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COURT OF APPEALS

STATE OF NEW YORK

CAPRUSO, ET AL.,

Respondents,

-against-

VILLAGE OF KINGS POINT,

No. 102
(Action No. 1)

Appellant.

STATE OF NEW YORK,

Respondent,

-against-

VILLAGE OF KINGS POINT,

(Action No. 2)

Appellant.

20 Eagle Street
Albany, New York 12207
May 1, 2014

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

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Karen Schiffmiller
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: We're going to start
2 with number 102, Capruso v. Village of Kings Point.

3 Counselor, you want any rebuttal time?

4 MR. BRICKMAN: If I may reserve three
5 minutes, Your Honor?

6 CHIEF JUDGE LIPPMAN: Three minutes,
7 absolutely you can.

8 MR. BRICKMAN: May it please the court, my
9 name is John Brickman for the Village defendants.
10 Your Honors, the Village purchased the great swamp
11 and trenches in 1927, with the design to create Kings
12 Point Park. And history shows that the Village
13 promptly and intentionally carved out a piece then
14 for nonpark purposes.

15 JUDGE READ: Does your - - - does your
16 argument, Mr. Brickman, depend on the lease
17 reservation or would you have - - - would you say you
18 win anyway, because you carved this piece out
19 initially?

20 MR. BRICKMAN: Judge Read, I would say we'd
21 win in either event. I think the lease reserva - - -
22 reservation and in particular, the action of the
23 Village Board at the June 18, 1946 public meeting
24 authorizing the lease reservation, each of that - - -
25 and the use for a decade or so before then - - - each

1 provides an independent basis - - -

2 JUDGE SMITH: You - - - you say you carved
3 out a precise piece, 5.4 acres or something like
4 that?

5 MR. BRICKMAN: Yes, yes, Judge Smith.

6 JUDGE SMITH: And when - - - what - - -
7 what, other than the lease reservation, tells us that
8 it was a 5.4 acre area that was carved out?

9 MR. BRICKMAN: Well - - - well, Judge, what
10 tells us what precisely the 5.44 acres was, is the
11 June 1946 Village board resolution, followed by the
12 July 1, 1946 lease amendment.

13 But I think Your Honor raises a rather key
14 point with respect to what the 1938 lease says. And
15 if I may quote, it's at page 368 of the record,
16 paragraph 10 of the original - - - at least, the
17 original, in terms of the record - - - 1938's lease
18 says, "The lessor reserves the right to use the
19 dumping area in said premises for dumping ashes,
20 clean refuse and waste material from the Village of
21 Kings Point".

22 JUDGE SMITH: Well, but apart from
23 everything else, how does that - - - I mean, you
24 didn't dump on 5.4 acres?

25 MR. BRICKMAN: No.

1 JUDGE SMITH: This isn't a 5.4 acre dump in
2 there.

3 MR. BRICKMAN: That's correct, Your Honor.
4 But 5 - - -

5 JUDGE SMITH: So I guess, I mean - - - I -
6 - - apart from that, what - - - what tells you that
7 that was the area that you said that those 5.4 acres
8 were nonpark?

9 MR. BRICKMAN: Judge, we don't know that,
10 and that's precisely why there has to be a statute of
11 limitations of six years.

12 JUDGE GRAFFEO: Well, how - - - how does -
13 - - how does the language that you just read, using
14 it for dumping purposes, mean that it's still not
15 parkland?

16 MR. BRICKMAN: Because it's - - -

17 JUDGE GRAFFEO: I'm - - - I'm trying to
18 determine what's the basis for claiming that - - -
19 that whatever the acreage is, that it's not parkland.

20 MR. BRICKMAN: Because the lease for use as
21 a park was from the Village of Kings Point to the
22 Great Neck Park District. The Great Neck Park
23 District is not like, for example, the New York City
24 Parks Department. It's a - - - it's an entirely
25 separate and inde - - -

1 CHIEF JUDGE LIPPMAN: Yeah, but if it's
2 used - - - if it's used for a different purpose, all
3 this time, assume it's parkland, everything except
4 the little strip that's actually been used, we're now
5 going to say it's not parkland because of the lease?

6 MR. BRICKMAN: No.

7 CHIEF JUDGE LIPPMAN: And that's consistent
8 with the - - - with the public trust doctrine?

9 MR. BRICKMAN: What I'm - - - what I'm
10 saying, Chief Judge Lippman, is that the use was by -
11 - - and this is where the term - - - precise language
12 of the '38 lease bears in. It was for use by the
13 Village of Kings Point for the dumping purpose. And
14 I - - - and I recognize Judge Smith's point, and that
15 is that there's some imprecision as to whether the
16 '38 - - -

17 CHIEF JUDGE LIPPMAN: But what's happened
18 since the lease? What's happened up to now, in terms
19 of the use of the land?

20 MR. BRICKMAN: What's happened - - -

21 CHIEF JUDGE LIPPMAN: The land in question.

22 MR. BRICKMAN: What's happened is that over
23 the years, the Village has added and used a pistol
24 range, a training facility for the Village Police
25 Department, a salt shed. And this all goes back - -

1 - the pistol range after 1946, the salt shed in 1988,
2 a sand pit in the late 1970s - - - all of this is in
3 the record that I - - -

4 JUDGE SMITH: Was it - - - was it legal the
5 first time you did it, when you - - - when you - - -
6 the first time you dumped, or the first time you
7 built the salt shed? Or was that - - - or was that a
8 violation of the public trust doctrine?

9 MR. BRICKMAN: I'm - - - I'm prepared to
10 agree for purposes of argument that it was a
11 violation.

12 JUDGE SMITH: So as you say - - - but - - -
13 and the statute started running at that point.

14 MR. BRICKMAN: That's our argument, Your
15 Honor.

16 JUDGE SMITH: Why isn't it - - - why isn't
17 it analogous to an encroachment in the law of
18 trespass, where - - - where it's a continuing wrong?

