STATE OF NEW YORK: COURT OF CLAIMS

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GYRODYNE COMPANY OF AMERICA, INC.,

Claimant,

-against-

THE STATE OF NEW YORK,

Defendant.

--x

Claim No.: 112279

CLAIMANT GYRODYNE COMPANY OF AMERICA'S
<u>POST-TRIAL MEMORANDUM OF LAW</u>

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INTRODUCTION

Pursuant to this Court's instructions at trial, Claimant Gyrodyne Company of America, Inc. ("Gyrodyne") submits this Post-Trial Memorandum of Law. This is an action to determine the value of 245.5 acres of property taken by the State of New York (the "State") as of November 2, 2005, for SUNY Stony Brook. Gyrodyne has owned the Property since the late 1940s, having used it for many years as a helicopter testing facility. The entire Gyrodyne Property exceeded 300 acres, located in the towns of Brookhaven and Smithtown (the "Property"). Prior to the State's taking, the Property was one of the largest undeveloped pieces of privately held land in Suffolk County.

At the beginning of the trial, it appeared that the parties' dispute centered on whether or not rezoning of the Property was reasonably probable. However, as the trial progressed, that turned out not to be an issue. First, the State's zoning expert testified that he never said the Property could not be rezoned, and that in his opinion there was a reasonable probability of rezoning to residential with multi-units per acre density. Then the State's expert appraiser admitted that he too agreed there was a reasonable probability of rezoning to residential, and even to mixed use such as assisted living or senior housing along with residential. Thus, by the end of the trial, the State's experts agreed with Gyrodyne's zoning expert that a reasonable probability of rezoning existed.

This revelation greatly narrows the scope of issues before this Court. Since both sides at trial agreed rezoning to residential is reasonably probable, then it is undisputed that the Property's highest and best use is as stated in Gyrodyne's appraisal. To the contrary, the State did not present a single piece of evidence concerning how the Property would be rezoned, what density would be allowed or what value might result. The State's appraiser did not even value the Property for the probability of rezoning. This Court is left with only Gyrodyne's expert

appraisal on the value of the Property as rezoned residential. A condemned property must be valued within the limits of the record created at trial including expert testimony. Since the State failed to provide any value for what its own experts admit represents the highest and best use – rezoning to residential – that value must be fixed by Gyrodyne's appraiser. As there is no basis to diverge from the well reasoned and conservatively calculated value provided in Gyrodyne's appraisal and supported by its experts, this Court should adopt Gyrodyne's valuation as the market value of the 245.5 acres taken by the State on November 2, 2005.

ARGUMENT

I.

THE CONDEMNED PROPERTY SHOULD BE VALUED BASED ON REASONABLE PROBABILITY OF REZONING TO RESIDENTIAL

The legal standard for the valuation of property taken in condemnation is well settled and not contested by the State in this case. The owner is entitled to the market value of the property at the time of taking. *See In the Matter of Town of Islip (Mascioli)*, 49 N.Y.2d 354, 360 (1980); *627 Smith St. v. Bureau of Waste Disposal*, 289 A.D.2d 472, 473 (2d Dept. 2001). The market value must be based on the "highest and best use" of the property, even if the property is not being used for such at the time of taking. *Mascioli*, 49 N.Y.2d at 360; *Chester Industrial Park Assocs. v. State*, 2009 N.Y. App. Div. LEXIS 5970 (2d Dept. August 4, 2009) citing *Chemical Corp. v. Town of East Hampton*, 298 A.D.2d 419, 420 (2d Dept. 2002). Therefore, if there is a "reasonable probability of rezoning," the valuation must reflect an increment for that as the highest and best use. *Mascioli*, 49 N.Y.2d at 360; *Chase Manhattan Bank v. State*, 103 A.D.2d 211, 217 (2d Dept. 1984); *see also In the Matter of County of Nassau (Cow Meadow)*, 39 N.Y.2d 574, 577 (1976) ("in determining the highest and best use of a parcel and thus in determining its

compensable value in eminent domain proceeding, the court should consider evidence of the reasonable probability of a zoning change").

