity, however, then "we look to external sources, including the legislative history of the statute, its development, its progression through the Legislature, prior legislation on the same subject, and the history of the times." Worcester v.

College Hill Props., LLC, 465 Mass. 134, 139 (2013), quoting 81 Spooner Rd. LLC, supra at 115.

i. Plain meaning of the bond provision. We begin our discussion by examining the plain language of the statutory provisions at issue. General Laws c. 40B, § 21, provides that "[a]ny person aggrieved by the issuance of a comprehensive permit . . . may appeal" such permit pursuant to G. L. c. 40A, § 17, the statute containing the recently added bond provision. The bond provision itself begins by expressly stating that "[t]he court, in its discretion, may require a plaintiff in an action under this section appealing a decision to approve a special permit, variance or site plan to post a surety or cash bond" (emphasis added). G. L. c. 40A, § 17, third par. This language is significant as comprehensive permits invariably include a site plan. Under G. L. c. 40B, § 21,

> "[t]he board of appeals . . . shall have the same power to issue permits or approvals as any local board or official who would otherwise act with respect to such application, including but not limited to the power to attach to said permit or approval conditions and requirements with respect to . . . site plan" (emphasis added).

See 760 Code Mass. Regs. § 56.04(2) (2020) (requiring "conceptual design drawings of the site plan" as part of the

"[e]lements of [a]pplication" under the comprehensive permitting regulations).[7]

Thus, a plaintiff who appeals, pursuant to G. L. c. 40A, § 17, from a comprehensive permit approval decision issued under G. L. c. 40B, § 21, is appealing from a decision that necessarily includes the approval of a site plan as a component of the comprehensive permit, see 760 Code Mass. Regs. § 56.04, and so is, in part, "appealing a decision to approve a . . . site plan," G. L. c. 40A, § 17, third par.

Further textual support for the bond provision's application to comprehensive permit appeals is provided in the latter part of the provision's first sentence, which calls upon the court to consider "the harm . . . to the public interest." G. L. c. 40A, § 17, third par. Particularly, the court may require the plaintiffs to post a bond "to secure the payment of costs if the court finds that the harm to the defendant or to the public interest resulting from delays caused by the appeal outweighs the financial burden of the surety or cash bond on the plaintiffs." Id. As we explain infra, when discussing legislative purpose, the harm to the public interest is a significant consideration when plaintiffs appeal comprehensive

[7] The plaintiffs contend that the board waived a site plan review when, in fact, the board found that such review was "redundant with the [c]omprehensive [p]ermit process."

permits issued under G. L. c. 40B, § 21, where there is an impact on the Commonwealth's heightened interest in removing barriers to constructing necessary affordable housing. In contrast, the public interest is often less pronounced, or even absent, in ordinary variance or special permit decisions.

A plain reading of the text, therefore, supports our conclusion that the bond provision applies to appeals of approved comprehensive permits because such permits include site plans. In so concluding, however, we recognize that some ambiguity persists, as comprehensive permits are not expressly referenced by the bond provision. Had the Legislature included such language, we would engage in no further analysis of legislative purpose and history, but given the lingering ambiguity, we now turn to that discussion.

ii. Legislative purpose and history of the bond provision and broader statutory scheme. Given the residual ambiguity in the plain language of the bond provision in G. L. c. 40A, § 17, we consider "external sources, including the legislative history" and purpose of the statute. College Hill Props., LLC, 465 Mass. at 139. The plaintiffs contend that the bond provision applies to appeals in ordinary zoning cases of approved variances or special permits but not to affordable housing projects permitted through comprehensive permits issued pursuant to G. L. c. 40B, § 21. This argument suggests that the

Legislature intended to allow bonds as an additional deterrence to meritless appeals in the context of most zoning challenges, but not to serve as a deterrence to affordable housing projects, thereby making it easier to appeal comprehensive permits for affordable housing than ordinary zoning permits. This interpretation of the bond provision flies in the face of the history and purpose of affordable housing legislation, codified at G. L. c. 40B, §§ 20-23, and the special permitting process developed to encourage and speed the development of such projects.

