Appellate Division Nos. 2010-08950, 2011-02295, 2011-02298

Court of Appeals of the State of New York

GYRODYNE COMPANY OF AMERICA, INC.,

Claimant-Respondent,

-against-

STATE OF NEW YORK,

Defendant-Appellant.

NOTICE OF MOTION AND MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR LEAVE TO APPEAL

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Dated: March 23, 2012

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NOTICE OF MOTION

PLEASE TAKE NOTICE that, upon the annexed memorandum of law and the exhibits annexed thereto, the accompanying record on appeal, the briefs submitted in the Appellate Division, and upon all of the proceedings and pleadings heretofore had herein, the undersigned will move this Court, at the Courthouse, 20 Eagle Street, Albany, New York, on April 9, 2012, or as soon thereafter as counsel may be heard, for an order pursuant to C.P.L.R. 5602(a) granting the State of New York leave to appeal to this Court.

Leave to appeal is sought from a final order of the Appellate Division, Second Department, dated November 11, 2011, which affirmed a judgment of the Court of Claims, Suffolk County (Lack, J.), dated August 17, 2010, and a money judgment of the Court of Claims, Suffolk County (Lack, J.), dated February 9, 2011.

Dated: Albany, New York
March 23, 2012

Respectfully submitted,

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MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR LEAVE TO APPEAL

PRELIMINARY STATEMENT

In this eminent domain proceeding, claimant Gyrodyne Company of America was awarded more than $125 million in compensation, plus more than $52 million in interest, as compensation for the taking of 245 acres of its industrial property in Suffolk County, near Stony Brook University, a campus of the State University of New York. The Court of Claims held that it was bound to award this amount, equal to the penny to the $125 million valuation offered by Gyrodyne at trial, simply because the court had rejected the State's appraisal, and no other clear dollar figure was then before it. The Appellate Division affirmed the award.

This Court should grant leave to appeal because the lower courts abdicated their responsibility to ensure that a condemnation award is just not only to the claimant, but also to the taxpayers who must pay it. Contrary to the Court of Claims' view, a court always has the choice, and indeed the legal duty, to reject a flawed valuation in a condemnation proceeding, such that taxpayers are not forced to bear a judgment that fails to reflect the actual value of the property taken.

The appraisal which the Court of Claims accepted without question was deeply flawed. Gyrodyne derived its $125 million valuation not by computing a per-acre amount that a purchaser would have paid for vacant land, as is customary and as this Court's precedents support, but rather by calculating a "per-residential unit" amount based on other and disparate residential developments that were a fraction of the size of a hypothetical residential development that Gyrodyne imagined as a possible use for its property. Instead of basing its appraisal on an estimate of the value of comparable land in Suffolk County, Gyrodyne estimated the value of supposedly comparable "units"—but of course a residential "unit" can be anything from a luxury home to a low-rent apartment; Gyrodyne's methodology allowed it to ignore these critical distinctions.

The use of this per-unit approach allowed Gyrodyne to claim that the highest and best use of its property was to build at least 1200 "units" on it—a glaringly implausible claim, given that Gyrodyne was, at the time of the taking, planning to build only 336 units on its property, and had publicly admitted that it had been forced to scale back a plan for higher-density development. Gyrodyne's hypothetical

high-density residential development could not have been built without zoning changes from two towns and numerous other approvals, and uncontradicted testimony in the record indicated that its density would be scaled back substantially during this process. (Indeed, Gyrodyne itself had scaled back a much lower-density proposal after encountering public opposition to a higher-density plan.) Gyrodyne identified no other development of a similar size in the surrounding area; in fact, the "comparable" properties on which it based its appraisal were as small as 3.8 acres—as compared to the 308-acre property at issue in this case. The arbitrary per-unit valuation method Gyrodyne adopted allowed it to base its analysis on properties that were in no sense comparable to the property at issue in this case.

As shown below, the resulting award of $125 million, plus nine percent interest, is grossly inflated beyond what is supported by sound valuation methodology and by the evidence in the case, as well as by Gyrodyne's own prior statements about the property's prospective use. Because the State's taxpayers should not be made to pay such speculative and unsupported condemnation awards, this Court should grant leave to appeal.