19 MR. BRICKMAN: Because the cases that talk
20 about the status of trespass or nuisance as creating
21 a continuing wrong with an ever regenerating statute
22 - - - statute of limitations really apply in
23 different circumstances. There's no definition of
24 continuing wrong that would fit precisely our fact
25 pattern. This is - - -

1 CHIEF JUDGE LIPPMAN: What is it - - - what
2 is this, if not a continuing wrong? What - - -
3 what's happening here?

4 MR. BRICKMAN: This is a use that has been
5 in place for seventy-odd years, Judge. And - - - and
6 if I - - - I mean, and it's - - - it's a use that was
7 inconsistent with the early conception of this area
8 as a park. Whether it's a use that's been permitted
9 to continue for that long, I think the - - -

10 JUDGE GRAFFEO: I have a more basic
11 question, though. Why should any statute of
12 limitations apply to land that's in public trust?
13 Because doesn't - - - just the name alone kind of
14 indicates that it's a forever, until the state
15 legislature decides?

16 MR. BRICKMAN: I think there are two
17 answers to that question, Your Honor. And the first
18 answer is that there are all kinds of important
19 public policies that we entrust to the state to
20 vindicate. The laws against corruption - - - the
21 laws against environmental pollution, and so on.

22 And yet, notwithstanding the value that we
23 as a society place on those virtues, there's a repose
24 that the law ultimately imposes. And from a
25 conceptual prospective, I don't see this as any

1 different. I urge to Your Honors that it isn't
2 different.

3 JUDGE GRAFFEO: Well, but what about - - -
4 what about this specific proposal to build this
5 garage, that I guess the Village trustees first
6 announced, what, in November 2008 in that meeting?

7 MR. BRICKMAN: That was a - - -

8 JUDGE GRAFFEO: Does that - - - does that
9 trigger any kind of statute of limitations - - -

10 MR. BRICKMAN: I don't think under the
11 circumstances - - -

12 JUDGE GRAFFEO: The residents that are
13 concerned about this, they have no right to bring any
14 kind of judicial review - - -

15 MR. BRICKMAN: I think that the - - -

16 JUDGE GRAFFEO: - - - in a timely fashion
17 from that meeting?

18 MR. BRICKMAN: I'm sorry; I didn't mean to
19 interrupt. The answer is, I believe, they do not.
20 These are people who have, in each instance, the
21 three plaintiffs, lived, not in the Village of Great
22 - - - in Kings Point, but in the adjoining Village of
23 Great Neck, since the 1990s, have walked the property
24 virtually daily - - -

25 CHIEF JUDGE LIPPMAN: So your view is

1 they're - - - they're - - - they've been on notice?

2 That's your - - -

3 MR. BRICKMAN: Well, I think that very
4 clearly, they've been on notice of the use. The use
5 is open. It's obvious. It - - - it goes on from day
6 to day. They - - -

7 JUDGE ABDUS-SALAAM: Well, if it's - - - if
8 it's a change in the use, though, counsel - - - well,
9 backing up a bit, according to your argument, even
10 though they might have seen some nonpark use in the
11 1990s, since the statute of limitations is long over
12 based on a 30s lease and something else, they
13 wouldn't be able to challenge it anyway.

14 But the use appears to be different now.
15 This bigger garage would be very different than a
16 seventeen-foot - - - square foot shed or anything
17 else that you've been using. So why wouldn't they be
18 able to talk about the change in the use?

19 MR. BRICKMAN: Well, I think first, the
20 fact is that there was a withdrawal from park
21 dedication or - - - back in 1938 and that has to have
22 some significance. But I think the overarching point
23 is that notwithstanding the argument that the
24 plaintiffs make, the proposed use is not all that
25 significantly different from the existing use - - -

1 CHIEF JUDGE LIPPMAN: It's different in
2 scale, isn't it?

3 MR. BRICKMAN: Moderately different in
4 scale. The record - - -

5 CHIEF JUDGE LIPPMAN: Pretty big - - -

6 MR. BRICKMAN: The - - -

7 CHIEF JUDGE LIPPMAN: - - - building you
8 want to build, right?

9 MR. BRICKMAN: At page - - - well, it's a
10 bigger building, but at page 452 of the record, we
11 have Michael Moorehead, who is the Village
12 Superintendent of Public Works, who says, look I've
13 worked in this Village this 1988; I've seen all
14 that's gone on there, and I know what's been done
15 there. And the proposed - - - the majority of the
16 area - - - majority, that means more than half of the
17 area - - - on which the proposed activity will take
18 place already is used for these, quite obviously,
19 nonpark purposes.

20 JUDGE READ: So it's used, but there's just
21 not a 12,000-foot building there?

22 MR. BRICKMAN: That's right. It's not a
23 12,000-foot building, Judge Read, but on the other
24 hand, it is a - - - a garage; it is - - - was fuel
25 pumps. There's a transfer station for waste.

1 JUDGE PIGOTT: Assuming you're - - -
2 assuming you're right, do you have a - - - is there a
3 SEQR obligation that's going to follow? Let's assume
4 we agree with you and you're about to construct all
5 of this. Do you have - - - do you have environmental
6 quality review requirements to meet?

7 MR. BRICKMAN: That's an issue I have not
8 confronted, Judge Pigott. And if we do, obviously,
9 we'll deal with them.

10 CHIEF JUDGE LIPPMAN: And what about - - -
11 and what - - -

12 MR. BRICKMAN: I can - - - my partner, who
13 is Village Counsel, happens to be sitting here, and I
14 suspect he's going to have - - -

15 JUDGE PIGOTT: I saw the note coming.

16 MR. BRICKMAN: I'm told - - - I'm not sure
17 it's in the record - - - that we have met all of the
18 SEQR requirements.

19 CHIEF JUDGE LIPPMAN: And what about the
20 state legislature and the public just - - - trust
21 doctrine? No - - - no application here? State
22 legislature doesn't have a role to play?

23 MR. BRICKMAN: Not in our view, although I
24 will point out, that in 1967, as a result of a pickup
25 in the comptrollers office, the existing lease was -

1 - - was the subject of a - - - of a proceeding - - -
2 of a - - - of a bill, and - - - and an act which
3 enacted into law, which interestingly conferred upon
4 the Village the right to lease all or a part of the
5 full 173.3 acres.

6 And in Section 2 of the legislation, the
7 legislature very specifically approved - - - I think
8 the words were ratified, confirmed and approved, or
9 similar - - - similar verbiage - - - the 1958 lease
10 which, by its very terms, had the carve-out of the
11 5.44 acres.

12 JUDGE PIGOTT: When - - - when you say
13 "carve-out", so what we're talking about is - - - and
14 I - - - and I looked at the maps - - - you don't
15 dispute that this is parkland. It's not like you - -
16 - you - - - the land was given to the Parks
17 Department and you kept 5.4.

