

*Franklin Sales & Marketing, LLC, v. Town of West Warwick*, C.A. No. KC-2021-0608 (Kent, S.C., filed March 2, 2022),  
<https://www.courts.ri.gov/Courts/SuperiorCourt/SuperiorDecisions/21-0608.pdf>

**Key Takeaways:**

- Municipalities filing appeals of permit approvals will likely toll the expiration of such permit approvals.
- To invoke the defense of laches, the moving party must provide fair explanation for the delay beyond mere allegations included in a Complaint.

**Holding:**

The filing of an appeal of a land use development permit tolled the expiration of such permit and its related approvals.

Kent Superior Court (“the Court”) denied Franklin Sales’ Motion for Summary Judgment because there was a genuine question of material fact as to whether Franklin Sales had “a fair explanation” for a decade-and-a half of relative inaction with respect to certain permit approvals sufficient to warrant the defense of laches.

**Facts:**

Franklin Sales owned several parcels of land in the towns of West Warwick and East Greenwich on which it planned to develop a 62-unit residential community.

To begin development, Franklin Sales first needed to obtain Master Plan Approval, a Special Use Permit, Preliminary Plan Approval, and Final Plan Approval.

Accordingly, Franklin Sales obtained Master Plan Approval in June 2004, a Special Use Permit in January 2006, and Preliminary Plan Approval in February 2006. The Master Plan Approval, Special Use Permit, and Preliminary Plan Approval, (together, “the Approvals”) had anticipated expiration dates of January 5, 2007, February 22, 2007, and February 6, 2008, respectively.

In March 2006, prior to receiving Final Plan Approval, the Town of East Greenwich filed an administrative appeal in Kent County Superior Court (“the Appeal”) regarding the Special Use Permit granted by the Zoning Board. East Greenwich took no further action for fifteen years.

In July 2021, Franklin Sales moved to dismiss the Appeal for lack of prosecution, and the Appeal was finally dismissed by Consent Order in October 2021.

In April 2021, Franklin Sales requested the Town of West Warwick concur with its opinion that the Appeal tolled the Master Plan Approval and Preliminary Plan Approval vesting periods. West Warwick’s Town Solicitor disagreed, stating that both approvals had expired.

Accordingly, Franklin Sales filed a single-count declaratory judgment action requesting that the Court find that the Appeal tolled the Approvals upon filing on March 10, 2006. Franklin Sales moved for summary judgment, which the Town of Warwick contested.

### **Analysis:**

The Court denied Franklin Sale's summary judgement motion, finding existing issue of material fact, but concluded that the Appeal did, in fact, toll the Approval's expiration.

In its analysis the Court relied heavily on a holding from Tantimonico II (Holding 2). Under Tantimonico II, the filing of an appeal that questions the legality of a permit will "act as a brake" against the requirement of activating such permit. *See* Franklin Opinion at 5. In other words, "***the filing of the adverse appeal itself triggers the tolling of the permit or approval.***" *Id.* at 9 (emphasis added).

Here, Franklin Sales argued that the Appeal tolled the two-year vesting periods of the Approvals because an adverse decision on the Appeal would cancel the benefits of their Approvals.

West Warwick, on the other hand, argued that under a separate holding of Tantimonico (Holding 1), Franklin Sales must have either begun substantial construction or incurred substantial obligations to earn the protections of the "brake." Because Franklin Sales had not satisfied either of these necessary conditions, the "brake" did not apply. Second, even if the Appeal had tolled the Approval's expiration dates, the length of time for such a "brake" was unclear, and it was "illogical and unrealistic for Franklin Sales to expect a brake to last for 15 years." *Id.* at 10.

The Court rejected West Warwick's first argument, finding Holding 1 applicable to "entirely different sets of factual circumstances" than those here, (namely, where there are zoning ordinance amendments affecting already approved permits), rather than a necessary precondition to receiving the benefits of Holding 2. *See* Franklin Sales at 8-9. Thus, applying Holding II, the ***Court agreed that the filing of the Appeal itself was sufficient to toll the Approval's expiration.*** However, ***the length of time such expirations were tolled remained unclear*** based on existing case law. Thus, the Court analyzed the common law defense of laches for guidance as to when exactly the "brake" is lifted.

Critically, to establish laches, the asserting party ***must provide a fair explanation of the reason for the delay.*** *Id.* at 12.

Here, because the Court could not rely merely on allegations in the Complaint or written or oral argument, there existed a genuine issue of material fact as to whether Franklin Sales possessed a ***fair explanation*** of the reason for its delay in moving forward with the Approvals. Thus, the Court denied Franklin Sales' summary judgment motion, finding a trial necessary to resolve the dispute.

### Tolling Statute

The Court also held that the R.I. Tolling Statute, 45-23-63.1 applied to the Approvals.

Here, West Warwick argued that the Tolling Statute did not apply because the Approvals had expired before November 9, 2009. *See* Section 45-23-63.1(c) (“tolling shall apply only to approvals or permits in effect on November 9, 2009, and those issued between November 9, 2009, and June 30, 2017, and shall not revive expired approvals”).

The Court disagreed. Applying Holding 2, the Court held that the Appeal placed a brake on the expirations of the Approvals, thus preventing their expiration before November 9, 2009, and keeping them within the ambit of 45-23-63.1. Still, under the Tolling Statute, the tolling period ended in November 2017. Thus, the Approvals would have expired by March 2018, even after applying the Tolling Statute.