QUESTIONS PRESENTED

1. Whether the Court of Claims has an obligation to ensure that the compensation awarded to an eminent domain claimant is just not only to the claimant, but also to the taxpayers who must pay the award, such that the court is required to independently assess the validity of the claimant's valuation of the property if it finds the State's valuation unpersuasive.

2. Whether the Court of Claims should have rejected claimant's appraisal as speculative and unsupported by the evidence because it estimated the value of vacant land by multiplying an estimated value per residential unit by a number of residential units in a hypothetical high-density development plan for the property, rather than using an estimated value per acre of the undeveloped land taken, as is customary and supported by this Court's precedents.

TIMELINESS OF THIS MOTION

Claimant Gyrodyne served the February 17, 2012 Order of the Appellate Division, which denied the State's motion for reargument and for permission to appeal, with notice of entry upon the State by

overnight mail on February 21, 2012. This motion for leave to appeal is therefore timely under C.P.L.R. 5513(b).

JURISDICTION

The Court has jurisdiction over this motion and of the proposed appeal under C.P.L.R. § 5602(a)(1) because this proceeding originated in the Court of Claims, and the appeal is from an order of the Appellate Division that finally determined the proceeding. The Appellate Division's November 22, 2011 Decision and Order disposed of all issues in the proceeding within the meaning of C.P.L.R. § 5611. As indicated in the discussion that follows, the issues raised in this motion were raised below.

BACKGROUND

A. Gyrodyne's Undeveloped Property

Until the condemnation of a portion of the property in 2005, claimant Gyrodyne Company owned almost 308 acres of undeveloped, unsubdivided property that straddled the border between the towns of

Brookhaven and Smithtown in Suffolk County. (A. 97, 380, 1192.[1]) On the date of the taking, the property was zoned industrial by both towns.

From 1946 to 1970, Gyrodyne manufactured helicopters for the U.S. Navy and used the Suffolk County property for flight-testing the helicopters. (A. 515.) In the late 1960s, Gyrodyne stopped receiving Navy contracts, and got out of the helicopter business. (A. 515-516.) It then began leasing the handful of industrial buildings on the Suffolk County property.[2] (A. 515-516.) Since Gyrodyne no longer manufactured helicopters, its leasing operations became its principal business, with the Suffolk County property being its principal asset. (*See* A. 515-516.)

Beginning in the 1990s, Gyrodyne began to look into a series of proposals to develop the property, but none of the proposals was implemented. (A. 517.) During this time, Gyrodyne and the neighboring

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[1] Citations to "A. __" are to the Appendix submitted to the Appellate Division.

[2] At the time of the condemnation, there were seven buildings on the 308-acre property; four of those were on the portion of the property appropriated by the State.

Stony Brook University explored the possibility of the University's buying the land, but were unable to agree on its value.[3]

In 2003, Gyrodyne, working in partnership with a residential developer called Landmark Land Company, submitted an application to the town of Smithtown for re-zoning of the relevant portion of the property. (A. 1945.) Gyrodyne explained that it "ha[d] spent the last five years looking at various redevelopment options in order to determine the most appropriate use for the property, while meeting the needs of the surrounding community." (A. 1947.) One of the options it had considered was "a higher-density mixed-use development." (A. 1947.) But a higher-density development, according to Gyrodyne, would have required the construction of an on-site sewage treatment plant. (A. 1947.) Gyrodyne explained that "[m]any community representatives objected to . . . the construction and operation of a sewage treatment plan at this site. Thus, the applicant has developed a plan wherein the density has been substantially reduced from earlier concepts." (A. 1947.) Accordingly, Gyrodyne proposed to build a development involving 336

[3] *See* Ken Schachter, "On equity market, Gyrodyne land snubbed," *Long Island Business News*, June 13, 2003.

residential units—a density of slightly more than one unit per acre. (A. 540.)