In 2020, the Legislature amended G. L. c. 40A, § 17, to include the bond provision with the passage of "An Act enabling partnerships for growth" (act), which the Governor signed into law on January 14, 2021. St. 2020, c. 358, § 25. The act broadly aimed to "finance improvements to the [C]ommonwealth's economic infrastructure and promote economic opportunity" and was "declared to be an emergency law, necessary for the immediate preservation of the public convenience." St. 2020, c. 358, preamble. It included provisions of a bill filed by the Governor, see 2019 House Doc. No. 4529, such as a $5 million provision "to accelerate and support the creation of low-income and moderate-income housing in close proximity to transit nodes," St. 2020, c. 358, § 2A. See Office of the Governor, Press Release, Baker-Polito Administration Files $240 Million

Economic Development Bill (Mar. 4, 2020), https://www.mass.gov/news/baker-polito-administration-files-240-million-economic-development-bill [https://perma.cc/B3LU-G786] . Referring to the bond provision specifically, a senator who sponsored the amendment inserting the provision stated in a floor speech that its purpose was "to protect developers from frivolous appeals."[8] Senator Brendan P. Crighton, Formal Session of Senate, July 29, 2020, https://malegislature.gov/Events/Sessions/Detail/3711.

By passing this act, the Legislature built upon a history of encouraging the construction of affordable housing throughout the Commonwealth and simplifying the permitting process for such projects. Decades ago, "[t]he Comprehensive Permit Statute, St. 1969, c. 774, now codified at [G. L.] c. 40B, §§ 20 through 23, was adopted by the [L]egislature to address the shortage of low- and moderate-income housing in Massachusetts and to reduce regulatory barriers that impede the development of such housing," 760 Code Mass. Regs. § 56.01 (2020), by "provid[ing] relief from exclusionary zoning practices," Zoning Bd. of

[8] Another senator, commenting after the act took effect, agreed with his assessment of the bond provision, noting "the value of the action the [L]egislature took to limit frivolous lawsuits that only serve to advance Nimbyism." Legere, Long-Pending "Cloverleaf" Plan Will Move Forward, Provincetown Independent, Feb. 16, 2022, quoting Senator Julian Cyr, https://provincetownindependent.org/news/2022/02/16/long-pending-cloverleaf-plan-will-move-forward/ [https://perma.cc/VJ6Q-EX7D].

Appeals of Amesbury v. Housing Appeals Comm., 457 Mass. 748, 760 (2010), quoting Board of Appeals of Hanover v. Housing Appeals Comm., 363 Mass. 339, 354 (1973).

In its quest to expand affordable housing, the Legislature designed a statutory scheme within G. L. c. 40B to "minimiz[e] lengthy and expensive delays occasioned by court battles commenced by those seeking to exclude affordable housing from their own neighborhoods." Zoning Bd. of Appeals of Amesbury, 457 Mass. at 761, quoting Standerwick v. Zoning Bd. of Appeals of Andover, 447 Mass. 20, 29 (2006). In particular, the comprehensive permitting process set out in G. L. c. 40B, § 21, streamlines the process for constructing affordable housing by allowing a potential developer to submit to a zoning board of appeals "a single application to build such housing in lieu of separate applications."

Because the purpose of the bond provision in G. L. c. 40A, § 17, is to serve as an additional deterrent to meritless appeals, we discern no reason why the Legislature would add such a deterrent in ordinary zoning cases but not in cases under G. L. c. 40B, § 21, to which the Legislature has granted enhanced protections in the permitting process in recognition of the critical need for affordable housing throughout the Commonwealth. The bond provision's express reference to the public interest, which is heightened in appeals of comprehensive

permits issued under G. L. c. 40B, § 21, for the construction of affordable housing but often less evident, or even absent, in ordinary variance or special permit cases involving disputes between private parties, further confirms this interpretation. Interpreting the "public interest" and "site plan" language in G. L. c. 40A, § 17, to apply to appeals of comprehensive permits brought under that statute thus "render[s] the legislation effective, consonant with sound reason and common sense," College Hill Props., LLC, 465 Mass. at 139, quoting Harvard Crimson, Inc. v. President & Fellows of Harvard College, 445 Mass. 745, 749 (2006), thereby "giv[ing] full effect to the expressed intent of the Legislature," Chin, 470 Mass. at 537, quoting Commonwealth v. Hampe, 419 Mass. 514, 518 (1995). In contrast, the plaintiffs' interpretation turns the legislative purposes on their heads. See Sullivan, 435 Mass. at 360 (statutory construction should avoid "illogical result").

