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

A14. The Property was in a pristine, bucolic setting for residential use, however, surrounded by fairly expensive homes and in highly-regarded school districts. Tr. A384; Decision A15.

Taylor looked at several sales of raw land zoned industrial and applied adjustments to ensure he compared like to like in determining an as-zoned value. Tr. A395-A405; *see also* Self Contained Appraisal Report of Rogers & Taylor Appraisals, dated October 17, 2007 (the "Taylor Report"), A1252-A1253. Then Taylor investigated the probability of rezoning. Based on his own experience, he agreed with Gulizio's opinion that the Property would probably be rezoned. Tr. A408; Decision A15. Taylor compared sales of raw land intended for residential development to determine a price per unit. To each of these comparable sales he applied adjustments for location, market conditions, yield density, utility restrictions (primarily whether sewers were available, since the Suffolk County sanitary code requirements impose significant limitations) and approval adjustments (since the comparables had zoning approval already in place). Tr. A413-A420; Taylor Report A1255-A1256. Taylor made an additional downward adjustment of 5 percent for the cost and time to obtain rezoning of the Property (Tr. A430) and a third set of adjustments to reflect Gulizio's different percentages of probability in each town. Tr. A431-A435; Taylor Report A1257-A1258.

Taylor appraised the Property with a probability of rezoning to residential at $153 million. Tr. A436. Since the value of the 62 acres Gyrodyne retained was $28 million, Taylor appraised the portion taken by SUNY Stony Brook at $125 million. Tr. A437-A439; Taylor Report A1279.

Gyrodyne also called its COO, Peter Pitsiokos ("Pitsiokos"), to testify about the history of the Property (Tr. A514, Decision A24-A25), and the developer, Barton, to testify about the efforts to develop the Property as a residential and golf community. Tr. A573-A585; Decision A26.

In presenting its case, the State called Robert Grover ("Grover") a consulting company's Director of Environmental Sciences responsible for environmental analysis and permitting processes. Tr. A601-A602. Grover stressed he did not do an environmental impact statement or conduct an environmental analysis of the Property. Tr. A665. Grover testified about the number of steps in the review process before development, particularly the extensive environmental review. Tr. A548-A557. A560-A565; Decision A10-A11. Grover concluded that development may be approved, possibly as a PDD, but it would take a long time. Tr. A637-A638; Decision A11. Grover agreed that Brookhaven and Smithtown "know they're not going to be able to keep this land pristine and undeveloped," that the Property is going to be developed either as of right industrial, or as rezoned residential. Tr. A679. Grover also agreed with factors applied by Gulizio to

determine the probability of rezoning. Tr. A669. When asked on cross-examination about that probability, Grover informed the court that he had never stated that the Property would not be approved for rezoning to PDD but rather, there was a reasonable probability of rezoning. Tr. A674; Decision A12.

William Fitzpatrick ("Fitzpatrick") testified as a traffic engineer for the State. Fitzpatrick had no experience in Suffolk County (Tr. A691-A694; Decision A12) and did no traffic impact study. Tr. A762-A763. Further, Fitzpatrick did not even assess traffic for the same scenarios, industrial or residential development, that Gyrodyne's and the State's appraisers used. Tr. A755; Decision A12-A13. Furthermore, Fitzpatrick's analysis was not done as of the November 2, 2005, date of taking. Decision A13.

Lastly, Kenneth Golub ("Golub") testified as the State's appraiser. Although he had been an appraiser since 1968, his work had been primarily in the Lower Hudson Valley area. Tr. A787-A788; Decision A6. Golub testified that the Property was "surrounded by homes" and "most developers would normally tend to gravitate to residential use." Tr. A797. However, due to the lengthy approval process, he believed development under the existing industrial zoning would be more beneficial than attempting to rezone to residential. Tr. A799. Thus, Golub found the highest and best use as zoned for a business park. Decision A6, A8. Using a methodology of comparing the sales of already-developed industrial

building sites, backing out the development costs (Tr. A813), and adding the value of Gyrodyne's existing buildings, Golub valued the 245 acres taken at $22.45 million. Tr. A818; Golub Report (A1770).