A news article published around the same time as Gyrodyne's application was submitted noted that although Gyrodyne claimed its land was worth up to $118 million, the company's total market capitalization was only $20.2 million. The article asked: "How is it possible that the entire company, which also includes 13 percent of a Florida citrus grove and a 4.5 percent revenue interest in Texas oil property, could be worth less than one-fifth of what it maintains is the value of its primary asset?"[4] In its 2004 annual report, Gyrodyne reported a total market capitalization of just over $31 million.[5]

B. This Condemnation Proceeding

In August 2004, Stony Brook University determined, after a hearing, to acquire by condemnation more than half of the Gyrodyne property for use as a research and development campus. After

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[4] Ken Schachter, "On equity market, Gyrodyne land snubbed," *Long Island Business News*, June 13, 2003.

[5] In 2004, the year before the taking, Gyrodyne's annual report stated that its market capitalization was a little over $31 million. Gyrodyne's annual reports are available on its website, at http://www.gyrodyne.com/secfilings.php.

Gyrodyne unsuccessfully challenged the condemnation, *see Matter of Gyrodyne Co. of Am. v. State Univ. of N.Y. at Stony Brook*, 17 A.D.3d 675, 675 (2d Dep't 2005), title vested in the University on November 2, 2005. (A. 52, 1202.) The State paid Gyrodyne approximately $26 million in compensation.

Gyrodyne filed this claim on May 1, 2006, asserting that it had not received adequate compensation for the taking. (A. 52-56.) The matter was tried before the Court of Claims (Lack, J.) in August 2009. The court heard testimony from experts as to the value of the property, as well as fact witnesses who testified about the history of the property, including the 2003 efforts by Gyrodyne and Landmark to create a low-density residential community.

1. The Trial

Claimant's witnesses testified that the best use of the property was residential development. Although the property was not zoned for residential use at the time of the taking, Daniel Gulizio, the planner who testified for claimant, claimed that there was a substantial probability that the two towns involved would change their zoning to allow for residential use. Specifically, he estimated that there was a 90

to 95% probability that the town of Brookhaven would re-zone its portion of the property to allow a density of three to six residential units per acre; and a 70 to 75% probability that the town of Smithtown would do the same. (A. 80-233.) He acknowledged, however, that when he prepared the report that made this claim, he omitted consideration of cases in which the towns had denied applications for rezoning, or effectively killed those applications by letting them linger indefinitely. (A. 181-183.) Nonetheless, Gulizio testified that a hypothetical development of the property would yield a total of 1230 to 1538 residential units of unspecified size and character, based on an assumed average density of three to six residential units per acre.[6] This hypothesized number of residential units was four times larger than the number of units proposed by Gyrodyne in the development plan it

[6] This figure represents Gyrodyne's estimate of the number of "units" that would have been built on the entire property (not just the portion that was appropriated). The estimate appears in the appraisal at pages A. 1257-1258; it is the total of the number of "units" assigned to each of the three portions of the property in Gyrodyne's "95% and 75% Scenario" (726 units in the Brookhaven portion of Parcel A, plus 255 units in the Smithtown portion of Parcel A, plus 249 units in Parcel B, for a total of 1230; *see* A. 1257) and its "90% and 70% Scenario" (908 units in the Brookhaven portion of Parcel A, plus 318 units in the Smithtown portion of Parcel A, plus 312 units in Parcel B, for a total of 1538; *see* A. 1258.) The total number of "units" Gyrodyne claimed for the appropriated portion of its property was 981 in its "95% and 75% Scenario" and 1226 in its "90% and 70% Scenario." (*See* A. 1257-1258.)

submitted shortly before Stony Brook decided to appropriate the property.

Claimant's appraiser, Gary Taylor, relied on Gulizio's claims about re-zoning, and used a comparable-sales approach to value the condemned property. Taylor acknowledged that there were no real comparators for a property of this kind, because he was aware of no similarly large parcels of land that had been sold in Suffolk County in recent memory. (A. 386-387.) He analyzed sales of small parcels, and based on the sales price for those parcels and the number of residential units developed on those parcels, calculated an estimate of the value-per-residential-unit of the parcels. Taylor did not consider the size, nature or character of the residential units developed on the various properties in reaching this estimate. Taylor reduced the estimated value-per-unit by what he said was 5%, to account for the costs and time associated with obtaining approvals and re-zoning for the property. (In fact, he reduced it by 3.8%.[7]) Taylor acknowledged that this reduction was not based on any evidence; he had not attempted to

[7] *See* A. 430, A. 1257. The downward adjustment was from $130,000 to $125,000, an adjustment of $5,000, which is 3.8% of $ 130,000.

estimate the time that re-zoning and approvals would take, or the costs involved in obtaining them. (A. 492-493.) By this unorthodox method, Taylor arrived at an estimated per-unit value of $130,000 for the other residential development properties considered. (A. 1255.)