For all these reasons, we conclude that the bond provision applies to appeals of comprehensive permits.

b. Bad faith or malice requirement. The plaintiffs' second challenge to the over-all validity of the bond order is that the Superior Court judge erred by requiring a bond in the absence of a finding that they brought the appeal from the comprehensive permit decision in bad faith or with malice. According to the plaintiffs, because a finding of bad faith or

malice is required before ultimately awarding costs in an appeal from a municipal zoning decision, see G. L. c. 40A, § 17, sixth par., such a finding should also be a prerequisite to ordering a bond.

We begin with the specific language of the text. As provided in G. L. c. 40A, § 17, third par.:

> "The court, in its discretion, may require a plaintiff . . . to post a surety or cash bond in an amount of not more than $50,000 to secure the payment of costs if the court finds that the harm to the defendant or to the public interest resulting from delays caused by the appeal outweighs the financial burden of the surety or cash bond on the plaintiffs. The court shall consider the relative merits of the appeal and the relative financial means of the plaintiff and the defendant." (Emphasis added.)

Later, in G. L. c. 40A, § 17, sixth par., the statute provides: "Costs shall not be allowed against the party appealing from the decision of the board . . . unless it shall appear to the court that said appellant or appellants acted in bad faith or with malice in making the appeal to the court" (emphasis added).

As the stated purpose of the bond provision is "to secure the payment of costs" (emphasis added)," G. L. c. 40A, § 17, third par., and costs can only be awarded if, at the end of the day, a plaintiff "acted in bad faith or with malice in making the appeal," G. L. c. 40A, § 17, sixth par., there is necessarily a close correlation between the bond requirement and a finding of bad faith or malice. The Legislature did not,

however, expressly state that such a finding is required for the issuance of the bond. Rather, it provided that the court may issue such a bond to secure the payment of costs "if the court finds that the harm to the defendant or to the public interest resulting from delays caused by the appeal outweighs the financial burden of the surety or cash bond on the plaintiffs." G. L. c. 40A, § 17, third par. In making that determination, the Legislature directed the court to "consider the relative merits of the appeal and the relative financial means of the plaintiff and the defendant." Id.

The Legislature's focus on the "relative merits" rather than the specific intent of the plaintiffs at the bond stage makes sense as the bond is imposed at the beginning and not at the end of the judicial process. Evidence of state of mind is difficult to prove and usually requires discovery and the completion of the fact-finding process. See National Ass'n of Gov't Employees, Inc. v. Central Broadcasting Corp., 379 Mass 220, 232 (1979), cert. denied, 446 U.S. 935 (1980). Although an evaluation of the relative merits of the appeal is also preliminary, that task is regularly performed by courts in injunctions and other contexts. See, e.g., Packaging Indus. Group, Inc. v. Cheney, 380 Mass. 609, 616-617 (1980) ("By definition, a preliminary injunction must be granted or denied after an abbreviated presentation of the facts and the law"; in

making its decision, court must also evaluate moving party's "chance of success on the merits"); Mass. R. Civ. P. 4.1, 365 Mass. 737 (1974) (attachments); Mass. R. Civ. P. 65, 365 Mass. 832 (1974) (temporary restraining orders and preliminary injunctions). This evaluation is further informed and simplified by the high standard ultimately required for the award of costs. Unless the claim is brought or pursued maliciously or in bad faith, no costs may be awarded. Thus, the court should not require a bond unless the appeal appears to be so devoid of merit as to allow the reasonable inference of bad faith or malice.

We are also concerned that a balancing of the relative merits of the appeal that is not informed and guided by the ultimate requirement of proving bad faith or malice for the award of costs has the potential to upend the normal appellate process. If bonds up to $50,000 could be required in closer cases, plaintiffs could be frightened out of appealing by the possibility of the imposition of a bond, even when they have legitimate claims. See Damaskos v. Board of Appeal of Boston, 359 Mass. 55, 61 (1971) ("there is strong reason for careful scrutiny of any statutory provision . . . for a bond which, if literally applied, might have the practical effect of barring [meritorious claims] from the courts"). We discern no such

intent from the Legislature.[9] Costs are meant to be an exceptional award at the tail end of the appellate process for meritless claims brought in bad faith or with malice; they are not meant to be a means of short-circuiting that process. The tail cannot be allowed to wag the dog.