Golub admitted that an appraiser should value property for any reasonable probability of rezoning. Tr. A822-A823. Further, as an appraiser, his job was to determine the highest and best use. Tr. A831; Decision A9. However, Golub did not value the Property as rezoned, because he thought it too hypothetical (Tr. A824) and no one gave him a model for residential development. Tr. A829, A832. Golub was able to develop a concept for industrial development as a business park without anyone providing a model. Tr. A849; Decision A9. Eventually, Golub was forced to admit that the Property did have a reasonable probability of rezoning under various circumstances. For example, he conceded a reasonable probability of rezoning residential for single homes, or for a multi-unit golf development, or for mixed use including assisted, senior and low-density residential. Tr. A836-A837, A844-A848; Decision A8-A9. However, Golub never prepared a valuation of the Property with a probability of rezoning.

3. The Decision Awarding Compensation

On June 30, 2010, the Court of Claims issued its Decision in this matter. The Decision discusses the testimony of each witness extensively. A6-A26. The court then explicitly set out its reasons for finding that, while the State's experts

were not credible, Gyrodyne's experts were credible. A31-A33. Based on all the evidence, the court determined the highest and best use of the Property would be as rezoned for a PDD with residential use. A36. Since the State did not present any evidence as to the value of the Property at this highest and best use, the court relied upon the valuation presented by Gyrodyne's witnesses, whom it had already found credible, and awarded Gyrodyne damages of $125 million. A37-38.

ARGUMENT

I.

THE TRIAL COURT DID NOT ABDICATE ITS RESPONSIBILITY TO DETERMINE JUST COMPENSATION

The Decision (A3-A39) represents a full and thoughtful analysis of all of the evidence presented. The trial court addressed the testimony of each witness and discussed in detail its evaluation of their credibility. Decision A31-A33. The court found the State's witnesses were less credible. Further, their testimony failed to support the State's preferred theory of valuation.

Before trial, the State's planning and zoning expert, Grover, was never asked to give an actual opinion about the probability of rezoning. Instead, the stated purpose of his expert report was "to examine and discuss the environmental and planning review process for change of zone and development of the Gyrodyne property ..." Environmental Analysis and Permitting Review Assessment, dated January 12, 2009 (the "Grover Report") A1741; *see also* Decision A10. Most of

Grover's report and testimony dealt with environmental aspects of this review process, understandably since Grover is an environmental scientist. *See* Tr. A640-641; Decision A32. When finally asked point blank on cross-examination about the probability of rezoning, Grover testified, "I have never stated that it could not be rezoned for PDD." Tr. A677. Grover then admitted there was a reasonable probability of rezoning. Tr. A678-A679; *see also* Decision A12.

Grover was not a witness who unexpectedly changed his testimony at trial. The State had artfully asked for an opinion that avoided the relevant question. When that question was asked, Grover's answer clearly supported Gyrodyne's approach to valuation, not the State's.

The State's appraiser, Golub, likewise admitted on cross-examination that there was a reasonable probability of rezoning the Property to residential for: (1) one to two acre lots or (2) a golf community, or (3) mixed use. *See* Decision A8-A9. Based on their testimony, the trial court concluded, "Defendant's experts agreed that a change of zone for the subject property to residential was probable." Decision A33. The State's appraiser, however, consistent with the State's theory, never determined a value for the Property as rezoned, even though Golub agreed that it was his responsibility as an appraiser to do so. *See* Tr. A835; A841; A848-A849. *See also* Decision A9 ("while Golub agreed it is his job to think of and appraise what the most probable use of the property could be," he did not for

residential but did for industrial). Now, the State seeks to escape the consequences of this tactical failure by seeking a new trial.

The Court in *New York City Transit Authority v. State Division of Human Rights*, 89 N.Y.2d 79 (1996) rejected a similar effort to obtain a "do over" by a government agency. There, the Transit Authority defended a discrimination complaint at trial on the basis of its collective bargaining agreement. Having been unsuccessful, the Transit Authority on appeal sought remand to try a different approach. The Court denied the Transit Authority "a second-bite" (*id.*, at 91) pointing out:

> it was incumbent on the Authority to come forward with whatever proof it had . . . . Having chosen to rely exclusively on the existence of a union-enforced seniority system to establish its economic hardship defense, the Authority cannot now claim that it should in fairness *be given a new opportunity to recast its strategy* and put forth a different set of facts in defense of its position.