Taylor multiplied this estimated per-unit value by the number of residential units that Gulizio hypothesized for the development of the property. Taylor then reduced the total value to account for Gulizio's estimated probability of re-zoning in each town (90-95% for Brookhaven, and 70-75% for Smithtown). (A. 1257.) Selecting a number in the resulting range of values, Taylor concluded that the value of the taken property was $125 million (A. 377-506), a figure four times greater than the total market capitalization for the entire company that Gyrodyne had stated in its 2004 annual report.

The State's appraiser and planner each testified that the best use of the property would have been industrial. (A. 787-914, 1769-1941.) Their analysis also used a different methodology: rather than comparing other sales on a per-residential unit basis, the State's appraisal calculated the value-per-acre of comparable properties, and then applied that to the number of acres in the State's property. (*See*

A. 813.) They also assessed "the prospects of success of a residential type planned development district on the entire Gyrodyne property." (A. 604.) Residential development, they concluded, would be difficult and costly, because of the lengthy and difficult process of obtaining environmental approval and zoning changes in two towns, which was likely to take at least seven years, and quite possibly more. (A. 638.) This process would raise a number of concerns, particularly traffic and groundwater issues. (A. 625-27.) The likely outcome of the zoning process, the environmental review process, and the process of obtaining approvals for construction would be a substantial reduction in the density of the proposed development. (A. 637.) The likely density at the end of the process was around 1 to 2 units per acre. (A. 679.)

Based on these conclusions about the likely course of an attempt at residential development of the property, the State's appraiser used the value of comparable land sold for industrial purposes to derive a value of $22,450,000.

2. The Court of Claims' Decision

The Court of Claims issued a written decision on June 10, 2010. (M.A. 1.[8]) It adopted claimant's view that the best use of the property was residential. It noted that the parties differed as to the best use of the property, and stated: "[O]nce the Court chooses the highest and best use of the subject property, if there is no range of value to guide the Court in valuing the subject property, the Court is left with the valuation of the property by only one set of experts." (M.A. 27; A. 29.) It held that the best use was residential, rejecting the testimony of the State's experts. (M.A. 35; A. 37.)

The court then opined that, given its rejection of the State's appraisal, "the Court is left with no choice but to accept the before and after values and damages found by claimant." (M.A. 35; A. 37.) The court therefore accepted Gyrodyne's valuation to the dollar, awarding it compensation of $125 million, plus interest up to the date of judgment totaling $ 54.6 million, and additional interest from the date of judgment to date of payment. (M.A. 39-40; A. 41-42.) Judgment was

[8] Citations to "M.A. __" are to documents in the Motion Appendix attached to this motion for leave to appeal.

entered on August 17, 2010. (M.A. 38; A. 40.) On December 14, 2010, the court issued a decision and order granting claimant's application for fees and expenses, directing entry of judgment for an additional $1,474,940.67. (M.A. 48; A. 51.)[9]

3. The Appellate Division's Decision

The State appealed. (M.A. 41, 52, 54.) The Appellate Division affirmed the decision of Supreme Court by decision and order dated November 22, 2011. *Gyrodyne Co. of America v. State*, 89 A.D.3d 988 (2d Dep't 2011) (M.A. 56-57). The Second Department held that the trial court properly rejected the State's appraisal and accepted claimant's appraisal. It did not address the State's argument that the Court of Claims erroneously held itself bound to accept claimant's appraisal once it rejected the State's. Nor did the court address the argument that vacant land should not be valued on a per-unit basis, stating simply that "the proposed density of the residential development, which formed the basis for the damages award, was supported by the evidence." *Id.* at 990 (M.A. 57). The State moved for reargument or, in the alternative,

[9] If this Court grants leave and reverses the judgment dated August 17, 2010, it should also reserve the later judgment awarding fees and expenses, which is predicated on the August 17 judgment.

for leave to appeal, but the Appellate Division denied the motion. (M.A. 59.)