The State's own expert appraiser, Kenneth Golub ("Golub"), testified that reasonable probability of rezoning had to be considered to determine highest and best use. *See* Trial Transcript (hereinafter "Tr.") p. 766-767:

Q (MR. CLASEN):	Okay. And then you also look at whether or not there's a reasonable probability of rezoning, right?
A (MR. GOLUB):	Yes.
Q:	Okay. Because if a property even though not zoned for something could reasonably be done so, you'd consider it, as a possible highest and best use, right?
A:	Yes...

This testimony was consistent with that of Gyrodyne's expert appraiser, Gary B. Taylor ("Taylor"), who likewise stated that once a reasonable probability of rezoning is determined, the Property must be valued for that probability. Tr. 352-203.

This case is unusual in that even the State's own experts admitted at trial that the Gyrodyne property could be rezoned, making the increase in value for rezoning a necessary consideration for its value. (For a more detailed discussion of this admission see, *infra,* pp. 14-15.) In this case, <u>experts on both sides</u> testified that there was a probability of rezoning the condemned Property for residential usage with multiple units per acre. Therefore, the Property must be valued at that highest and best use, including an increment for the resulting increase in the Property's value due to rezoning. *Mascioli*, 49 N.Y.2d at 360; *see also Chase Manhattan Bank*, 103 A.D.2d at 217 ("if the claimant proves a reasonable probability of such rezoning . . . the value of the property as zoned or restricted on the day of taking will be

augmented by an increment representing the premium a knowledgeable buyer would be willing to pay for a potential change to a more valuable use").

A. Gyrodyne Demonstrated A Reasonable Probability Of Rezoning

The issue of reasonable probability of rezoning is a question of fact for this Court. *See In the Matter of City of New York (Nelkin)*, 51 N.Y.2d 921, 923 (1980); *see also Rochester Urban Removal Agency v. Lee*, 83 A.D.2d 770 (4th Dept. 1981) (differences of opinion on possible rezoning "presented the trial court with a factual issue"). "The quantum of proof to establish the probability of rezoning is merely reasonable proof." *In the Matter of County of Nassau (Washington Avenue, Plainview)*, 67 Misc.2d 144, 147 (Nassau Sup. Ct., 1971) (emphasis added).

1. Gyrodyne's Evidence Demonstrated Probability of Rezoning

Daniel Gulizio ("Gulizio") has been working in public sector planning on Long Island for over 23 years. Tr. 25. From 2002 through 2005, he was the Commissioner of the Department of Planning for the Town of Brookhaven, where much of the Property is located. Tr. 26. He testified that there were five principal factors to be considered in determining reasonable probability of rezoning:

(1) the existing zoning of the property;

(2) the nature and character of the surrounding area;

(3) site constraints – unique aspects of the property that may limit or promote particular development;

(4) the local government's comprehensive plan; and

(5) the pattern of rezoning in local area.

Tr. 42-43; *see also* Ex. 1, p. 2. The State's environmental scientist Robert Grover ("Grover") testified that "absolutely" these five factors had to be taken into account. Tr. 612-613 (emphasis added).[1]

Well established case law supports Gulizio's testimony concerning the relevant factors for determining reasonable probability of rezoning. One of the seminal cases is *Masten v. State of New York*, 11 A.D.2d 370 (3d Dept. 1960). In upholding a determination by the trial court of reasonable probability, the appellate court pointed to evidence of the commercial nature of the surrounding area, the traffic impact and the prior pattern of rezoning. *Id.*, at 371. "More significant," the court pointed out was the study and subsequent adoption of a "comprehensive amendment" to the town's zoning ordinance, dealing specifically with the area of the condemned property. *Id.*, at 372. Such evidence "was accorded great weight" in prior cases, the court in *Masten* pointed out. *Id.* Similarly, *In the Matter of The Village of Hempstead (YMCA)*, 33 A.D.2d 1036 (2d Dept. 1970), upheld the trial court's finding of reasonable probability of rezoning considering the "neighborhood's character" and "that the Renewal Agency Map, filed more than two years prior to the vesting date herein, designated this precise damage parcel for business use." *See also In the Matter of the Town of Brookhaven (Englberger)*, 51 A.D.2d 804, 805 (2d Dept. 1976) ("fact many neighboring properties are zoned for business use, supports finding that there existed a reasonable probability that the subject parcel would be rezoned for business use"); *Jankiewicz v. State of New York*, 54 A.D.2d 1092 (4th Dept. 1976) (considerations included growth and usage pattern in the area, zoning of adjacent properties and "the prior favorable recommendation of the town planning board for the rezoning to commercial use of the area, including the subject").

