To be argued by
James G. Sweeney
Time Requested: 15 minutes

Supreme Court

State of New York
Appellate Division - Second Department

Docket No.
2015-00095

Monroe Equities LLC,

Claimant-Appellant,

against

The State of New York State,

Defendant-Respondent.

REPLY BRIEF OF CLAIMANT-APPELLANT

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December 23, 2015

Court of Claims No. 121673

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INTRODUCTION

The following is the Appellant's (Equities) brief submitted in reply to the Respondent's (the state) answering brief. These reply arguments will respond only to the new matters raised by the state, i.e. the timeliness of this action; the issue of proof preclusion, and the "background principles of state law" exception to *Lucas* liability.[1]

The state was a complete victor in the court below achieving a full dismissal of Equities's claim. It is not an "aggrieved party" and could not appeal any aspect of that ruling to it disagreed with. The state's new arguments made in its answering brief come to this Court under the authority of what has been termed the "sore winners" doctrine set out in *Parochial School Bus Systems*.[2] They will be addressed in that order.

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[1] *Lucas v. South Carolina Costal Council,* 505 U.S. 1003 (1992) hereafter only *Lucas.*

[2] *Parochial School Bus Systems, Inc. v. Board of Education,* 60 N.Y.2d 539 (1983) hereafter only *Parochial School Bus.*

REPLY ARGUMENTS

1. Equities' claim is not time barred. There is no statute of limitations with respect to the unconstitutional effects of a statute as opposed to the unconstitutional commission of a tort. Moreover, the State has waived any statute of limitations defense.

A. There is no statute of limitations in New York applicable to a wrong occasioned by the unconstitutional impact of statute as opposed to a discrete unconstitutional act of a state or municipal official or agency.

The state correctly summarizes the law in New York with respect to the doctrine of a continuing wrong that may - or may not - be employed to toll the applicable statute of limitations. Summarized briefly, the doctrine may not be employed to avoid the continuing effects of earlier wrongful conduct.

But that is not the situation here and, besides, Equities has never argued the classic continuing wrong theory.

The wrong here is not the conduct of a state official or agency. It is not a tortuous act committed by a state official or agency - overt or covert - made on behalf of the State that Equities complains of.

The wrong here is far above that. The wrong at issue is embedded in the impact of a policy decision made by the Legislature. It is the unconstitutional impact upon Equities' land - a *per se* taking - caused by a piece of state legislation (PHL §1100) that has resulted in Equities' loss. No discrete act of a state officer or official or a state administrative agency has caused Equities' loss.

In such a case there is no statute of limitations. And there is no need or cause to resort to the contours of the continuing wrong doctrine.

This rule was well stated by this Court in the seminal *Amerada Hess* case.[3] In *Amerada Hess* this Court articulated the rule as follows:

> However, "no period of limitation at all is applicable to an action for a declaratory judgment in cases involving a continuing harm, such as the application of an invalid statute" (1 Weinstein-Korn-Miller, NY Civ Prac, par 213.02). In this regard, the case of *MacEwen v. City of New Rochelle*, 149 Misc. 251, 267 N.Y.S. 36, which was decided in 1933 when the residuary Statute of Limitations was 10 years (Civil Practice Act § 53), is particularly instructive. In *MacEwen*, the plaintiff alleged, inter alia, in a declaratory judgment action, that

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[3] *Amerada Hess Corporation v. Acampora,* 109 A.D.2d 719, 722 (2nd Dept., 1985).

> the New Rochelle zoning ordinance, although presumptively valid, (1) was arbitrary, discriminatory and unreasonable and (2) deprived her of her property without due process of law, insofar as it placed that property in a residence A district, thereby forbidding the use thereof for an apartment or multi-family house. The court in *MacEwen* (*supra*, p. 254, 267 N.Y.S. 36), citing as its authority the decision of the Court of Appeals in *Dowsey v. Village of Kensington*, 257 N.Y. 221, 228, 177 N.E. 427, noted:
>
> > "viewing the ordinance for the moment as invalid a fair argument may be made that until its repeal, or a judicial declaration of its invalidity, the same constitutes at least the equivalent of a continuing invasion of plaintiff's property rights akin to a continuing trespass - a situation in which a new cause of action arises in plaintiff's favor against the defendant city each day" (*cf. Gignoux v. Village of Kings Point*, 85 N.Y.S.2d 675, affd. 274 App.Div. 1003, 85 N.Y.S.2d 516).