REASONS FOR GRANTING LEAVE TO APPEAL

The Appellate Division's conclusions warrant review because the significant errors of law made by the Court of Claims, and affirmed by the Appellate Division, have statewide importance. *See* 22 N.Y.C.R.R. § 500.22(b)(4). This Court has emphasized that condemnation proceedings are infused with the public interest. Consequently, "[j]ust compensation requires a result which is 'just' both to an owner whose property is taken and to the public that must pay the bill.'" *Port Authority Trans-Hudson Corp. v. Hudson Rapid Tubes Corp.*, 20 N.Y.2d 457, 470 (1967) (quoting *United States v. Commodities Corp.*, 339 U.S. 121, 123 (1950)). The lower courts violated this basic principle of condemnation law.

The Court of Claims erred in holding that once it had rejected the State's appraisal, it was required to accept claimant's alternative appraisal to the penny, rather than reviewing the appraisal to ensure that taxpayers were not forced to pay an inflated price for the property taken. The court also erred in accepting wholesale claimant's badly

flawed appraisal—most glaringly because the appraisal used an unsupported methodology of valuing vacant land on a "per residential unit" basis. These errors of law, if allowed to stand, will distort condemnation awards across the State, to the detriment of the State's taxpayers. In addition to the mischief the decisions below will cause in future condemnation proceedings, this case is leaveworthy because the award here, by itself, forces taxpayers to pay the enormous sum of $125 million—with interest now adding tens of millions to that sum, and accumulating rapidly—based on an appraisal that is totally unmoored from any realistic estimate of the taken property's value.

I. The Court of Claims Should Have Independently Assessed Claimant's Appraisal

The first leaveworthy issue in this case is presented by the Court of Claims' erroneous holding that it was required to accept claimant's appraisal once it had rejected the State's valuation.[10] The court noted that the parties differed as to the best use of the property, and stated: "[O]nce the Court chooses the highest and best use of the subject

[10] This issue was raised in the State's brief to the Appellate Division. (App. Div. Br. at 11-12.)

property, if there is no range of value to guide the Court in valuing the subject property, the Court is left with the valuation of the property by only one set of experts." (M.A. 27; A. 29.) When the Court held that the best use was residential, rejecting the testimony of the State's experts, it stated that "the Court is left with no choice but to accept the before and after values and damages found by claimant." (M.A. 35; A. 37.) Indeed, the following discussion contained no independent assessment of claimant's appraisal; it merely recited the figures offered by claimant's appraiser, and then awarded judgment in precisely that amount. But those figures were based on pure speculation, not evidence.

As discussed above, this Court has stressed that compensation in an eminent domain proceeding must be just to the taxpayers, as well as to the claimant. *Port Authority Trans-Hudson Corp.*, 20 N.Y.2d at 470. Based on this principle, the departments of the Appellate Division have generally held that the Court of Claims has an independent duty to ensure that the compensation awarded is just by remanding for new trials when both sides' appraisals are inadequate. *See Yaphank Dev. Co. v. County of Suffolk*, 203 A.D.2d 280, 282 (2d Dep't 1994) (remanding for a new trial where "the appraisals of both parties [were] defective");

see also Bell v. Village of Poland, 281 A.D.2d 878 (4th Dep't 2001); *Matter of Acquisition of Real Property by Iroquois Gas Transmission Sys.*, 226 A.D.2d 808 (3d Dep't 1996). But, as this case shows, the lower courts have not always honored this principle. Moreover, this Court has never explicitly addressed the proper steps for a trial court to take in an eminent domain proceeding when neither side's valuation is supportable. The Court should grant leave to address the question.

This case dramatically illustrates the dangers that arise when lower courts misunderstand their responsibilities in eminent domain cases. Rather than ensuring that the judgment reflected the real value of the condemned property, the Court of Claims simply accepted the valuation offered by the claimant because it was the only one left standing after the State's appraisal was rejected. The Appellate Division affirmed the judgment.