We therefore conclude that the court should only order a bond if the judge finds that a plaintiff's appeal appears so devoid of merit that it may be reasonably inferred to have been brought in bad faith.

c. Costs secured by the bond provision. As set out in the statute, the purpose of the bond is "to secure the payment of costs." G. L. c. 40A, § 17, third par. According to the plaintiffs, the use of the word "costs" is simply a reference to the default rule that a prevailing litigant can ordinarily only recover a circumscribed, statutorily defined set of litigation costs known as "taxable costs."[10] See Waldman v. American Honda

[9] Indeed, our "anti-SLAPP" statute, G. L. c. 231, § 59H, was passed to prevent pressure tactics by developers from impeding meritorious challenges. See Commonwealth v. Exxon Mobil Corp., 489 Mass. 724, 732 (2022), and sources cited ("The legislative history makes clear that the motivation for the anti-SLAPP statute was vexatious, private lawsuits, especially ones filed by developers to prevent local opposition to zoning approval").

[10] Examples of taxable costs include filing fees; certain small daily fees (five dollars per day in court, up to fifteen dollars maximum); travel by the plaintiff or defendant in "such sum as the court may allow," G. L. c. 261, § 23; and witness fees for trial, G. L. c. 261, §§ 9, 11; G. L. c. 262, § 29

Motor Co., 413 Mass. 320, 322 (1992). The developer contends that "costs" should not be so limited but rather should be read broadly to include, among other things, the costs of experts, attorney's fees, and damages caused by delay during the pendency of the appeal. We conclude that neither party is fully correct. The bond provision's use of "costs" allows for a bond securing certain nontaxable litigation costs like those recoverable under G. L. c. 93A, which includes the costs of experts but, in the absence of any explicit authorization, does not extend to include attorney's fees, carrying costs, or other delay damages.

We begin by acknowledging that "[t]he usual rule in Massachusetts is that the litigant must bear his own expenses," an approach known as the "American Rule." Waldman, 413 Mass. at 321-322, quoting Linthicum v. Archambault, 379 Mass. 381, 389 (1979). Thus "[a] successful litigant may recover the actual, reasonable costs of the action," and not just the taxable costs, "only if 'a statute permits awards of costs . . . or . . . a valid contract or stipulation provides for costs, or . . . rules concerning damages permit recovery of costs.'" Waldman, supra at 322, quoting Broadhurst v. Director of the Div. of Employment Sec., 373 Mass. 720, 721-722 (1977).

(setting witness fees at six dollars per day, with additional ten cents per mile traveled).

The language of the bond provision refers to "costs," alone and without modification. In Waldman, 413 Mass. at 323, we were tasked with interpreting a similarly unadorned use of "costs" in G. L. c. 261, § 1, the statutory source of the default rule that "[i]n civil actions the prevailing party shall recover his costs, except as otherwise provided." We concluded that the statute only authorized recovery of taxable costs because that was consistent with existing practice, and where "nothing . . . suggest[ed] that the Legislature intended that G. L. c. 261, § 1, reverse the American [R]ule, we assume[d] the Legislature did not intend to do so." Id.

We went on, however, to contrast the codification of the default rule at G. L. c. 261, § 1, with other statutes that authorized more than just taxable costs. In particular, we noted that, where G. L. c. 93A, §§ 9 and 11, authorize recovery of "costs incurred," we have interpreted that to allow recovery of certain nontaxable costs "in order to vindicate the policies" of that statutory scheme. Waldman, 413 Mass. at 324, quoting Maillet v. ATF-Davidson Co., 407 Mass. 185, 194 (1990) (allowing recovery of actual cost of experts). See Linthicum, 379 Mass. at 388-390. The question before us is thus whether G. L. c. 40A, § 17, third par., is merely affirming the background rule, as did G. L. c. 261, § 1, or whether it is an explicit,

policy-driven exception to that rule, as with G. L. c. 93A, §§ 9 and 11.

We conclude that the statute is intended to provide for more than taxable costs. Most persuasive is the maximum amount of the bond contemplated under the statute. Allowing a bond of up to $50,000 strongly suggests that costs in this statute encompass more than taxable costs, as such costs almost never come close to $50,000. Indeed, in the record below and at oral argument, the plaintiffs' counsel conceded that taxable costs are often too low to be worth recovering, because they are outstripped by the legal expense of doing so. Limiting costs in the bond provision to taxable costs would thus render that cap largely superfluous. We instead must choose an interpretation that "lends meaning and purpose" to all the statutory language. DeCosmo v. Blue Tarp Redev., LLC, 487 Mass. 690, 701 (2021).