18 MR. BRICKMAN: Well, there's an argument we
19 did, but for purposes of this - - - the appeal, we
20 don't take the position that this was never, ever,
21 ever parkland.

22 JUDGE PIGOTT: And at some point, if the
23 lease expires, can they evict you?

24 MR. BRICKMAN: I'm sor - - - can they?

25 JUDGE PIGOTT: Evict you?

1 MR. BRICKMAN: Well, I'm the lessor.

2 JUDGE PIGOTT: Oh, you're leasing it to the
3 parks - - -

4 MR. BRICKMAN: Yeah, we - - -

5 JUDGE PIGOTT: I see. I got you. I was
6 looking at it the other way that they were leasing -
7 - -

8 MR. BRICKMAN: I wanted to - - -

9 JUDGE SMITH: I'm still - - - I'm still
10 hung up - - - maybe you've answered it, but I - - - I
11 missed it. What - - - assume you're right, that you
12 got - - - that - - - that everything you did, the
13 statute of limitations has run on: the shed, the
14 shooting range if it were still there which it's not,
15 the dumping ground which you're entitled to do that.

16 How does that translate into a right to
17 build a new building on area - - - some areas that
18 are still green and have always been green?

19 MR. BRICKMAN: They may be green and always
20 green, but that doesn't mean they weren't carved out
21 way back - - -

22 JUDGE SMITH: Tell me again, what carved
23 them out? How we know that an area, which has always
24 had - - - it never had anything but a tree on it, got
25 carved out?

1 MR. BRICKMAN: May I respond to - - -

2 CHIEF JUDGE LIPPMAN: Yes, of course, sure.

3 MR. BRICKMAN: Not only was there the
4 express description in the 1938 lease, in 1946, the
5 Village Board specifically approved an amendment to
6 the lease; that was on June 18 of '46. And two weeks
7 later, the Village and the Park District - - - an
8 entirely independent agency that serves a much larger
9 of the Great Neck Peninsula, entered into a formal
10 lease agreement.

11 And I will tell Your Honors that it is at
12 page - - - I'll pick that up on - - - I'm sorry. The
13 resolution to page 374 of the record, and the lease
14 amendment takes place at 377 of the record.

15 JUDGE PIGOTT: Is that a metes and bounds
16 lease?

17 MR. BRICKMAN: Yes. Very specifically what
18 it has is an attachment that sets out the - - - the
19 original lease. It sets out the full metes and
20 bounds description.

21 JUDGE SMITH: So - - - so at that point - -
22 - at that point, the Village essentially recovered
23 from the Park District 5.44 acres.

24 MR. BRICKMAN: I think that's accurate.

25 JUDGE SMITH: How does that make it not

1 parkland anymore?

2 MR. BRICKMAN: It - - - it may not make it
3 not parkland, but to the extent that it's parkland,
4 that's a violation of the public trust doctrine.

5 JUDGE SMITH: You mean, just - - - just to
6 get it - - - even though you - - - even - - - why - -
7 - why is it? I mean, assuming - - - let's say to
8 simplify things, that there's 3 acres there that you
9 never touched of those 5.4. I made that up. But
10 let's - - - let's assume that's - - - that's the
11 case. How - - - how did - - - how did you violate
12 the public trust doctrine by - - - by terminating the
13 lease and putting it in your own name?

14 MR. BRICKMAN: May I read you from the
15 minutes of the June 1946 board meeting? This is at
16 page 374 of the record. "Mayor O'Rourke (ph.)
17 advised that it's necessary that the Village obtain
18 permission of the Great Neck Park Board to reserve a
19 strip of land approximately 400 by 600" - - - the
20 original - - -

21 JUDGE SMITH: Which is about half an acre,
22 right?

23 MR. BRICKMAN: What?

24 JUDGE SMITH: That's about a half an acre?

25 MR. BRICKMAN: No, no, that's - - - that's

1 237,000 or 240,000 feet and the 5.44 acres is
2 237,000. It's vir - - -

3 JUDGE SMITH: Oh, that is - - - so that is
4 - - - that is the 5.44 acres.

5 MR. BRICKMAN: It's virtually precise; "at
6 the southwest corner and" - - - so-and-so - - - "for
7 a pistol range and storage of highway materials and
8 supplies." So that whole area is cut out for Village
9 nonpark purposes.

10 JUDGE SMITH: Okay, but you're basically
11 saying, then, that by saying that in the resolution,
12 they started the statute of limitations running?

13 MR. BRICKMAN: I am, Your Honor, and that's
14 perfectly consistent with what I think is the best
15 law out there, regrettably not a decision of this
16 court, but the decision of the Second Department in a
17 case called Shapiro v. Town of Ramapo. What happened
18 there in 2001, the Village Board - - - sorry, the
19 Town Board - - -

20 JUDGE SMITH: They actually alienated the
21 land.

22 MR. BRICKMAN: But that wasn't the trigger
23 for the statute. What the - - - what the Second
24 Department held the trigger to the statute was the
25 action of the town board in approving the alienation.

1 And later on the alienation happens. And later on
2 there are applications for the various approvals.

3 And the Second Department in the face of
4 precisely this same challenge says, uh-huh, the time
5 - - - it's a six-year statute, and the time runs from
6 the action of the Village board. They're at a public
7 meeting here in our - - -

8 CHIEF JUDGE LIPPMAN: Okay, counsel.
9 You're going to have rebuttal time.

10 MR. BRICKMAN: Thank you, Your Honors.

11 CHIEF JUDGE LIPPMAN: Let's hear from your
12 adversaries.

13 MR. BRICKMAN: Thank you very much, Your
14 Honor.

15 CHIEF JUDGE LIPPMAN: Thank you.

16 Counselor, has this plot of land been set
17 aside the whole time for this purpose?

18 MS. NOLL: No, Your Honors. The - - -

19 CHIEF JUDGE LIPPMAN: Why now, all of
20 sudden, do we say, hey, you can't have this anymore
21 when it's - - -

22 MS. NOLL: The Village - - -

23 CHIEF JUDGE LIPPMAN: - - - seems to be
24 notorious for all this time?

25 MS. NOLL: The Village concedes this has

1 always been dedicated parkland at page 2 of the reply
2 brief. But Village - - -

3 CHIEF JUDGE LIPPMAN: Yes, but these 5.4,
4 or whatever it is, acres?

5 MS. NOLL: Exactly, that part - - - that
6 the entire 173 acres of Kings Point Park have always
7 been dedicated parkland.