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[1] On redirect, Grover mentioned there could be twenty-two other considerations. Tr. 626. However, he did not discuss them or rely on them in either his testimony or his report. *See* Tr. 626-635; Exhibit F.

Considering these factors in the present case, reasonable proof of the probability of rezoning clearly was demonstrated. Gulizio testified that under the existing industrial zoning, the condemned Property could be developed "as of right" into at least 3 million square feet of office space – and perhaps up to 4.5 million square feet, "a significant amount of commercial space." Tr. 45.[2] However, the site constraints, distance from major highways, narrow roads, and particularly traffic, made such development inconsistent with highest and best use. Tr. 47-8. Gulizio testified that "one of the main constraints to the property is actually getting traffic onto and off the property . . ." Tr. 47.

Gulizio testified that, in contrast to the existing industrial zoning, the character of the surrounding area is residential. "Overwhelmingly the character of the area is . . . residential development" with a density of two to three units per acre. Tr. 46. Taylor, who drove "by the property almost every day on [his] way to and from work" (Tr. 326), testified that "this area surrounding the property as I indicated is primarily residential. It's really a residential location." Tr. 324. Grover, the State's expert, agreed that "[i]t would be more consistent to have residential to be compatible with the surrounding development." Tr. 616.

Of particular significance, Gulizio testified that the 1996 Comprehensive Land Use Plan of the Town of Brookhaven (the "Brookhaven Plan") specifically recommended rezoning areas from industrial where the property was "underdeveloped" or represented "spot zoning." Tr. 51-52; Ex. 2, p. 187; Ex. 1, pp. 11-13. As Gulizio's Report points out, "the comprehensive plan has been described as the essence of zoning. It represents a blueprint for development as courts have consistently found that zoning actions must be made in accordance with a comprehensive plan." Ex. 1, p. 3. Here, the Brookhaven Plan states: "[e]liminate industrial zoning that is isolated and

[2] The State did not offer any contrary evidence.

located too far from major roadways and other transportation access ... spot industrial zoning should be eliminated and industrial zoning that intrudes into, accessed through or is surrounded by residential areas should be eliminated." Ex. 2, p. 207. Gulizio testified that the Property was referred to as "a spot zone . . . it's incompatible or inconsistent with the predominate land use pattern in the area." Tr. 46. In fact, the map prepared as an appendix to the Brookhaven Plan specifically identifies the Property as one which should be rezoned. *See* Map attached to Exhibit 1; Tr. 53-54. As *Masten* points out, evidence concerning a town's comprehensive plan is to be given great weight. *See also* Tr. 49.[3]

Grover, the State's expert, testified "I would concur that the industrial zoning of Gyrodyne is a form of spot zoning." Tr. 617. Grover also agreed that the Brookhaven Plan was "trying to get rid of" such "inappropriately zoned industrial properties surrounded by residential." Tr. 618. In his report, Grover had stated that the Brookhaven Plan in discussing elimination of spot zoning was "generic and not specific to Gyrodyne" (Ex. F, p. 7). However, at trial, Grover testified to the contrary that there was a specific reference in the Brookhaven Plan to the Property and a map showing the Property as an area to be rezoned, admitting "I do stand corrected on that point." Tr. 618 (emphasis added). Grover testified that he simply did not notice the reference, or the map, in preparing his report (Tr. 619), even though he agreed that the comprehensive plan is "something that has to be taken into account." Tr. 613.