Id., at 90 (emphasis added). *See also FleetBoston Financial v. Alt*, ___ F.3d ___, 2011 U.S. App. LEXIS 5853, at *21-*22 (1st Cir. March 23, 2011) (appellant who "for what appears to be strategic reasons bet it could convince the district court" to adopt a certain approach and after losing "essentially seeks another bite at the apple," it "is not entitled to this second chance"); *Ordonez v. Guerra*, 295 A.D.2d 325, 328 (2d Dept. 2002) (Goldstein, J. dissenting) ("[i]n effect, the respondents were seeking a second bite of the apple"). The State seeks nothing different here.

It made a tactical decision to limit its valuation of the Property to the existing zoning, rather than confront the far higher values for residential property in the locale. No second chance to try a different strategy can be allowed.

A. Where Only One Expert Provides A Relevant Valuation That Sets The Range For The Court

As a result of the State's choice, once the probability of rezoning was proven by the expert testimony on both sides, the trial court was "left with the valuation of only one set of experts." Decision A29. A court must determine the value of property within the range of expert testimony, or explain how a divergence is supported by other evidence. *See e.g., Madowitz v. State*, 288 A.D.2d 442, 443 (2d Dept. 2001). Where only one valid expert opinion is presented, however, no range exists. The trial court specifically recognized this and addressed the relevant caselaw, which directs a court to follow the remaining expert's valuation unless other contrary evidence is available. Decision A29. As this Court stated in *Dennison Holding Corp. v. Finance Administrator*, 105 A.D.2d 700, 701 (2d Dept. 1984), since petitioner's "was the only evaluation standing before Special Term, there was no range of values within which it could make a different finding as to market value. Accordingly *it was bound to accept petitioners' appraisal in this regard.*" (emphasis added). *See also In re City of New York (Jomar Real Estate)*, 94 A.D.2d 724 (2d Dept. 1983) *aff'd* 61 N.Y.2d 843 (1984) (in view of "the fact that the only proof of value contained in the record

on appeal as to such [highest and best] use is contained in the claimant's expert appraisal, the value found by such expert must be given full weight and accordingly, is the basis of our award").

Other decisions by this Court confirm that, where one party's expert valuation is rejected, a trial court can properly rely upon the other side's. *Yonkers Post 1666 V.F.W. v. Bottiglieri*, 143 A.D.2d 267, 271 (2d Dept. 1988) points out "where an adverse party fails to present valid evidence, the court *is obliged to accept the remaining expert testimony* unless it provides a sufficient explanation for its decision and there is other evidence in the record to support the court's determination." (emphasis added). In *Bottiglieri*, this Court reversed the trial court for departing from the remaining expert's valuation, even though that expert's opinion was challenged in a cross-examination that elicited concessions and revealed mistakes. *Id.*, at 270. In *Town of Islip v. Sikora*, 220 A.D.2d 434, 435 (2d Dept. 1995), the trial court rejected the Town's valuation because it was not based on highest and best use of the property. This Court, noting the findings must be within the range of expert opinion or explained how supported by other evidence, held the trial "court's determination should be given deference." *Id.*, at 436. *See also Town of Islip v. Mustamed Associates*, 222 A.D.2d 682, 683 (2d Dept. 1995) (trial court's valuation within the range "must be given deference.").

This Court's treatment of trial court valuations based on a single expert is merely a specific application of the more general rule that the "trial court is in the best position to evaluate the credibility of witnesses and its determination must be given great deference." *Pav-Co Asphalt v. Heartland Rental Properties*, 278 A.D.2d 395 (2d Dept. 2000). *See also Protano v. 16 N. Chatsworth Avenue Corp.*, 272 A.D.2d 597 (2d Dept. 2000) ("The court's determination rested largely on its assessment of the credibility of the witnesses presented during the trial, and the determination was supported by a fair interpretation of the evidence").

The State ignores the trial court's discussion of the applicable caselaw. Instead, it seizes on the court's statement, made after a review of all of the evidence, that "the court was left with no choice but to accept the before and after values and damages found by Gyrodyne." (NY Br. 12, quoting Decision A37). Notably, the State's quotation leaves out the Decision's (A37) critical phrase that the court "is without a range of values by which to be guided." Based on its truncated and out-of-context quotation, the State asserts (NY Br. 12) that "the court abdicated its constitutional duty to ensure just compensation." That simply is untrue.

