

To be Argued by:
JOSEPH L. CLASEN
(Time Requested: 15 Minutes)

New York Supreme Court
Appellate Division – Second Department

Docket No.:
2010-08950

GYRODYNE COMPANY OF AMERICA, INC.,

Claimant-Respondent,

– against –

STATE OF NEW YORK,

Defendant-Appellant.

BRIEF FOR CLAIMANT-RESPONDENT

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Court of Claims No. 112279

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Should the trial court's performance of its duty in making a factual determination of the value of the property based on all the evidence presented, including the credibility of the witnesses it saw, be accorded due deference?
2. Should the trial court's factual determination of the highest and best use as probably rezoned residential, in accord with the testimony of the experts on both sides, be sustained in the absence of contrary evidence?
3. Should the trial court's exercise of discretion in awarding an additional allowance for fees be sustained where the State does not allege any abuse of discretion?

PRELIMINARY STATEMENT

The purpose of any eminent domain proceeding is to determine just compensation. To do so, a court hears evidence from both sides, and decides the value of the property. That is what happened here. The land taken from Gyrodyne Company of America (“Gyrodyne”) was described by the State’s own appraiser as “beautiful land,” “ripe for development,” “eminently buildable” (A795) and “in a very nice residential location.” (A797).

Unwilling to pay the fair price for land it took over five years ago, the State now seeks a new trial from this Court. Incredibly, the State is seeking a “do-over.” It claims “there are many problems that the State would point out at retrial.” Brief For Appellant (“NY Br.”), 13. However, these turn out to be questions the State wishes it had asked at trial, or arguments it wishes it had made based on the questions it did ask. None of them would justify the reduction of over \$100 million necessary to value the land as the State did at trial. Having gone through that trial, benefited from the extensive analysis in the trial court’s decision and having considered the matter for over eight months, the State believes it could do a better job next time around. That is not the purpose of appeals.

The State does not contend the trial court made any errors in admitting the evidence. Nor does it rely on real errors in the court’s legal analysis. Rather, the State argues the valuation might be different, if the case had been tried a different

way. Any competent attorney could say as much in any case before this Court, but that would not get him, or her, a second chance. Trials are not out-of-town tryouts of tactical approaches to be changed after the judge's decision gives a bad review. Trials are intended to be final performances that resolve cases when the curtain comes down.

Moreover, a new trial here would not change the result. All of the evidence supports the trial court's factual finding of a reasonable probability of rezoning. Even the State's own experts conceded that. On appeal, the State does not seriously contend that the property would not have been rezoned. It merely regrets its choice not to provide an alternative value of the property as rezoned. The State placed all its eggs in the basket of valuation as zoned industrial. Once the trial court accepted the expert testimony of a reasonable probability of rezoning to residential, the State had no fallback position – but that was the State's choice.

Nor is this a case where the claimant's experts grasped for the highest possible valuation, stretching every element to the extreme. Instead, Gyrodyne's witnesses specifically chose a conservative approach in calculating value, rejecting the largest numbers and utilizing more reasonable figures. The result was a fair number.

Deciding to expand the State University's campus by almost 20%, the State took one of the largest undeveloped parcels left in Suffolk County. The trial

court's decision, weighing all of the evidence, and expressly determining Gyrodyne's witnesses were more credible, produced an award that gives just compensation. No purpose would be served by granting the State a "do-over."

COUNTERSTATEMENT OF FACTS

This appeal arises out of the State's taking of 245 acres from Gyrodyne on November 2, 2005. *See* Court of Claims Decision, dated June 30, 2010 (Lack, J.) (the "Decision") A3. Gyrodyne had owned 308 acres in Suffolk County that straddled the boundary between the Towns of Brookhaven and Smithtown (the "Property"). *Id.*, A3-A5, Trial Transcript ("Tr.") A380. The State took Gyrodyne's land to expand the campus of the State University of New York at Stony Brook ("SUNY Stony Brook"). Decision A3.

1. The History Of The Property

Gyrodyne purchased the Property in 1951 to conduct helicopter test flights. Tr. A515; Decision A24. The Property was zoned residential at the time, but Gyrodyne obtained a rezoning to industrial. *Id.* Over the next 20 years, Gyrodyne used the Property for its helicopter business, constructing several buildings on the site. Tr. A516. With the close of the Vietnam War came the end of Gyrodyne's government contracts. *Id.*; *see also* Appraisal Report by American Property Counselors dated October 1, 2008 (the "Golub Report") A1787. Gyrodyne discontinued the helicopter business and rented portions of its old buildings to

small companies and entrepreneurs. Tr. A516; *see also* Tr. A386 (the buildings were cut-up into “incubator space”).

From its beginning, Gyrodyne was a family-owned business. Although a public company, the family owned 40% of the stock. The family’s main goal after Vietnam was to use the company to keep themselves employed. Tr. A516; Decision A24-A25. As a result, the family made no efforts to develop the Property. Tr. A516. After its patriarch passed away, the family squabbled, leading to a takeover by a new independent board in 1999. Tr. A517. From that time on, Gyrodyne focused on development of the Property.