Gulizio analyzed the pattern of rezoning in both Brookhaven and Smithtown. Tr. 55. He identified a number of instances in which property had been rezoned from industrial to moderate density multi-family residential. Tr. 55-60; *see also* Ex. 1, pp. 13-16. In some cases, the density allowed in Brookhaven ranged up to 11 units per acre and in one case in Smithtown, up to 14.8

[3] As Gulizio testified (Tr. 54), Smithtown has not updated its plan since the 1950s. Since it still is in the process of updating its plan, Gulizio testified the old plan was not entitled to great weight. *Id.*, at 55.

units per acre. Tr. 57-60; Ex. 1, pp. 14-15. From his analysis, Gulizio concluded "the trend in Smithtown as in Brookhaven, was to consider diversification of the housing stock and to consider rezoning, particularly from commercially zoned designations to moderate and low density multi-family . . ." Tr. 60.

In this case, as Gulizio testified, very real practical political considerations contribute to the probability of rezoning. Given the Property is presently zoned light industrial, neighbors and their political leaders would be faced with a choice between intensive industrial development "as of right" or permitting rezoning to a more moderate density residential Planned Development District ("PDD"). Gulizio testified that, "they're going to look at whether development under the existing zoning is better or worse for the community or more or less well accepted by the community than development under the proposed zoning category." Tr. 61. Taylor concurred, stating "given a choice of industrial development, [or] residential and the associative traffic patterns that would change it would appear to be almost a no-brainer for them. They would go with the residential . . ." Tr. 397.

The choice for the Property would not be between leaving it as it was in November 2005 and development, but rather between two types of development. Even the state's expert, Grover, testified the Towns knew, "that they're not going to be able to keep this land pristine and totally undeveloped." Tr. 623. Rather, they would be faced with very dense industrial development as of right or rezoning. *Id.* Grover stated: "the general consensus is that, yes, something is going to be built here and we want the something built here that's going to have the lease [sic] impact on our homes and our neighborhoods." Tr. 624. This is consistent with Gulizio's testimony that:

> when you are looking from a zoning from say light industrial zoning or business zoning to residential zoning, even if it's moderate or high density, typically, the community as well as local boards will look at the impacts associated with multiple family

> zoning designation or the planned retirement community as being much less significant than development or the impacts associated with development under industrial zoning category.

Tr. 61, *see also* Tr. 136-7.[4] Given the choice between being hit on the knee or on the head, the Towns would choose the knee – residential rezoning to PDD.

Gulizio testified that densities for such an area could go "up to 12 units per acre." Tr. 69. This was evidenced by the actual examples in Brookhaven of 11.7 units per acre (Tr. 70) and in Smithtown of 14.8 units per acre. Tr. 60. Gulizio testified about a particular example in East Moriches where "the existing industrial use was not wanted by the community and they were trying to get rid of it." Tr. 70. As a result, the rezoning in East Moriches permitted "a density of seven units to the acre." *Id.* To be "on the conservative side," Gulizio limited his opinion to a density less than that. *Id.*

Based on all of the factors, which the State's expert Grover accepted as relevant (Tr. 623), Gulizio gave his expert opinion that <u>there was a reasonable probability of rezoning</u> the Property from light industrial to residential with a density between three and six units per acre. Tr. 68, 135; Ex. 1, p. 3. Gulizio provided specific percentages of that probability: 90 to 95 per cent for Brookhaven; and 70 to 75 percent for Smithtown. Tr. 71-72. Gulizio explained the differences in these percentages arose principally, although not exclusively, from the existence of a comprehensive plan in Brookhaven which addressed the Property. Tr. 71-72; *see also* Tr. 137-141.

Notably, Gulizio testified that he did not receive any payment for either his testimony, or for all the work he did in preparing his report. Tr. 173-4. Notwithstanding the skepticism of the State's counsel, Gulizio chose to forego any fees to avoid even the appearance of a conflict of

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[4] Faced with this choice, the effect of residential development on schools would not be as significant a factor, particularly a potential retirement community multi-unit development. Tr. 175; *see also* Tr. 149-151, 156.

interest with his new job with Suffolk County. *Id.* Thus, Gulizio had no monetary incentive to color his opinion. Instead, he gave an honest evaluation based on his years of experience as a planner in the local area.