This rule was perhaps best stated by the First Department in *Lutheran Church v. City of New York* some years earlier.[4] In that important case testing the City's landmark preservation law as applied to the plaintiff's church the court, quite pointedly, said, "The exercise of a power which offends the Constitution may be attacked at any

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[4] *Lutheran Church v. City of New York*, 27 A.D. 2d 237, 239 (1st Dept., 1967), aff'd after remand 35 N.Y.2d 121, 126 (1974).

time" and was not barred by a statute of limitations.[5] The federal district courts in New York relying on *Amerada Hess* have also recognized this rule.[6]

The point to be made here is that unlike the traditional application of the continuing wrong doctrine used to toll a statute of limitations and employed in cases of a specified and discrete wrongful act of a government official or agency the injury here is the result of a long standing enactment of a law - a policy decision - that has unconstitutional impacts on its object. There is no earlier discrete "conduct" of some person or agency at hand that could be deemed continuing for some reason. It is the state statute and its implementing regulations as applied to these lands that are the fountainhead of this injury. It is the exercise of the State's power that is at issue here not the discrete acts of state officials or agencies acting on behalf of the

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[5] See also *Piedra v. New York State Division of Parole*, 2010 WL 8751484, *2 (Sup. Ct. Bronx Co., 2012) and *Asian American For Equality v. Koch,* 128 A.D.2d 88, 135 (Carro J. in dissent) (1st Dept.,1987) ["It is well known that the exercise of a power which offends the Constitution may be attacked at any time."]

[6] *Greene v. Town of Blooming Grove,* 1998 WL 126877, *4 (SDNY, 1998), rev'd in part on other grounds 879 F.3d 1961 (2nd Cir., 1989). See also *Deepwell Estates, Inc. v. Incorporated Village of Head of the Harbor,* 973 F.Supp. 338, 346-347 (EDNY, 1997).

State. That makes a difference and the difference is, as the First Department said in *Lutheran Church*, that the exercise of state power such as this "may be attacked at anytime."

This only makes sense as it is ill conceived to say that a law or statute that has unconstitutional impacts is somehow insulated from attack as such and transformed into a constitutional enactment by reason of the mere passage of time. Such a notion is anathema to our whole constitutional system. There is no statute of limitations to be applied here and when Equities' cause of action accrued is of no moment.

B. In any event, the State has waived any statute of limitations defense.

Quite aside from the applicability - or inapplicability - of a statute of limitations in this situation, the State has waived that defense in any event and the court below was correct to so hold.

(1) The Defense is waived under CCA §11(c).

CCA §11(c) seems to be directly on point. A statute of limitations defense based on the time limits of CCA §10 is waived by the State unless raised either by a motion to dismiss made before

service of an answer or unless set forth in the State's answer. This section is virtually the same as CPLR §3211(3) and the result should be the same.[7]

(2) The need not answer clause of Rule 206.7(a) does not obviate the waiver provisions of CCA §11(c).

Here, the State deliberately chose not to answer the claim. Instead it consciously chose to rely on the exception clause of Rule 206.7(a) applicable to appropriation claims. Accordingly, the allegations of Equities' claim are denied.

But the State chose not to interpose any affirmative defenses at all and never made a pre answer motion to dismiss based on the defense of statute of limitations. It could have answered but chose not to even after being queried by Equities' counsel many months after the normal time to answer had expired. So too it could have moved to dismiss the claim on timeliness grounds. But it didn't. But *17 months* after the claim was filed the State, for the first time, raised a statute of limitations defense in its cross motion to dismiss. It should be precluded from doing so.

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[7] The background to Section 11(c) is explored at length in *Sinacore v. State,* 176 Misc.2d 1 (Ct. Clm., 1998).

The deemed denied clause has nothing to do with the interposition of necessary affirmative defenses. Necessary affirmative defenses stand completely apart from denials. It is axiomatic, and in no need of citation of authority, that necessary affirmative defenses must be plead and proved. The State could have made a motion to dismiss based on the defense soon after the claim was filed. But no, it deliberately chose to do nothing. And by that inaction it attempted to lull Equities into a false sense of security about having to face the defense. But that "slumber tactic" will not work. The State must now live with the consequences of its deliberate choice. It waived any statute of limitations defense - if any there be.