8 CHIEF JUDGE LIPPMAN: Yeah, but they've had
9 a right to use it for other purposes, right?

10 MS. NOLL: The Village has - - -

11 CHIEF JUDGE LIPPMAN: Why can't they
12 continue to use it for the - - -

13 MS. NOLL: The passage of time doesn't take
14 away from the legislature, its exclusive authority
15 under the public trust doctrine, to determine whether
16 a park should be used for nonpark purposes. This
17 court decides in Matter of Ackerman, in Matter of Van
18 Cortlandt Park - - -

19 JUDGE READ: Well - - -

20 MS. NOLL: - - - that the equities - - -

21 JUDGE READ: Well that was - - - we
22 affirmed that in the decision below, right? We
23 didn't really discuss this issue ourselves.

24 MS. NOLL: In - - - in Matter of Ackerman,
25 the statute of limitations wasn't raised as a

1 defense. But the court recognized the principle that
2 the fact that those facilities were there for fifteen
3 and twenty-four years wasn't relevant to whether this
4 decision should be given to the legislature.

5 JUDGE SMITH: On your - - - on your theory,
6 if they bui - - - if they - - - if no one had - - -
7 no one had noticed and they went ahead and built the
8 new Department of Public Works building, and let's
9 say they occupied the whole 5.4 acres, paved it over
10 with cement. And it stood there for a hundred years,
11 literally a hundred years. Could then bring a suit
12 or your grandchildren bring a suit to - - - to make
13 them tear it down?

14 MS. NOLL: Yes, but that can't extinguish
15 the public trust doctrine. But - - -

16 CHIEF JUDGE LIPPMAN: Does anything
17 extinguish the public trust - - -

18 MS. NOLL: The legislature.

19 CHIEF JUDGE LIPPMAN: - - - doctrine?

20 MS. NOLL: The legislature has the role to
21 decide - - -

22 CHIEF JUDGE LIPPMAN: It doesn't matter how
23 long this has been in place. It doesn't matter
24 what's on those 5.4 acres or whatever it is. Without
25 legislative approval, no good.

1 MS. NOLL: Well, the Village isn't out of
2 time to ask for permission. If they had built the
3 Department of Public Works facility there, the
4 Village can ask for legislative approval after the
5 fact. And I cited session laws in my brief, that
6 show that the legislature does regularly receive
7 requests for authorization after the fact.

8 JUDGE RIVERA: So - - - so - - - so they
9 would take this action of building or otherwise using
10 the land for nonpark purposes - - - I take it your
11 argument is - - - at - - - at their peril, because
12 first of all, you may come in a hundred years later
13 or second of all, they may seek permission, and the
14 state may deny it.

15 MS. NOLL: That's right.

16 JUDGE RIVERA: So if they - - - if they
17 move on the kind of action that is nonpark use, and -
18 - - in your position is they do that at their own
19 peril. And that's fine, because the law is very
20 clear and their on notice of that.

21 MS. NOLL: Right, and even adverse
22 possession, which they now say they're not pressing,
23 requires a reasonable belief that they can use this
24 property, then they - - - that they have title to
25 this property, without - - -

1 JUDGE READ: And you don't - - - you don't
2 draw any distinction between what's there now and the
3 12,000-sqaure-foot building that's proposed?

4 MS. NOLL: That's right. There is a - - -
5 there is a huge distinction. In any of that - - -

6 JUDGE READ: You do draw a distinction?

7 MS. NOLL: Yeah.

8 JUDGE READ: I thought you said that both -
9 - -

10 MS. NOLL: They both - - -

11 JUDGE READ: - - - both were impermissible.

12 MS. NOLL: They do - - - they are both
13 impermissible and the Village has the duty and the
14 responsibility to request - - -

15 JUDGE SMITH: One's - - - one's more
16 impermissible than the other?

17 MS. NOLL: They're both completely
18 impermissible at this point, because the Village
19 hasn't asked for permission for either as it
20 concedes. But in any event - - -

21 JUDGE GRAFFEO: So what's the effect of the
22 leases? They're - - -

23 MS. NOLL: The leases say - - -

24 JUDGE GRAFFEO: They're void?

25 MS. NOLL: The leases aren't void. The

1 leases reserve to the Village a portion of the park.
2 That doesn't change the Village's duty to run this as
3 a park. They don't authorize nonpark use - - -

4 JUDGE PIGOTT: But they own the whole - - -
5 they own the whole thing, right?

6 MS. NOLL: They own the whole thing, and
7 the lease - - -

8 JUDGE PIGOTT: So when you say that the
9 lease give them, you know, a portion of it, well,
10 they - - - they've got it all. They're just saying,
11 this part we want to use for something else.

12 MS. NOLL: The lease gives them - - - the
13 lease leaves in their hands the duty to run it as a
14 park. And, in fact, what they asked the legislature
15 for permission for was - - -

16 JUDGE PIGOTT: So the - - - the logic of
17 that would mean then that the carve-out was
18 meaningless, right?

19 MS. NOLL: The carve-out - - - the carve-
20 out is what it is. What they told the legislature -
21 - -

22 JUDGE PIGOTT: No, but - - - no, no. What
23 I'm saying is, if - - - if what Judge Smith asked you
24 is true, which is that they can't, under any
25 circumstances, anytime, anywhere, period, use it for

1 anything but a park, unless they get Albany's
2 permission, that the carve-out was senseless. I
3 mean, it was - - - it was a park.

4 MS. NOLL: They didn't try to carve this
5 out for nonpark purposes. In - - -

6 JUDGE PIGOTT: So it's - - - it was
7 senseless. I mean, it was a futile add - - -

8 JUDGE GRAFFEO: The dumping was not okay;
9 the seventeen-foot shed is not okay. Anything - - -

10 MS. NOLL: The dumping - - -

11 JUDGE GRAFFEO: - - - they've used it for
12 since 1938 - - -

13 MS. NOLL: As I - - - I under - - -

14 JUDGE GRAFFEO: - - - is inappropriate or
15 inconsistent with - - -

16 MS. NOLL: As I understand - - -

17 JUDGE GRAFFEO: I'm trying to understand
18 your - - -

19 MS. NOLL: Yeah, as I understand it, the
20 dumping area isn't in the western corner. And it's
21 not clear from the lease - - -

22 JUDGE GRAFFEO: Well, let's talk about this
23 5.4 acres. Whatever they're doing there, is it
24 permissible or impermissible?