Moreover, the bond provision in G. L. c. 40A, § 17, is not establishing a default rule as G. L. c. 261, § 1, did. Instead, the bond provision is one component of legislation with a unified policy goal: to expand much-needed housing throughout the Commonwealth, in part by deterring frivolous appeals and the delays they cause in construction. See Zoning Bd. of Appeals of Amesbury, 457 Mass. at 761. See also St. 2020, c. 358, § 2A. To vindicate these policy aims, the bond provision logically must be "a statutory exception to th[e usual] rule" and must

authorize a bond securing more than mere taxable costs. Linthicum, 379 Mass. at 389. To hold otherwise would undermine its purpose; because taxable costs are typically small, a correspondingly small bond would not provide any significant deterrent to meritless claims.[11] See College Hill Props., LLC, 465 Mass. at 139. Cf. Polanco v. Sandor, 480 Mass. 1010, 1012 (2018) ("[A] principal purpose of [the bond provision in medical malpractice appeals] is to deter plaintiffs from going forward with unmeritorious claims. . . . Allowing a plaintiff to proceed on [a nominal bond amount] effectively ignores the deterrence intent of the statute").

Nevertheless, a review of other statutes authorizing costs, fees, and delay damages leads us to conclude that the "costs" secured by a bond issued pursuant to G. L. c. 40A, § 17, third par., are not nearly so expansive as the developer claims. We return to our initial textual point: the statute only says "costs." It does not authorize a bond to secure attorney's fees, delay damages, or even "all costs."[12]

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[11] That costs are ultimately available only for appeals brought or conducted in bad faith or with malice further suggests that more than ordinary taxable costs are covered, as graver misconduct calls for greater deterrence.

[12] The bond provision does include "harm to the defendant or to the public interest resulting from delays" as a consideration in the balancing test governing whether to order a bond but not in any definition or explanation of the included "costs." For

This choice of wording is telling. There are numerous examples of the Legislature providing more expansive language when it intended to authorize more expansive recovery. For example, G. L. c. 93A, § 11, enables recovery of not just costs but also, explicitly, "reasonable attorneys' fees." General Laws c. 231, § 6F, provides for not only "costs" but also "expenses" and "counsel fees." Likewise, another land use statute, G. L. c. 40R, § 11 (h), authorizes a bond that includes "an amount sufficient to cover the defendant's attorney[']s fees."[13] See Matter of the Estate of King, 455 Mass. 796, 802 (2010) (explaining that G. L. c. 215, § 45, separately authorizes "costs" and "expenses," latter of which includes attorney's fees under historical Probate Court practice).

This deliberate choice of language is not just confined to attorney's fees. The Legislature has also used specific language to authorize recovery of delay damages and other expenses. General Laws c. 40R, § 11 (h), for example, spells out that a prevailing party can claim "carrying costs." The statute governing appeals from variances in the city of Boston is also explicit in allowing awards of "damages and costs." St.

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reasons discussed infra, we reject the developer's argument that it implicitly authorizes delay damages as part of costs.

[13] The statute governing bonds in medical malpractice cases also expressly defines the costs secured as "including witness and experts fees and attorney[']s fees." G. L. c. 231, § 60B.

1956, c. 665, § 11, as amended by St. 1993, c. 461, § 5. Cf. Mass. R. A. P. 25, as appearing in 481 Mass. 1654 (2019) (in case of frivolous appeal, court may award both "costs" and "just damages" to appellee).

"[T]he Legislature has demonstrated that, when it intends to" authorize recovery of attorney's fees or delay damages, "it knows how." Protective Life Ins. Co. v. Sullivan, 425 Mass. 615, 621 (1997). In particular, awarding delay damages of the type the developer seeks -- increased price of materials, increased construction and carrying costs, and financing costs caused by rising interest rates -- would represent a marked departure from the American Rule, and we would expect such a consequential change to be clearly presented in the text.[14] See Waldman, 413 Mass. at 323. No such clear language exists in the bond provision, and we decline to read any in it. See National Lumber Co. v. United Cas. & Sur. Ins. Co., 440 Mass. 723, 727 (2004); Resendes v. Boston Edison Co., 38 Mass. App. Ct. 344, 354 (1995) ("We decline to imply language which the Legislature has omitted, particularly where, unlike here, the Legislature has expressly provided [for as much] elsewhere in the general laws" [citation and alteration omitted]).

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[14] Those costs could far outstrip the $50,000 bond limit. Indeed, in the instant case, the developer estimates costs totaling $250,000.