Oddly, in its timeliness arguments the State spends a great deal of time in trying to evade this critical issue by attempting to cast the burden of seeking relief from the statute of limitations on Equities. The State has it backward. The burden is in the State to explain away why it never raised timeliness as an affirmative defense. It can't do that and that failure is fatal to its arguments.

This Court should recognize that *any* timeliness defense was waived and the court below was correct to so hold.

2. The state's Rule 206.21 (preclusion) argument is wrongly presented to the Court, and fails on its merits.

A. The court below never "determined" that Equities' proofs of economic idleness caused by the watershed regulations were precluded under rule 206.21. Thus, that court's failure to dismiss Equities' claim because of a failure of proof is not properly before this court.

The state has invoked the rule of *Parochial School Bus* as a platform for placing its timeliness and Rule 206.21 arguments before the Court notwithstanding it was completely successful in the lower court.

However, the rule of *Parochial School Bus* preserves for review by a non aggrieved party, such as the state, only a "determination incorrectly rendered below".[8] Here, the state admits that the court below did not make a determination on the Rule 206.21 issue. And it is clear from the language of the court itself that it did not (". . .the court need not reach [the rule's] effect on this case. . ."). Thus, this question - even assuming the truth of the state's argument - is simply not properly before this Court. It falls outside of the rule of *Parochial School Bus*.

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[8] *Parochial School Bus* at 60 N.Y.2d 545.

B. The state cannot show that Rule 206.21 would, of necessity, result in a preclusion of Equities' proofs of economic idleness. Quite the contrary is true.

The state's preclusion argument is bottomed on the presumption that the Petroccione factual affidavit - utterly unrefuted by any professional opinions - would, of necessity, be precluded on trial and thus cannot support Equities' motion. This categorical conclusion ignores the layers of discretion contained in Rule 206.21 vested in the trial court which may well be exercised in these very early pre-trial circumstances, assuming also the Petroccione affidavit is the same as a "report" contemplated by the rule.

The argument also ignores that the state has not offered a single word by a professional to refute the cold hard facts in that affidavit demonstrating economic idleness and recognized as such by the court below. And, finally, the argument ignores the fact that the state was aware of each and every fact contained in the Petroccione affidavit as far back as March 2012 when the same affidavit was used to support Equities' motion for summary judgment in its initial action for a declaratory judgment and monetary relief in the supreme court.[9] The

[9] Orange County Supreme Court Index No. 4037/2011.

elements of discretion contemplated by the rule, i.e., the lack of any prejudice to the state, seem to abound.

The state's Rule 206.21 preclusion arguments should be seen for what they really are, a last ditch effort to avoid the real issue at hand, the total isolating impact of its watershed regulations on Equities' lands which the state cannot deny and hasn't even tried to deny.

3. The state's residual value arguments fail. Speculative value is not the test of *Lucas* for determining current economic idleness, and the Assistant Attorney General - an attorney - misreads the Petroccione affidavit authored by a professional as to the totality of such idleness in these circumstances.

A. Speculative value is not the test of current economic idleness under *Lucas*.

The state advances a "speculative value" argument in an effort to defeat Equities' professional observations via the Petroccione affidavit showing total economic idleness occasioned by the watershed regulations. It argues that some future condition can be speculated about that could restore the property economic value. The state posits the example of the possibility that the Town of Monroe

could extend the nearby sewer system and render the prophylactic effect of the regulations meaningless - and the property valuable once again.[10]

But speculative value is not the test under *Lucas*. The test is the deprivation, by reason of the application of the questioned regulation, of "all economically beneficial uses" leaving the claimant's property "economically idle".[11] Guessing about what conditions a speculator may envision for the property in the future does not address the fact that currently - in the present - this regulation as applied effectively render the property economically idle. That is the test. Not what may or may not happen in the future. Anything can happen in the future but that does not mean that it will happen and the state has adduced no proof that it will.

More to the point the state has not cited a single authority that says some type of speculative value defeats a *Lucas* categorical taking claim. The test is what has happened by reason of the regulation not

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[10] This despite Equities' repeated - and rejected - attempts to have the Town do just that.

[11] *Lucas* at 505 U.S. 1019.

what might happen if the regulation is somehow abrogated or diluted in the future whereby the property may regain the value it has currently lost by reason of the current application of the regulation. This is a false and unsupported argument and should be rejected.

B. The assistant attorney general is not a professional and his questioning of the professional Petroccione's hard facts is without merit - and wrong.