The State attempts to bolster its flawed analysis by quoting language from two decisions of this Court. *Id.* Yet in each case, the State's quotations are incomplete, leaving off critical qualifying language. The State quotes *Bienenstock*

v. State, 287 A.D.2d 587, 588 (2d Dept. 2001) noting rejection of the State's appraisal did "not mean that the Court of Claims was required to accept the valuation of the claimant's appraiser without question." However, *Bienenstock* goes on in the next sentence to say, "[y]et the claimant's appraiser sets the outer limit of the award to the claimant unless there is sufficient basis for a different conclusion." *Id.*, citing *Zappavigna v. State*, 186 A.D.2d 557, 560 (2d Dept. 1992). In *Zappavigna*, this Court stated "having rejected the claimant's appraisal of the property, *the trial court was bound to accept the Power Authority's appraisal*, unless there is support in the record and sufficient explanation for a different conclusion." *Id.* (emphasis added).

The State (NY Br. 12) also relies on an incomplete quotation from *In re New York City Transit Authority (Superior Reed & Rattan Furniture)*, 160 A.D.2d 705 (2d Dept. 1990) that "[t]he trial court is not bound by the claimant's testimony even where uncontradicted ..." The language in the quotation replaced with ellipsis continues, "provided that its findings have some basis in the evidence and are *not predicated on the court's subjective judgment*" *Id.* (emphasis added). In *Superior Reed & Rattan*, the trial court rejected only part of the government's appraisal, and this Court sustained reliance upon the remaining element (*id.)*; not the case here.

The State claims that, even if its valuation is rejected, the claimant's valuation must be scrutinized by the court with a view to the possibility of a new trial, citing a string of cases. NY Br. 11-12. However, the cases cited do not deal with that issue. Rather, the decisions address the situation where a trial court rejected the expert valuations offered by *both* litigants. In such cases, this Court has held that a trial court cannot substitute its own valuation. *See Chester Industrial Park Associates v. State*, 65 A.D.3d 513, 515 (2d Dept. 2009); *Suffolk County v. Kalimnios*, 275 A.D.2d 455, 456 (2d Dept. 2000); *see also Frank Micali Cadillac-Oldsmobile v. State*, 104 A.D.2d 477, 481 (2d Dept. 1984) (both sides' appraisals defective); *Yaphank Development Co. v. Suffolk County*, 203 A.D.2d 280, 282 (2d Dept. 1994) (same); *In re Nassau County (Cohen)*, 39 N.Y.2d 574, 578 (1976) (no evidence in record so decision based "on the subjective judgment of the court" cannot be sustained). None of these decisions contradict, or even address, the controlling precedents on which the trial court based its ruling (Decision A29) that dictate reliance on the only remaining valuation.

B. The Trial Court Found Credible The Only Valuation With A Probability Of Rezoning

The trial court did not completely reject either expert's report. *See* Decision A30. However, due to the State's choice to present only a value as zoned, the court was "left with no range of value" for the Property as rezoned. Decision A30. The Decision expressly recognizes that other evidence to support divergence from

the sole relevant valuation by Gyrodyne "could include alternative appraisals or *cross examination of the prevailing expert opinion* leading to a diminishment of the award." *Id.*, at A29 (emphasis added). However, as the opinion details, the State's cross-examination did not provide such evidence. Decision A34-A35.[1]

The trial court painstakingly reviewed the testimony of each of the witnesses for both sides. Then, the court explained in detail why it found the State's expert's testimony not to be credible. Decision A32-A33. Contrary to the State's assertion (NY Br. 8-9), this was not limited to where those experts came from, or the accuracy of their resumes. The court stated the State's "experts were inconsistent with their own reports and vague as to their testimony on cross-examination." Decision A33. In addition, they claimed to rely on information from other experts but when questioned "could not recall" if they read a final report or spoke to the other expert. *Id.*

The trial court also specifically set out its reasons for finding Gyrodyne's experts credible:

> In contrast, claimant's experts were detailed in their analyses. Each claimed to have relied on the other experts and indeed, each of the experts was familiar with the other reports. Their testimony was focused on the valuation date. While these witnesses were dealing with

[1] The State (NY Br. 9) calls attention to the trial court's criticism of its attorney. However, in the absence of a competing valuation that included probability of rezoning, the State's cross-examination of Gyrodyne's experts was especially significant. The trial court properly discussed that cross-examination's failure to undermine Gyrodyne's valuation. The full transcript supports the trial court's analysis of the State's cross-examination.