25 MS. NOLL: It's impermissible. The salt

1 shed that they have there now and the garage, we now
2 know, they've conceded are nonpark uses. Therefore,
3 it's impermissible without legislative approval, and
4 that's because the legislature's never out of time to
5 rule on it.

6 CHIEF JUDGE LIPPMAN: So - - - so - - - so
7 the bottom line is what Judge Graffeo asked you is
8 that the leases are of no effect whatsoever.

9 MS. NOLL: They have an effect, but it
10 doesn't change the - - -

11 CHIEF JUDGE LIPPMAN: What effect do they
12 have?

13 MS. NOLL: The Village wanted to run it, so
14 whatever the Village wants to do there - - -

15 JUDGE SMITH: And the - - -

16 JUDGE RIVERA: You're saying the lease
17 gives the - - - the District the right to run the
18 park, even if they hold ownership to the park? I'm a
19 little confused on this argument.

20 MS. NOLL: The Village - - -

21 JUDGE RIVERA: What's the point of the
22 Village?

23 MS. NOLL: The Village holds ownership.

24 JUDGE RIVERA: Uh-huh.

25 MS. NOLL: And the lease grants the Park

1 District the right to run and manage it.

2 JUDGE RIVERA: To run and manage the park.

3 MS. NOLL: And - - -

4 JUDGE RIVERA: So they carved out the right
5 to not only own it, but to manage and run the park.

6 MS. NOLL: Exactly.

7 JUDGE RIVERA: Is that what you're saying?

8 MS. NOLL: That's as much as it does. If
9 you look at the language - - -

10 JUDGE RIVERA: Got you.

11 MS. NOLL: - - - all it does is reserve to
12 the Village that portion of the park, and in the
13 legis - - -

14 JUDGE SMITH: So it's just like any lease.
15 It affects possession, but not - - - but it doesn't
16 affect the - - - it doesn't change what's a
17 permissible use.

18 MS. NOLL: Exactly.

19 JUDGE SMITH: But you said - - -

20 JUDGE PIGOTT: Well, wait - - - wait, wait.
21 I mean, if it affects possession - - - I mean, they -
22 - - they own - - - they possess the whole thing.

23 MS. NOLL: It affects what they can do with
24 their possession.

25 JUDGE PIGOTT: They own the whole 173.

1 They said, we're going to - - - we're going to lease
2 it to you, but we're carving out 5.4 - - -

3 MS. NOLL: And that's it.

4 JUDGE PIGOTT: - - - and you're saying that
5 there's absolutely no meaning to that carve-out,
6 because it's going to be a park, as the 169 acres are
7 a park, and the only difference is that the - - - the
8 conservancy or whatever you call it, runs the 169,
9 and they run the 100 - - - they run the 4?

10 MS. NOLL: Yes, but the evidence in the
11 record shows that the Park District was actually
12 running the entire park. And in 1967, it - - -

13 JUDGE PIGOTT: But that - - - let me then -
14 - - then - - -

15 MS. NOLL: It's signif - - -

16 JUDGE PIGOTT: Just tell me yes or no on
17 this. The carve-out then is meaningless, right?

18 MS. NOLL: It's not - - - as far as the
19 public trust doctrine goes, yes.

20 JUDGE PIGOTT: No, no, no. Is - - - is the
21 carve-out meaningful in any way, shape, or form?

22 MS. NOLL: Yes, it's meaningful, because it
23 tells you who runs that portion of the park.

24 JUDGE PIGOTT: So - - - yeah, but all
25 you're saying it to me then, is that the Village who

1 owns the park and says to the conservancy, you run
2 169 acres; we're going to run the other 4, just as
3 you run the 169, but there's something special about
4 it, so we're going to - - - we're going to mow the
5 lawn; we're going to - - - we're going to look at the
6 trees, and we're going to - - -

7 MS. NOLL: Right. The Village - - -

8 JUDGE PIGOTT: - - - check the birds.

9 JUDGE RIVERA: Well - - - well - - -

10 MS. NOLL: The Village has control.

11 JUDGE RIVERA: I take it what's going on
12 is, it's like a landowner who owns fifty acres and
13 leases out forty-nine to someone else, to farm and do
14 whatever they want on it, or otherwise pursuant to
15 the lease, but they say, but I'm keeping my one acre
16 to myself. You cannot come on this property without
17 my permission; you can't use it.

18 MS. NOLL: Right.

19 JUDGE RIVERA: Is that - - - that's - - -
20 that's what gone on here.

21 MS. NOLL: That all that it does.

22 JUDGE RIVERA: And that what has - - - the
23 difference here, or the difference of opinion, legal
24 or otherwise, is that they believe that they could
25 carve it out and use it for nonpark purposes, and if

1 no one told them otherwise, they could continue to do
2 that, and you say, no, they can't. And they do it at
3 their peril, if they don't seek the state's
4 permission.

5 MS. NOLL: Exactly. And they've carved - -
6 - they actually represented - - -

7 JUDGE GRAFFEO: If we agree with you, can
8 they now go to the legislature and ask for a local
9 bill - - -

10 MS. NOLL: There's - - -

11 JUDGE GRAFFEO: - - - a special act?

12 MS. NOLL: There's no time bar asking the
13 legislature for this permission.

14 JUDGE SMITH: That's a yes.

15 MS. NOLL: That - - - exactly, that's a
16 yes.

17 JUDGE RIVERA: But again, at their peril,
18 that you might deny it.

19 MS. NOLL: The legislature might deny it.

20 JUDGE RIVERA: Yeah.

21 MS. NOLL: But the legislature can be
22 counted on to reasonably entertain reasonable
23 requests. This happens all the time and the doctrine
24 works. So - - -

25 JUDGE RIVERA: Are they put in a better

1 position to make that request by building, or not?

2 MS. NOLL: That's for the legislature to
3 determine.

4 JUDGE RIVERA: But that's a political
5 choice, okay.

6 MS. NOLL: If there are reliance issues at
7 stake, then the - - -

8 JUDGE RIVERA: Okay.

9 MS. NOLL: - - - that's what the
10 legislature is entrusted - - -

11 JUDGE RIVERA: Okay.

12 MS. NOLL: - - - to determine, whether
13 these - - -

14 JUDGE RIVERA: Okay.

15 MS. NOLL: - - - longstanding reliance - -
16 -

17 JUDGE SMITH: You said - - - you said a few
18 minutes ago that they didn't carve out the 5.4 acres.
19 What about that language that he pointed me to. It
20 says, that we reserve a strip, which I guess adds up
21 to 5.4 acres, for a pistol range and storage of
22 highway materials and supplies. Isn't that - - -

23 MS. NOLL: In - - - that's - - - those are
24 minutes. That isn't in the lease. There's nothing
25 in the lease or in what they told the legislature in

1 the 1960s.