For the first time - on this appeal no less - the state attempts to refute the hard facts set forth in the Petroccione affidavit. And it does so in a brief authored by an attorney, not a professional with Petroccione's qualifications. The assistant attorney general who authored the state's answering brief in this matter is not an engineer. He is not a land use planner. He is not familiar with the Town of Monroe or its zoning law. He has never visited or walked the property. He is a non entity when it comes to assessing the conditions of this property and whether is has been rendered "economically idle" by reason of the application of the state's watershed regulations. On these grounds alone his observations about the Petroccione facts should be disqualified.

Aside from this glaring fact the assistant attorney general is just

wrong when he attempts to assess and refute the Petroccione facts. He attempts to paint the property as possibly being suitable for agricultural uses despite the fact that Petroccione says - categorically - in his professional opinion because of the property's soil and topographical conditions it is not.[12] Next he suggests that the property could be overgraded with new top soil or leveled off to render it agriculturally productive without ever discussing the massive cost associated with such a huge enterprise, assuming such could be accomplished at all on this extremely rocky and steep property, thereby rendering the it totally uneconomical.[13] Lastly he suggests that the property could be used for recreational purposes by the public or possibly sold to the state as part of the adjoining Sterling Forest State Park or some other unnamed public conservation agencies. This idea of residual recreational value was urged by Justice Blackman in

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[12] Petroccione affidavit ¶15 at R-51. Besides, foresting or tree harvesting is not a permitted or specially permitted use in this zoning district of the Town of Monroe - even if it were feasible on this difficult site. See the list of such uses in the Petroccione affidavit in FN 6 at R-51.

[13] This fantastical comment reflects the assistant attorney general's utter lack of knowledge about the geo-physical characteristics of this land.

his *Lucas* dissent to defeat the claim.[14] It was rejected by the majority as constituting an indicia of retained value sufficient to defeat a *Lucas* claim. The *Lucas* majority saw this result as something akin to pressing the affected land into some form of public service under the guise of mitigating serious public harm" but without just compensation.[15]

All in all the assistant attorney general's poorly put late attempt to refute the Petroccione facts set out in his brief is both unprofessional and wrong and should be ignored by the Court.

4. The state's argument that the state's police power allowing it to protect against condemnation of public water supplies is, of itself, a "background principle" of New York law foreclosing *Lucas* liability avoids the true question at hand, i.e. was the prohibitory regulation itself a background principle when it was adopted in 1920.

In replying to Equities' argument that neither of the exceptions to *Lucas* apply, i.e., that at the time the challenged regulation was promulgated in 1920 it was either (i) already embodied in the state's existing law of nuisance, or (ii) it was already part of the state's

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[14] *Lucas* at 505 U.S. 1044.

[15] *Lucas* at 505 U.S. 1919 and its FN 8 read together.

existing background principles of law, the state concentrates on the later exception the state virtually admits that New York's law of nuisance, in any of its iterations, in 1920 did not specifically prohibit the mere installation and operation of a well maintained septic system within 300' of a public water supply or its tributaries. Instead, the state focuses on the later exception, the background principles of law exception.

In its quest to convince the Court that the watershed regulation under attack was, in 1920 when it was adopted, already part and parcel of the state's background principles of state law, the state cites case after case from all jurisdictions proclaiming that government - federal, state or local - has the ability under its police power to prevent the contamination of public water supplies by way of appropriate legislation.[16]

There is no question that any government has the police power to protect the populous against the contamination or pollution of public water supplies. And government has had that power since time

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[16] In this regard it cites but one New York case, *City of New York v. Kelsey,* 158 A.D. 183 (2nd Dept., 1913), aff'd 213 N.Y. 638 (1914).

immemorial, long before 1920. Equities does not argue otherwise. But as sound as that rock bottom principle of law is it does not answer the question at hand.

The question before the Court is whether, in 1920, when it was promulgated this discrete watershed protection regulation against placing *any* septic system of *any* kind, no matter how well operated or maintained, within 300' of a public water supply or its tributaries was already a background principle of this state's common law. If it was, Equities' claim is defeated under the second exception to *Lucas* liability. If not, that exception does not apply.

The state cannot, and does not, point to any case law or to any rule or regulation existing before 1920 that in any way prohibited or limited in some way the mere placement and operation of a well maintained septic system within 300' of a public water supply or its tributaries. None! That the state by employing its police power could have enacted some law or promulgated a regulation to that effect as of 1920 is not disputed. But it didn't!