The strong public interest in accurate valuation in eminent domain cases should have led the lower courts to independently assess the claimant's valuation and reject it as a matter of law. The claimant's valuation was fatally flawed, for many reasons. As discussed in Point II, below, the valuation was based on a guess about the number of

residential units that might eventually be built on the property if it were re-zoned and ultimately developed—a guess that was contradicted both by the actual development proposal that Gyrodyne had committed to at the time of the taking, and by uncontradicted testimony that the high-density development assumed by Gyrodyne's appraisal would face substantial reductions in density as it went through the zoning and approval processes. The valuation also was based on an inherently unreliable method of appraising vacant land, not on a per-acre basis, but by calculating a per-residential unit value based on properties that were already approved for specific kinds of development. Further, the valuation was based on supposedly comparable properties that were dramatically smaller than Gyrodyne's property—the "comparables" ranged from 3.8 acres in size, about one percent of the size of Gyrodyne's property, to 74.79 acres, about one-fourth the size of Gyrodyne's property.

This Court should grant leave because of the strong public interest in ensuring that courts do not, in the future, fail to independently assess claimants' appraisals that are based on such flawed valuation methods, simply because the court has first rejected the government's

appraisal.

II. Valuing Vacant Land On a "Per Residential Unit" Basis Is Unreliable and Unsupported

The second leaveworthy issue in this case is presented by the valuation method adopted below. Claimant's appraisal, which the Court of Claims considered itself obligated to accept, estimated the value of Gyrodyne's vacant land on a "per residential unit" basis.[11] Instead of estimating the value of Gyrodyne's acreage, as did the State's appraiser, Gyrodyne's witnesses estimated the number of "units" (residences) that hypothetically could be built on that acreage, and then multiplied that number of units by the estimated value of "units" elsewhere on Long Island. Estimating the value of vacant land in this way is an error of law, because it invites enormous departures from the real-world value of property, as this case demonstrates.

Although this Court has not specifically addressed the permissibility of an appraisal that uses per-unit measurements of value

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[11] This argument was raised in the State's brief to the Appellate Division. (App. Div. Br. at 28-29.) The appropriated property is referred to in this brief as "vacant," although it was improved by four buildings, because the appraisal adopted by the Court of Claims assumed that those buildings would be demolished, rather than used.

for vacant land, it has made clear that appraisals following the comparable-sales approach should state clearly the per-acre value of the condemned property and the comparable properties. When the best use of undeveloped land is residential development, courts should "treat the premises not as raw acreage nor as part of a completed development but as a potential subdivision site giving *the acreage* an increment in value because of that potential use." *Matter of County of Suffolk (Firester)*, 37 N.Y.2d 649, 652 (1975) (emphasis added) (quoting *Hewitt v. State*, 18 A.D.2d 1128 (1963)). Importantly, "the determiner of the facts should set out the found *acreage* value and the found *increment* value, rather than [just] the final *per acre* figure, so that intelligent review is permitted." *Matter of County of Suffolk*, 37 N.Y.2d at 653 (emphasis added). *See, e.g., In re Village of Haverstraw*, 33 Misc.3d 1232(A), 2011 WL 6155720 (N.Y. Sup. Ct. 2011) (sharply criticizing per-unit valuation).

The approach adopted by the Court of Claims violates this rule, because claimant's appraisal never set forth any per-acre figure for its "comparable" residential properties—not any per-acre base figure, not any per-acre increment to be added to the base figure due to the

potential for development, and not any final per-acre figure used to value the condemned property. Instead, the value of the supposedly comparable properties and the value of the condemned property were given solely on a per-residential unit basis—making "intelligent review" impossible.

While it is easy to know the number of acres in a condemned tract of vacant land, there is no non-speculative way to estimate the number of "units" that might someday have been built there, had it not been taken. If the land in question is already *developed,* or at least subdivided, at the time of the taking, it might be reasonable to value it on a per-unit basis—so long as reasonably precise "units" were chosen and comparable units used to estimate the value. For example, if a cemetery has already been developed and divided into a set number of plots, it is possible to know with precision the number of plots involved in a hypothetical "highest and best use": usually, it will be the same as the number of plots that actually existed at the time of the taking. *See*

St. Agnes Cemetery v. State, 3 N.Y.2d 37 (1957).[12] But vacant land should be appraised based on the number of acres it contains, because it is not possible to know with any reasonable degree of certainty what kind of "units" will be built there, or how many of them will be built. Thus, a standard treatise on appraisal notes that "each sale price should be stated in terms of appropriate units of comparison," and for "[v]acant land," recommends "[p]rice per front foot," "[p]rice per square foot," or "[p]rice per acre" as the appropriate unit of comparison. Appraisal Institute, *The Appraisal of Real Estate* 424 (12th ed. 2001).