Working with Marriott, Gyrodyne submitted an application for rezoning a portion of the Property from industrial to residential. Marriott planned to develop an assisted living facility of 126 units on 10 acres of the Property. Tr. A519-A520; Decision A25. In February 2000, Brookhaven granted the rezoning application. Decision A25; A1660. The project did not go forward only because Marriott got out of the assisted living business. Tr. A529, A569; Decision A25 n.23.

Gyrodyne investigated other options for development of the Property. Tr. A521. In 2001, Gyrodyne began working with a developer, Gerald Barton (“Barton”). Barton’s company, Landmark, had developed luxury residential communities centered on golf courses across the country. Tr. A575. Over many months, Barton inspected the Property, investigated the area and met with local

citizens. Tr. A581. He concluded that the Property was a good site for a golf and residential development. *Id.*; Decision A26.

In October 2003, Gyrodyne withdrew its prior application for the Marriott project and submitted a new application to rezone the entire Property for a golf course with 336 residential units. Tr. A521, A569; A1663-A1665; Golub Report A1757. That application was subsequently resubmitted to both Brookhaven and Smithtown, since the development involved both towns. Tr. A523; Decision A25; A1942-A1947. A public meeting was held on the application in Smithtown and no real public opposition to Gyrodyne's plan surfaced in either town. Tr. A523-A525. A583; Decision A25. While the rezoning application was pending, representatives of SUNY Stony Brook met with Brookhaven officials to say the University was considering condemnation of the Property, and urge that no action be taken on Gyrodyne's rezoning application. Tr. A202-A203; A232-A233. On November 2, 2005 SUNY Stony Brook took 245 acres of the Property by eminent domain. Decision A3.

2. The Evidence At Trial

Gyrodyne filed a timely claim and trial proceeded in the Court of Claims over four days in August 2009. The trial consisted primarily of expert testimony. Gyrodyne called Daniel Gulizio ("Gulizio") who worked in local and county government on Long Island for over 24 years as a public planner, including serving

as Commissioner of Department of Planning for the Town of Brookhaven and, at the time of trial, Deputy Director of Planning for Suffolk County. Tr. A81-A83; Decision A18. Gulizio testified to the factors considered in determining probability of rezoning, including the existing zoning, the character of the surrounding area, physical limitations, the local government's comprehensive plans and the recent history of rezoning applications. Tr. A98; Decision A18.

Applying these factors to the Property, Gulizio testified that the existing light industrial zoning would allow development of over 3 million square feet of commercial space. Tr. A100-A101; Decision A19. However, the narrow country roads, far from the Expressway, constrained industrial development. Tr. A103-A104. The surrounding area was residential (Tr. A101-A102) so as zoned the Property qualified as spot zoning. Tr. A102. Brookhaven's comprehensive plan called for the elimination of spot zoning and specifically indicated the Property should be rezoned to a Planned Development District ("PDD"). Tr. A105-A110; Decision A19. Both Brookhaven and Smithtown in the past had granted rezoning from industrial to high density residential (11 to 14 units per acre). Tr. A111-A115; *see also* Zoning Analysis – Gyrodyne Property, dated October 17, 2007 (the "Gulizio Report") A931. Based on all of these factors, Gulizio testified that there was a reasonable probability of rezoning the Property from industrial to residential PDD with a density of 3 to 6 units per acre. Tr. A124; Gulizio Report A920.

Gulizio testified that the probability of rezoning in Brookhaven was 90-95 percent, since the comprehensive plan addressed the Property. Tr. A127. However, as Smithtown did not have an up-to-date comprehensive plan, Gulizio set a lower probability, 70-75 percent, there. Tr. A128 Decision A20-A21.

Alan King (“King”) also testified for Gyrodyne. King was a licensed traffic engineer with 23 years experience. King performed a traffic impact study of the roads surrounding the Property as of the date of taking. Tr. A237; Decision A21-A22; A1353. He compared traffic from a full build-out of the Property as zoned industrial to a residential development of 3 to 6 units per acre. Tr. A243-A250; Decision A22. King’s study demonstrated that industrial development would result in 4,000 to 5,000 additional cars at peak morning and evening commuting times compared to just 323 to 343 for residential. Tr. A252-A253; Decision A23.

Gary Taylor (“Taylor”) testified for Gyrodyne as its expert appraiser. He had 36 years of experience practicing on Long Island (Tr. A378-A379; Decision A14) and drove by the Property every day on the way to work. Tr. A382. Taylor testified that the proper method of valuing undeveloped land, such as the Property, was to use comparable sales of raw land as zoned and then, where a probability of rezoning exists, to add an increment to the value to reflect that probability. Tr. A385. Taylor testified that the Property was in a poor location for industrial development as it was remote from main thoroughfares. Tr. A382-A383; Decision