The more difficult question is what "costs" beyond "taxable costs" are recoverable. We believe that our treatment of "costs" recoverable under G. L. c. 93A provides the correct measure. By that measure, recoverable costs include the "actual, reasonable costs" directly incurred by litigating the appeal, Waldman, 413 Mass. at 322, the most significant of which often will be expert witness fees, see Maillet, 407 Mass. at 194; Linthicum, 379 Mass. at 389. In the instant case, the developer claimed that it would "also incur significant additional consultant fees (engineering, traffic, environmental) in order to provide testimony during the course of the litigation." We conclude that these consultant fees are also reasonable recoverable costs.[15] These fees could easily amount to or exceed $50,000. This broader set of recoverable costs leaves the bond provision with some deterrent bite and is aligned with the $50,000 limit but does not entail reading in language that is not there by authorizing attorney's fees or delay damages.

[15] We have, however, excluded jury consultant fees from recoverable costs under G. L. c. 93A. See Sullivan v. Five Acres Realty Trust, 487 Mass. 64, 76 (2021). A "luxury service," like a jury consultant, is plainly different from the engineering, traffic, or environmental experts or consultants required to address the claims brought by the plaintiffs in the instant case. See id.

d. Decision to order a bond. Finally, we examine the Superior Court judge's decision to order a $35,000 bond. Because under the bond provision the decision to order a bond rests with "[t]he court, in its discretion," G. L. c. 40A, § 17, third par., we reverse only if that discretion is abused. "A decision constitutes an abuse of discretion where it results from 'a clear error of judgment in weighing the factors' and consequently 'falls outside the range of reasonable alternatives.'" Commonwealth v. Herring, 489 Mass. 569, 573 (2022), quoting L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014).

We conclude that a remand is required. Although the $35,000 bond may have been justifiable here, the judge did not have the benefit of this decision, and we cannot discern from the ruling how the judge applied his discretion. In particular, it is not clear what costs he considered, as the developer's analysis, which the judge adopted, defined costs broadly to include attorney's fees and costs of delay, which we conclude in this decision are not covered, as well as the costs of experts, which we conclude are recoverable. The consideration of costs is important, especially because the financial burden to secure a $35,000 bond is by no means negligible, and comparison of "the relative financial means of the plaintiff and the defendant" is necessary. See G. L. c. 40A, § 17, third par.

Without further explanation from the judge, we also cannot discern whether he concluded that the claims are so devoid of merit as to support a reasonable inference of bad faith or malice. Such a possibility may exist here given the limited legal argument and factual support presented by the plaintiffs. For example, the plaintiffs provided no legal support to contradict the developer's explanation that the site control issue had been properly determined by the subsidizing agency as provided by Board of Appeals of Hanover, 363 Mass. at 378, and 760 Code Mass. Regs. § 56.04(6), or that the comprehensive permitting process allows the overriding of local zoning requirements for the reasons stated by the board even when the ten percent requirement is met, see Taylor v. Housing Appeals Comm., 451 Mass. 149, 151 (2008) ("achievement of the ten per cent statutory minimum does not deprive a local zoning board of appeals of the ability to grant additional comprehensive permits to developers seeking to construct low or moderate income housing"). Finally, the sole affidavit provided in response to the developer's motion for the bond included only conclusory statements regarding unaddressed impacts on the plaintiffs' properties from the project. At the same time, however, the developer had incorrectly argued that bad faith or malice did not figure into the analysis, and the judge's order adopted the developer's arguments more generally.

Consequently, on remand the judge should apply the standard we have explicated here explaining whether he found the claims so devoid of merit as to support an inference of bad faith or malice. He should also expressly weigh "the harm to the defendant or to the public interest resulting from delays caused by the appeal" and explain whether that "outweighs the financial burden of the surety or cash bond on the plaintiffs." See G. L. c. 40A, § 17, third par.

In sum, a remand is required, as the judge's ruling predates our decision clarifying the standards for the issuance of the bond, and we cannot determine, based on the judge's limited explanation, whether he properly exercised or abused his discretion in ordering the $35,000 bond.

3. Conclusion. For the foregoing reasons, we conclude that the bond provision in G. L. c. 40A, § 17, applies to appeals from comprehensive permit approvals issued under G. L. c. 40B, § 21, but a remand is required to determine whether a $35,000 bond should have been issued to secure costs in the instant case. We therefore vacate the bond order of the Superior Court and remand for further proceedings.

So ordered.