That the courts of this state could have ruled that the simple placement and operation of a well maintained septic system within

300' of a public water supply or its tributaries was somehow, in and of itself, an objectionable and stoppable nuisance is not doubted. But they didn't![17] (Of course, under the state's existing law of nuisance a malfunctioning septic system that was leaking leachate into the water supply could be enjoined by the courts.)

Taken to its logical end the state's argument in this respect suggests that any *potential* use of the state's police power in any area amounts to a background principle of its law. In short, the state argues that the police power in and of itself even if unexercised, theoretical or unused is a background principle of state law that precludes recovery under *Lucas*. Surely, that nebulous unbridled concept of background principles of state law was not what the Supreme Court had in mind in *Lucas* or *Palazzolo*.[18] If it were there never could be a successful *Lucas* claim and that landmark decision would be without meaning.

Furthermore, to argue, as the state and some scholars seems to,

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[17] It appears the closest that government and the courts came to such a position was in the *Kelsey* case involving cemeteries in the vicinity of public water supplies - but not septic systems which were legion in 1913.

[18] *Palazzolo v. Rhode Island,* 533 U.S. 606 (2001).

that the 1920 regulation itself was somehow a background principle of state law is self defeating and circular. How can the regulation be a "background" principle? It cannot be prior to itself. It cannot act as a bootstrap to pull itself up with. This argument doesn't make any sense.[19]

Thus, the state's attempt to pull this case within the exceptions to *Lucas* liability just doesn't work. It has pointed to nothing that demonstrates that the simple placement and operation of well maintained septic system within 300' of a public water supply or its tributaries was already prohibited or constrained in some way by New York's law of nuisance or was already a "background principle" of its common law as of 1920. Thus, the state's attempt to explain away *Lucas* liability in this particular instance fails.

CONCLUSION

In 1920 the state, on behalf of the Village of Monroe, promulgated a regime of regulations intended to protect the watershed of the Village's reservoir, Mombasha Lake, located far outside its

[19] The circular nature of this argument is explored at length in Equities' main brief at pp. 22-27 and will not be further expounded on here.

boundaries. The Village had no extraterritorial power to do so on its own. The concept and purpose of the regulations were - and remain - eminently worthwhile. But the impact of the regulations with their all encompassing 300' sanitary buffer has the effect of sterilizing - completely - any productive or economic use of this claimant's land allowed by law. Any! Thus, Equities lodged its *Lucas* total taking claim.

The state now argues the claim is time barred - but it never plead timeliness in its responsive pleading. Indeed it didn't even deign to file a responsive pleading. But, in any event, the passage of time - no matter how long - eradicates a claim that a statute or regulation is unconstitutional or as applied results in an uncompensated taking. Besides in taking the course of action it did, the state waived any timeliness argument.

The state now attempts to refute the hard facts presented by Equities that its watershed regulation eviscerated any economic value for its land. The very attempt to do so is questionable under the rule of *Parochial School Bus*. But, in any event, it does so too late and does so by way of the statements of a completely unqualified person -

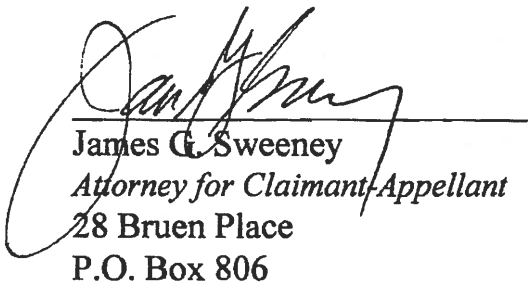
its lawyer - in its brief no less. In that light Equities' facts attesting to the economic isolation of its land stand unimpeached.

Lastly, the state attempts to show that the 1920 watershed regulation was part and parcel of the "background principles of state law" when it was put in place that year. But it cannot point to a single judicial ruling or administrative regulation in place at that time proclaiming that the simple placement and operation of a well maintenance septic system within 300' of a public water supply or its tributaries was somehow prohibited by law, rule or regulation. How then could the 1920 regulation be a "background" principle of state law? It defies sense to say that it was.

All of the state's answering arguments should be rejected and the decision below should be reversed for the reasons set forth in Equities' main brief.

Dated: Goshen, New York
December 23, 2015

Respectfully submitted,
James G. Sweeney, P.C.



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Dated: Goshen, New York
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