Particularly where, as here, there are no genuinely comparable properties—*i.e.*, no tracts of land nearly as large as Gyrodyne's property sold in Suffolk County in recent memory—it is dangerous and improper to allow speculation about the number and nature of the residential

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[12] Only one case from this Court discusses per-unit valuation, and it is a very different kind of per-unit valuation. In *Acme Theatres v. State of New York*, 26 N.Y.2d 385 (1970), the State appropriated a strip of land bordering a road; the strip of land was part of a larger property that contained a drive-in movie theater. The condemnee urged the Court to assign a higher value to the strip of land next to the road than to the other parts of the property; it called this a "bands of valuation" approach. The State, on the other hand, argued that the entire property should be valued at the same rate; the Court referred to this as a "per-unit" valuation. *Id.* at 389. The question before the Court in *Acme Theaters*—whether a single property can be divided into "units" of variable value—has no bearing on the question whether vacant land and the comparable properties used to estimate its value can be analyzed on a per-unit basis.

units that might someday have been developed on vacant land had it not been condemned. In fact, the "comparable" properties that Gyrodyne used to derive its per-unit estimate of the value of comparable land were dramatically different from Gyrodyne's property. While Gyrodyne's property was 308 acres (245 of which were taken), the seven "comparable" properties it used were much smaller; the largest was 74.79 acres, and the smallest were 11.1, 8.11 and 3.8 acres. (A. 1255.) And the smaller properties had extremely high values per acre: the 3.8-acre property was valued at over $1 million per acre, and the 8 and 11-acre properties were valued at over $700,000 per acre, while the 74-acre property was valued at $240,673 per acre.[13] Moreover, each of Gyrodyne's "comparable" properties already had the zoning and approvals needed for residential development[14]; although Gyrodyne's appraisal purported to deduct small percentages to account for the need to obtain re-zoning and approvals, the properties on which the appraisal was based were fundamentally different from the vacant land at issue

[13] These values are derived from the table of values in claimant's appraisal report(*see* A. 1255), by dividing "Land Area (Acres)" by "Total Sales Price".

[14] In the table of information about comparable residential properties on A. 1255, each entry in the row labeled "Approvals" is marked "Yes."

in this case.

The arbitrariness and manipulability of per-unit valuation of vacant land is well illustrated by the record in this case. The sharp divergence between Gyrodyne's appraisal and the evidence was made possible by its arbitrary per-unit approach. Gyrodyne's appraisal claimed that the best use of the land would have been a residential development featuring 1230 to 1538 residential units, which represented a density of 3 to 6 units per acre. (A. 1257-1258; *see* above, note 6.) The State's experts, by contrast, testified that the zoning and environmental review processes would likely end with a substantial reduction in the density of a proposed development (A. 637); they estimated an eventual density of 1 to 2 units per acre. (A. 679.)

As explained above, the Court of Claims did not attempt to independently assess the credibility of claimant's testimony; it simply rejected the State's appraisal and then entered judgment in the amount sought by claimant. If the court had independently reviewed claimant's evidence, it would have noted that at the time of the taking, Gyrodyne was actually planning a low density, not high density, development on its land, and that this actually planned low-density development would

have yielded only 336 residential units—less than one-fourth the number of units in the hypothetical development Gyrodyne presented at trial. (*See* App. Div. Br. at 28-37.)

The per-unit approach also improperly allows appraisers to gloss over and ignore the real-world challenges that accompany any residential development. While a developer may wish to build a certain number of units, it is extremely common for that number to be scaled back during the process of environmental and zoning review. Uncontradicted testimony in the record indicated that development proposals are typically scaled down quite dramatically during review. *See In re Town of Islip*, 49 N.Y.2d 354, 360-61 (1980) (claimant must prove likelihood of obtaining necessary government approval for hypothetical use).

