NEW YORK STATE : COURT OF CLAIMS

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GYRODYNE COMPANY OF AMERICA, INC.

Claimant,

AFFIRMATION

- against -

Claim No. 112279

THE STATE OF NEW YORK,

Defendant.

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J. GARDNER RYAN, an attorney admitted to practice before the courts of this state, affirms the following under the penalties of perjury:

1. I am an Assistant Attorney General of counsel to Andrew M. Cuomo, Attorney General of the State of New York, the attorney for the defendant. I make this affirmation in partial opposition to claimant's motion for the discretionary award of an additional allowance under Eminent Domain Procedure Law § 701 in the amount of $1,474,191.18.

2. EDPL § 701 provides that, where an award to a condemnee is substantially in excess of the condemnor's proof, the court, in its discretion, may award an additional sum for the "actual and necessary costs, expenses and disbursements, including reasonable attorney, appraiser and engineer fees actually incurred by such condemnee." The purpose of the award is to ensure that the condemnee is made whole and that the fair and just compensation received for the property taken is not

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diminished by the costs of obtaining it. The court is given discretion, where appropriate, to ameliorate the condemnee's costs while considering both the need to limit any incentive for frivolous litigation and the cost of acquiring land through eminent domain. *(Hakes v. State of New York, 81 NY2d 392, at 397, 599 N.Y.S.2d 498).*

3. In this claim there is no issue that the court's award is substantially in excess of the State's proof, or that litigation was unnecessary. The claimant and the State had divergent views as to the probable use and reasonable value of the property. The claimant urged that the under-utilized, light-industrial zoned acreage was ripe for rezoning to residential uses on the taking date and that rezoning for residential development was imminent. It valued the lands as an assured residential development site. The State, on the other hand, believed that securing needed approvals from the affected municipalities for an, otherwise undefined, residential development of the entire acreage was a complex and lengthy process on which, given the lack of success of similarly sized development schemes, no prospective purchaser would gamble in deciding the price to be paid to acquire the lands. It valued the lands in their existing zoning for their allowed development as a low density office/research park.

4. The court's determination resolves that dispute. It awards the claimant $125,000,000.00 based on the finding that a purchaser would consider the lands a probable site for a residential development with a density of 4.5 living units per acre, and would pay for that acreage a sum equal to 92.5% of the value that the lands in the Town of Brookhaven, and 72.5% of the value that the lands in the Town of Smithtown would have if they possessed an assurance of the needed municipal zoning and approvals for such a residential development. The decision adopts claimant's proof and rejects the State's proof. The value adopted by the court is more than five times that asserted by the State at trial.

5. Achieving a substantial increase in compensation is a necessary criteria for the discretionary allowance of an additional award of fees. It is, however, not the sole criteria. The court must consider the effect of any additional award on the public's cost of acquiring land through eminent domain and any sum awarded must be both reasonable and necessary to the claimant's obtaining fair compensation for the appropriation.

6. Claimant is ably represented in claim by Robinson & Cole, LLP and the claimant seeks an additional award for attorney fees totaling $973,668.82. The total amount sought is calculated from the firm's billing invoices, of which there are fifty (50), dating from February, 21, 2006, to March 15, 2010.

It is inclusive of interest charges accruing on invoices billed in December, 2009 and the first quarter of 2010, but apparently not yet paid by the claimant, for the sum of $122,689.48.

7. It is represented by Mr. Clausen, claimant's trial counsel and a member of the firm, that the billing statements represent the firm's charges to the claimant under an hourly fee agreement. Stephen V. Maroney, President and Chief Executive Officer of Gyrodyne also refers to a "negotiated" fee arrangement in his affidavit, dated September 2, 2010 (para. 3). No copy of the agreement, however, is attached to the moving papers.

8. The fifty billing invoices are not summarized as to the hours expended, either in total by the firm or per attorney, but the hourly rates charged for legal services are identified and range from $200 to $600 per hour. The rates charged appear fair and consistent with legal charges in the New York City community. Given the unquestionable success to date of the firm's efforts, no dispute is made but that its time spent on the litigation to obtain the award was reasonable. Not all time charges of the firm, however, relate to the litigation.

9. The details of the billing records provide some specifics from which it is apparent that while most of the firm's services were related to the litigation before the court and may be "deemed necessary … to achieve just and adequate

compensation," additional service were provided on matters not directly, or at all, related to the claim for compensation. The time charges billed also include: attorney hours providing services to assist the claimant in obtaining documents needed for receipt of the advance payment, questioning the amount of the payment; and with matters of corporate import, such as reviewing press releases and corporate filings, appearing at annual shareholder's meetings and communicating with the Town of Brookhaven regarding a referenced Town Board decision. The latter issue apparently led to extensive research, discussion and meetings relating to possible federal claims under the Racketeer Influenced and Corrupt Organizations Act (RICO) (18 U.S.C. §§ 1961-1968) and Civil Rights Act (42 U.S.C. § 1983). The firm's time charges also include significant disbursements to Buckhurst Fish & Jacquemart, Inc. as to which Mr. Classen offers no comment. Those non-legal charges appear duplicative of the claimant's request for an additional allowance to an entity referred to as BFJ Planning.