2 JUDGE SMITH: Would it - - - would it be
3 different if it was in the lease?

4 MS. NOLL: It's not different, because the
5 legislature needs to give them permission to use it
6 for nonpark purposes.

7 JUDGE SMITH: I guess what you - - - I - -
8 - if I understand it, you're really making two
9 alternative arguments. One is, that even if they - -
10 - even if they shout and scream from the housetops,
11 we're taking this away and we're using it for nonpark
12 purposes, we're going to open a bar, even that would
13 not start the statute of limitations running, because
14 it's a continuing wrong?

15 MS. NOLL: Right. Even if there was a
16 statute of - - -

17 JUDGE SMITH: But also - - - I mean, your
18 other point is they didn't do that.

19 MS. NOLL: Right. Here the minutes show at
20 most an ambiguous statement of intent that they're
21 going to use it for nonpark purposes. To - - - so to
22 think that we should have come in then, and challenge
23 that act, is preposterous.

24 JUDGE READ: Well, there was - - - there
25 was an actual reservation of the 5.4 in one of the

1 leases, though, wasn't there?

2 MS. NOLL: It doesn't say that they're
3 going to use it for nonpark purposes.

4 JUDGE PIGOTT: No, but did - - -

5 MS. NOLL: And what they - - -

6 JUDGE PIGOTT: I mean, wouldn't it be - - -
7 wouldn't it be - - - that's, I guess is getting back
8 to my point. I mean, logically, the Village knew
9 that they were carving it out for a purpose, and I
10 would think that the conservancy knew that they were
11 carving it out so it wasn't going to be used for a
12 park, because they talked about dumping and all of
13 this other stuff, right?

14 MS. NOLL: Well, that - - - that gets me to
15 what they told the legislature in the 1960s. When
16 they finally obtained permission for this lease to
17 the Park District, both the Village and the Park
18 District represented to the legislature that the
19 whole 173 acres of the park was being run and kept in
20 trust for the public, as a park.

21 So to the extent we're on notice of
22 anything, the Village represented to the legislature
23 that it was running the 173 acres as a park. It
24 never told the legislature that it was - - -

25 JUDGE GRAFFEO: And - - -

1 MS. NOLL: - - - had reserved it for some
2 other purpose.

3 JUDGE GRAFFEO: What's the posture of the
4 state? Is this a continuing wrong so you can still
5 challenge it - - -

6 MS. NOLL: Yes.

7 JUDGE GRAFFEO: - - - or is it that no
8 statute of limitation applies under the public trust
9 doctrine?

10 MS. NOLL: No statute of limitation removes
11 a - - - from the legislature, the responsibility and
12 the right to determine whether this should not go - -
13 -

14 JUDGE GRAFFEO: No, I'm asking you what
15 rationale you are asking us to adopt. Is it
16 continuing wrong or no statute of limitations
17 applies?

18 MS. NOLL: Both, both. And this court's
19 decisions that say that it's the legislature's job -
20 - -

21 JUDGE SMITH: Is there a difference or are
22 those different ways of saying the same thing?

23 MS. NOLL: Exactly. And the continuing
24 wrong - - -

25 JUDGE SMITH: Well, no, no, no. Exactly is

1 not a possible answer for that question. Is - - - is
2 there a difference between saying there's no statute
3 of limitations and saying it's a continuing wrong?

4 MS. NOLL: Is there a difference? Sure,
5 here's no statute of limitations, but the continuing
6 wrong doctrine cases explain the re - - - help
7 explain the result.

8 JUDGE READ: What's the difference?

9 MS. NOLL: Well, if there's no statute of
10 limitations at all, then assume there were damages,
11 which there isn't in the public trust. Then you
12 count back to the time when the statute of
13 limitations - - -

14 JUDGE SMITH: So - - - so - - -

15 JUDGE READ: Oh, so you're saying if there
16 are damages, you get the three years?

17 MS. NOLL: But in this case, that's
18 irrelevant. I mean, it's not a damages - - -

19 JUDGE READ: Yeah, but that would be the
20 difference between the two?

21 JUDGE SMITH: So - - - so and for - - -

22 MS. NOLL: They are doctrinally different.
23 But even - - -

24 JUDGE SMITH: But for - - - for a
25 nonmonetary cause of action, there's no practical

1 difference at all.

2 MS. NOLL: Exactly. And even - - - and
3 this court's decision in Jensen explains that for
4 injunctive relief, there's no time limit on when we
5 can bring our action.

6 CHIEF JUDGE LIPPMAN: Okay, counsel, now we
7 understand you exactly. Let's hear from your
8 colleague.

9 MR. SUPER: May it please the court, my
10 name is Reed Super, and I'm here on behalf of Daniel
11 Capruso and the other individual plaintiffs. I'd
12 like to focus in, since the court appears to be very
13 interested, in the leases and the carve-out, I'll
14 focus my remarks on that.

15 One point I'd like to make is that even if
16 we were challenging the lease and not - - - not the
17 use, the last lease was in 2004. In 1967, when the
18 legislature allowed the Village to lease the park to
19 the Park District, it said but for lease terms of no
20 more than ten years. The most recent lease was in
21 2004, well within any six-year statute of
22 limitations, so we don't see why, if it were a lease,
23 it would be the first lease, and not the last lease.

24 Secondly, the Village and the Park District
25 have not acted consistent with the carve-out that

1 they purported to make. The - - - only a very small
2 fraction of the 5.4 acres - - -

3 CHIEF JUDGE LIPPMAN: So what's the
4 significance of that, that they're not using all the
5 land?

6 MR. SUPER: It has been - - - even if it
7 were somehow made not a park, and - - - and we don't
8 believe that to be the case, it was rededicated as
9 parkland by - - -

10 CHIEF JUDGE LIPPMAN: You mean, the
11 remaining part of the parcel, you mean?

12 MR. SUPER: Yes. The - - - in the record,
13 at pages 442 to 444 are very good visual images that
14 show the limited area actually used. The area that
15 my clients and many members of the public use is
16 trails through a forest. Those trails are maintained
17 by the Park District; even though it's within the 5.4
18 acres, the Park District maintains those.