Gyrodyne itself acknowledged, in its 2003 proposal to the town of Smithtown, that it had been forced to abandon a proposal for high-density development due to community opposition. As Gyrodyne explained in its proposal to Smithtown, a higher-density development would have required the construction of an on-site sewage treatment plant, but "[m]any community representatives objected to . . . the

construction and operation of a sewage treatment plant at this site. Thus, the applicant has developed a plan wherein the density has been substantially reduced from earlier concepts." (A. 1947.) But Gyrodyne's appraiser ignored this evidence and stuck to the high number of "units" that allowed them to arrive at the figure of $125 million, and the Court of Claims accepted the appraiser's estimate to the penny.

Furthermore, "residential units," in the real world, vary immensely in size, character, and value. Some "units" can be improved with luxury residences, and others can be developed with affordable, lower-profit housing. Indeed, although Gyrodyne's expert chose not to offer any valuation for the actual low-density development Gyrodyne had been pursuing shortly before the condemnation, the expert did opine that the 336 units Gyrodyne had proposed would have been roughly equal in value to the 1230 to 1538 residential units the appraisers assumed in their hypothetical development model, because the units in the low-density development would have been luxury units near a world-class golf course. (A. 540.) But Gyrodyne produced no evidence to support the claim that the overall value of the actual planned low-density development and the hypothetical unplanned high-

density development would have been equivalent. And the fact that its experts treated 336 "units" as roughly equivalent in value to more than 1200 "units" simply illustrates how manipulable and arbitrary the "per unit" approach is. It was error for the Court of Claims to accept speculation of this kind, and do so without even questioning its relation to the evidence.

To be sure, it is mathematically possible to manipulate the per-acre approach to produce the same result as the per-unit approach, by valuing the acres at issue on the assumption that they will support an unrealistically large number of expensive residential units. But in practice the per-acre approach normally makes it difficult to rely on "comparable" properties that are materially different from the property being appraised, or comparable properties whose values are too divergent to serve as a useful baseline for property valuation.

If Gyrodyne's appraisal had calculated the value-per-acre of its putatively comparable property, it would have been obvious that the value of the small properties it used was much higher than the value of the larger properties it used. Gyrodyne's per-unit valuation made it appear that its comparable properties each had a value per unit of

between $126,000 and $146,000. (A. 1255.) The lack of apparent variation in its comparables made it seem that Gyrodyne had found a reliable measure of the value of Suffolk County land. If Gyrodyne had calculated the per-acre value of its "comparable" properties instead, it would have been forced to admit that those properties varied in value from $240,000 to $1.1 million per acre—and that the smaller properties had a dramatically higher value per acre.[15] These discrepancies make clear that the comparables were in fact widely disparate, and thus not at all representative of the value of comparable land in Suffolk County. Gyrodyne was able to camouflage the discrepancies by using the per-unit approach, rather than a per-acre approach.

It is well established that adopting an erroneous valuation method in a takings case is an error of law. *See, e.g., Acme Theatres, Inc. v. State*, 26 N.Y.2d 385 (1970) (Court of Appeals can consider "whether the courts below correctly applied the proper method of computing damages"); *Arlen of Nanuet, Inc. v. State*, 26 N.Y.2d 346, 357 (1970) (holding that retrial is required due to "erroneous methods of

[15] Property 8 was 74.79 acres, and sold for $18 million, a per-acre value of $240,674. Property 14 was 40.8 acres, and sold for $45,030,000, a per-acre value of $1.1 million. (A. 1255.)

valuation"). Because the lower courts here adopted a fundamentally erroneous method of valuation, and entered a judgment to be borne by taxpayers that is unmoored from the real-world evidence, this Court should grant leave.

CONCLUSION

Leave to appeal should be granted.

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Respectfully submitted,

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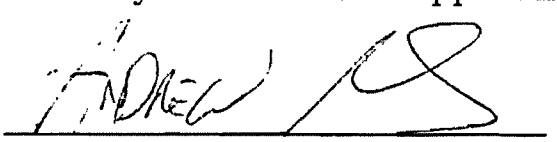
By: 
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