10. While all services provided by the firm may relate to the Gyrodyne Corporation and its property, the performance of its contractual responsibilities under the terms of the advance payment agreement, review of its required public filings, drafting and review of press releases, relations with investors, and the exploration of potential litigation against entities

other than the State, are not legal services reasonably "necessary" to its obtaining just compensation for the taking in this court. The court should not impose those general corporate expenses as part of the public's cost of acquiring the lands through eminent domain.

11. The claimant seeks an allowance of fees to its appraiser, Gary Taylor, in the amount of $73,087.00 and the State has no question that his fees for professional services is reasonable and was necessary. The same, however, cannot be said of the request for an allowance of $164,397.61 for the engineering services of Cameron Engineering & Associates, LLP, the fee of $226,749.49 requested for Timothy Barnes, the fee of $32,037.75 for BJF Planning and the fee of $5,000.00 for the Cramer Consulting Group.

12. Alan King, P.E., a partner in Cameron Engineering, reported and testified to the relative traffic impacts of a full residential development and a full-scale industrial development of the approximately 300 acre site at trial. There is no issue that his services were necessary to the award and that a reasonable fee for such services may be warranted. Neither the amount of such a fee, nor reasonable justification of the amount demanded, however, is supported by the submissions made on this motion.

13. Cameron Engineering was retained by Gyrodyne to provide engineering services both in connection with this litigation and the preparation and submission of an application and environmental impact assessment to the Town of Smithtown for the proposed redevelopment of its remainder lands. The billing invoices of Cameron Engineering do not differentiate between the hours of work done for the claim and that done for the property re-development proposal.

14. While Mr. King avers that the charges of $164,397.61 sought here only relate to the litigation, in the absence of any contemporaneous earmarking of the firm's time charges, his "calculation" of those charges is patently a matter of interpretation and historic revise. The fee sought from the court represents approximately 65% of the firm's total charges to Gyrodyne, and considering the relative scope of services and the overlap required in preparing a single-issue traffic analysis for the property on a particular date, and the production of a traffic and environmental impact analysis effecting a significant portion of the same property, involving not only issues of traffic, but also a detailed rendition of historic and projected site and area conditions, such as would acceptable to a municipality for assessing the merits of a large residential development proposal, there is clearly an unexplained disproportion in Mr. King's conclusory assertion

that the identified portion of his firm's billings relate exclusively to the condemnation. The calculation should be weighed with a healthy measure of judicial skepticism and any additional award to claimant for engineering fees should ensure that no part of the cost of claimant's land development ambitions is shifted to the taxpayers of the State as a penalty for the condemnation.

15. Cramer Consulting, Timothy Barnes and BFJ Planning apparently offered additional planning, appraisal and litigation support services to claimant and claimant's counsel. The affidavit of Timothy Barnes is presented as to his expertise and the nature of his services to the claimant. Neither Mr. Barnes, nor the others, however, prepared written reports that were disclosed to the defendant or offered in evidence at trial, and none offered any expert testimony to assist the court in determining the value of the property.

16. The standard for an award of an additional allowance requires the court to consider whether the fees sought are reasonable and were necessary for claimant to achieve just compensation. In determining whether an expense incurred by claimant warrants a separate award under EDPL § 701 the Court must review the bases for its award of compensation and should "[disregard] those expenses and services not contributing thereto" (*Meyers v. State of New York*, *166 Misc 2d 586, 590;*

Brown v. State of New York, *Ct Cl, Read, Presiding J., Cl. No. 88093, Motion No. M-63028)*. The work of Mr. Barnes, Mr. Cramer and BJF Planning was not offered in evidence, and their services and opinions provide no base for the award made. The court cannot assess the necessity for those services to the proof at trial, and has before it merely the subjective, self-servingly supportive, assessments by the claimant and claimant's counsel as to the importance and relevance of those services to the proof that was submitted.

17. If the claimant, for its own purposes, chooses to engage others to help facilitate communicate with and coordinate the work of its expert witnesses, aid and advise counsel, or help strategize the preparation and presentation of its claim, those auxiliary services provide undoubted benefit to the claimant, claimant's retained witnesses, and its counsel, but contribute nothing to the court's determination of fair compensation. No additional award should be made for the ancillary services of Mr. Barnes, the Cramer Consulting Group and BJF Planning.

WHEREFORE, the defendant requests that the court consider claimant's request for an additional allowance and award such additional compensation in a substantially lesser sum as reflects the expenses necessary and reasonable to the proof that was offered by the claimant at trial.

DATED: Poughkeepsie, New York
October 7, 2010

S/J. GARDNER RYAN
J. GARDNER RYAN
Assistant Attorney General