19 CHIEF JUDGE LIPPMAN: So they've been
20 notoriously in use as parkland.

21 MR. SUPER: They have been used exclusively
22 - - -

23 CHIEF JUDGE LIPPMAN: Openly - - -

24 MR. SUPER: Openly, exclusively as a park,
25 at least since my clients moved to the area in the

1 1990s. In fact - - -

2 CHIEF JUDGE LIPPMAN: And that's all they
3 know. And what about his argument that these - - -
4 your clients walk the property all the time. They're
5 on notice as to what's been going on with all of
6 this.

7 MR. SUPER: Certainly, they were aware of
8 the presence of the salt shed. What they did not
9 know was that that was illegal. They didn't know
10 exactly what it was used for. They didn't know the
11 exact boundaries of the park. They didn't know that
12 that - - - the salt shed was never authorized - - -

13 JUDGE SMITH: But if - - - but if notice - -
14 - - if notice would do it - - - I'm sure you - - -
15 you dispute that it does - - - but if notice of a
16 nonpark use creates the right, then you have lost
17 your right to get rid of the salt shed.

18 MR. SUPER: I don't believe they were on
19 notice - - - first of all, I agree with you. I
20 dispute that notice is enough. But even if notice
21 were enough, the minutes - - -

22 JUDGE SMITH: Well, they're certainly on
23 notice that a salt shed is sitting there.

24 MR. SUPER: There's notice that it exists,
25 but it's not reasonable to impose upon the public - -

1 - if a citizen is walking through any park, and all -
2 - - parks throughout the state have some sort of
3 infrastructure. It's not entirely clear from looking
4 at it, from walking by it, whether that's serves the
5 park, whether it is - - - the boundaries of the park
6 exclude it or not, whether it's been approved by
7 Albany or not.

8 It's not reasonable to put that burden on
9 citizens to know it's the Village who is operating
10 the salt shed within lands that its own official map
11 - - - the official map - - -

12 CHIEF JUDGE LIPPMAN: They just see what's
13 on the surface, and don't - - - might not have a
14 deeper understanding of what's going on.

15 MR. SUPER: Yeah, they don't have the
16 critical facts needed - - -

17 JUDGE SMITH: Well, what - - - what about
18 the - - - what about the Shapiro case. Suppose they
19 had - - - suppose they had taken a piece of this
20 property and sold it to Morton Salt Company. Have
21 them put up a salt shed there. And they - - - and
22 the salt - - - the salt shed is just as visible or
23 invisible. The public knew just what it knew. The
24 statute of limitations would run under the Shapiro
25 case, wouldn't it?

1 MR. SUPER: That would present a harder
2 case for the court. Obviously, that is not - - -
3 that is not this case. Shapiro was decided two years
4 after the Second Department decided our first appeal.
5 And they didn't purport to overrule that. So the
6 Second Department must have seen that as a
7 distinguishable.

8 In addition, Shapiro was really a SEQR case
9 to Judge Pigott's question about SEQR. From reading
10 the decision, one can see that the public trust
11 doctrine was sort of an afterthought. It was alleged
12 parkland. The lower courts said the public trust
13 doctrine claim doesn't save the SEQR complaint. I
14 understand that the Second Department ultimately
15 found them out of time, but - - - and it is
16 distinguishable.

17 We think Shapiro is also wrong because
18 there is authority. The Rodriguez case that we cite
19 out of the Third Department, and in fact, this
20 court's decision in Brooklyn Park Commissioners - - -

21 JUDGE SMITH: So - - - so if - - - if - - -
22 you're saying that if - - - if the City of New York
23 sells me a piece of Central Park today, and my great-
24 grandchildren are there in the late twenty-second
25 century, the City can come and take it back?

1 MR. SUPER: Well, that - - - that and your
2 hypothetical previously about a hundred years later,
3 those are certainly considerations the legislature
4 can - - - can take into account. I understand the
5 merits - - -

6 JUDGE SMITH: Yeah, but it would be - - -
7 be subject - - - subject to the legislative action,
8 yes.

9 MR. SUPER: Subject to the legislative
10 action, but - - - but that's not this case. This
11 court could certainly find that when there's a true
12 alienation - - - what the continuing wrong cases
13 focus - - - focus on is whether the defendant
14 maintains control of the instrumentality. That's the
15 - - - the Bloomingdales case, 509 Sixth Avenue, all
16 of the cases with an encroachment, the Suffolk County
17 cases where there are jetties that are causing damage
18 to - - - to shoreline properties.

19 If the defendant maintains control, and can
20 abate the nuisance, or abate the trespass, then there
21 is a continuing wrong. I - - - I believe that under
22 the public trust doctrine, it's even stronger, and
23 that the title continues to be encumbered even if
24 it's sold to a third party. But that's not this
25 case, where the defendant - - -

1 JUDGE GRAFFEO: So do we - - - we have to
2 identify a statute of limitations of some length in
3 order to apply continuing wrong, or we just say it's
4 a continuing wrong?

5 MR. SUPER: Well, because there are no
6 damages in - - -

7 JUDGE GRAFFEO: Do we have to say it's a
8 six-year statute of limitations and you were within
9 four months of the November meeting, or do we just
10 say it's a continuing wrong?

11 MR. SUPER: No, Your Honor, I don't believe
12 you have to identify a statute of limitations,
13 because it is a continuing wrong - - -

14 JUDGE READ: Do we have to identify an
15 accrual point, then, I guess?

16 MR. SUPER: Well, it - - - under continuing
17 wrong cases what the courts have said is that a new
18 cause of action accrues each day that the - - - that
19 the wrong continues.

20 JUDGE SMITH: Would - - - as your co-
21 counsel said, it would make a difference if there
22 were a monetary remedy being sought, then you would
23 need to decide the statute.

24 MR. SUPER: Absolutely, Judge Smith. If
25 there were damages - - - in the Jensen case, it

1 speaks - - - Jensen v. General Electric from this
2 court speaks to that exactly, that - - - because of
3 the discovery rule which was applicable only to toxic
4 torts, damages accrued and then the cause of action
5 runs out, the statute of limitations runs three years
6 later, but not for injunctive relief.

7 CHIEF JUDGE LIPPMAN: Okay, counsel.

8 MR. SUPER: Thank you very much, Your
9 Honors.

10 CHIEF JUDGE LIPPMAN: Counsel, rebuttal?

11 MR. BRICKMAN: I'd like to make, if I
12 might, Your Honor, three points.

13 CHIEF JUDGE LIPPMAN: Go ahead.

14 MR. BRICKMAN: First, in - - - in response
15 to a point raised by Judge Rivera. The rule that the
16 plaintiffs urge here would put municipalities at
17 significant peril, because - - - and the argument why
18 I think is set out more than amply in the brief
19 amicus submitted by the New York State Conference of
20 Mayors and Municipal Officials - - - because what it
21 would effectively do would be to compel every
22 municipality constantly to be assuring itself that
23 some piece of land within its border hadn't, by use -
24 - - because remember, parkland can become parkland
25 not simply by expressed dedication, but by use as

1 well.

2 And it would put the municipality to the
3 burden of having to be certain that every greensward
4 - - -

5 JUDGE RIVERA: Okay, but - - - but this is
6 express parkland. So what's wrong with following the
7 law, and doing it before you build, and risking that
8 the state will not - - - will not let you - - - allow
9 you to use it for nonpark purposes?

10 MR. BRICKMAN: Well, I mean, that in effect
11 - - -

12 JUDGE RIVERA: Could we make a distinction
13 between express - - - I mean, this is express
14 parkland?

15 MR. BRICKMAN: Yes. I don't - - - I don't
16 think one makes a distinction in this context. I
17 mean, I - - - I go back again, and I'm to some extent
18 repeating myself, but I go back to the fact that it
19 goes back to 1938. And - - - and that is - - -

20 JUDGE RIVERA: What about his argument
21 about the 2004 lease?

22 MR. BRICKMAN: All that did was - - - that
23 was consistent with the legislation, and what it did
24 was simply perpetuate the circumstance that had
25 existed in the - - - it was a lease from the 90s.

1 There was - - -

2 JUDGE RIVERA: But isn't it - - -

3 CHIEF JUDGE LIPPMAN: But why is it - - -

4 why each time it's renewed, doesn't - - - if you had
5 a statute, why doesn't it start to run again?

6 MR. BRICKMAN: Because the wrong - - - if
7 there were a wrong - - - was the wrong that was - - -
8 that occurred back in 1938.

9 JUDGE PIGOTT: Is your peril point that if
10 you have a park and the city decides to lease a
11 portion of it to a ice cream stand or something that
12 they run the risk of having - - - of having that set
13 aside, because it's not park purposes?

14 MR. BRICKMAN: Well, I - - - I mean, that
15 is a whole other question, as they say, which Your
16 Honors have recently confronted, but there is - - - I
17 would go back to - - - my point about 1938, though, I
18 think has resonance for the statute. If the question
19 were what was covered by the 1938 lease expression of
20 - - -

21 JUDGE RIVERA: Let's go to the 2004 lease.
22 You could upon renewal, of course, change the terms
23 of the lease. You could seek more property. You
24 could decide - - -

25 MR. BRICKMAN: Yes.

1 JUDGE RIVERA: - - - to allow the district
2 to have use of more than the five acres. I mean, you
3 can change the terms. So why isn't a new lease?

4 MR. BRICKMAN: Because I think it - - -

5 JUDGE RIVERA: Why isn't he right about
6 this?

7 MR. BRICKMAN: Because I think if we'd gone
8 for more than 5.44 acres or had taken different land,
9 then I think Mr. Super's argument would have
10 resonance.

11 JUDGE GRAFFEO: This has been - - -

12 MR. BRICKMAN: That's a new taking, as it
13 were.

14 JUDGE GRAFFEO: This plan was publicly
15 announced in 2008, so we're six years into this.
16 What - - - what was the resistance to going to the
17 state legislature and getting this approved, to avoid
18 all of this? The building could have been built by
19 now.

20 MR. BRICKMAN: Judge Graffeo, as a
21 practical matter - - -

22 JUDGE GRAFFEO: Is it because they want
23 land swaps, usually?

24 MR. BRICKMAN: Yeah, exactly.

25 JUDGE GRAFFEO: And they can't acquire

1 another five acres? Is that the problem?

2 MR. BRICKMAN: The Village of Kings Point
3 has virtually no buildable land left. Two acres, on
4 which the current DPW facility sits is one of the
5 last pieces. And - - - and it's a relatively small
6 village. It's 3.3 square miles. There's just not
7 land out there to be gotten.

8 If this case had been brought in 1943, five
9 years after the 1938 act, or in 1951, five years
10 after the '46 lease, I could have brought a hundred
11 residents to testify at trial as to what activity
12 took place, what went on, what happened. That's why,
13 Your Honors, you need a statute of limitations.

14 JUDGE SMITH: Well, what - - - what - - -
15 what could they have said that would make this not
16 parkland?

17 MR. BRICKMAN: I - - - what they could have
18 said was that, for example, what the carve-out in the
19 1938 lease was precisely the 5.44 acres. They could
20 have said that the activity that's going on on that
21 is not simply dumping refuse, but it's all manner of
22 things. They could - - -

23 JUDGE SMITH: But your adversary's position
24 is none of that would have made any difference,
25 because parkland is parkland. And they can carve it

1 out all you want. You can do anything you want on
2 it. It's a - - - it's still a continuing wrong.

3 MR. BRICKMAN: Well, I mean, we have a very
4 different view then there. And - - -

5 JUDGE SMITH: I mean, if this - - - I mean,
6 in fact, you're admitting for purposes of the
7 argument, that the public trust doctrine was
8 violated. Well, on that assumption, if the lawsuit
9 had been brought the day after the cause of action
10 accrued, the plaintiffs would have won. That's - - -
11 that's a truism.

12 MR. BRICKMAN: That's perhaps true, Your
13 Honor, but if they brought it six and a half years
14 afterwards, they would have lost, and I would have
15 had the evidentiary opportunity to prove my case.
16 Eighty years later, I can't find a witness.

17 CHIEF JUDGE LIPPMAN: Okay, counsel.

18 MR. BRICKMAN: Thank you.

19 CHIEF JUDGE LIPPMAN: Thanks. Thank you.
20 Thank all of you.

21 (Court is adjourned)

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C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of Capruso v. Village of Kings Point (Action No. 1), and State of New York v. Village of Kings Point (Action No. 2), No. 102, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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