The history of the Property supports Gulizio's analysis. Gyrodyne was formed in 1946 as a helicopter company. Tr. 459; Ex. H, p. 16. To carry out its government contracts, Gyrodyne looked for open land for helicopter flight testing. Tr. 459. In the late 40's much of Suffolk County was open and undeveloped. Gyrodyne found approximately 360 acres which had been used for a flower farm, specifically to grow tulip bulbs. Tr. 459; Ex. H, p. 16.[5] At the time the land was zoned residential. Tr. 459. Gyrodyne got the Property rezoned to industrial in 1950-1951 to conduct its helicopter flight tests. *Id.* During the 1950s and early 1960s, Gyrodyne built some buildings to support helicopter operations. Tr. 460. Those buildings only occupied approximately 10 acres of the Property. Tr. 501. The rest of the land remained open.

In the late 1960s, Gyrodyne's government contracts ended and the company exited from the helicopter business. Tr. 460. Meanwhile the neighborhoods around the Property developed as residential areas. Much of the Property remained open, being used at times for fairs and flea markets. Ex. H, p. 16. Thus, the area has never been industrial but, from the beginning, residential. This is not a case where a portion of an otherwise industrial area would be rezoned, but rather where the Property would be returned to its original zoning as residential, consistent with the rest of the local area.

Gyrodyne also presented the testimony of Gerald Barton ("Barton"), a developer. For the past 40 years, Barton has headed a company developing high-end residential communities, frequently built in conjunction with golf courses. Tr. 519. In 2000, Barton began working with

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[5] Based on this prior use, the land was sometimes referred to as "Flowerfield." *See* Exhibit H, p. 16.

Gyrodyne on a development plan for the Property. Tr. 520-521. After visiting the Property and having his staff analyze it, Barton concluded:

> that it was a good site for a residential community. It was very appropriate. It has no environmental impact problems that I saw that were unusual. I met with neighbors. I met with organizations. I met with a lot of people and I thought that the only political issue that came up was traffic. And I thought that it would be successful if done right.

Tr. 523. Barton's company proceeded with the golf community development proposal and assisted Gyrodyne in seeking town approvals. Barton testified he attended a public meeting and observed: "in doing this for 38 years, I saw less resistance here than in anytime, except in two other cases, that I've ever seen." Tr. 527. When the SUNY taking occurred, the golf community concept had to be abandoned.

2. The State's Experts Agreed To A Reasonable Probability Of Rezoning

Normally during post-trial briefing, the claimant would provide a long refutation of the State's argument that the Property had no probability of rezoning. However, as stated above, this is an unusual case. The report (Exhibit F) of Grover, the State's expert, does not include an actual opinion on the probability of rezoning. Similarly Golub's appraisal talks around the issue but never says whether or not a reasonable probability exists. *See, e.g.,* Ex. H, pp. 36-37. The reason for this curious omission was only explained at trial when these witnesses finally were asked directly for their opinion on what they conceded was the critical question. Then both state experts admitted that there was a reasonable probability of rezoning.

As its expert on rezoning, the State relied upon Grover. Grover is primarily an environmental scientist. Tr. 545-6; 584. Rather than being asked to give an opinion on reasonable probability of rezoning, Grover testified that he was asked to analyze "the process" and "the likely prospects of success of a residential type planned development," with a yield of 5

to 7 units per acre (not the 3 to 6 Gyrodyne relied upon). Tr. 548. In both his report and his direct testimony, Grover focused on the steps in the approval and environmental review processes. *See e.g.*, Tr. 550-555; Ex. F. Although Grover concentrated on the time necessary to conduct an environmental review, he testified "I need to stress again that I did not do an environmental impact statement. I did not conduct an environmental analysis." Tr. 609; *see also* Tr. 632-3 ("Again and I don't know why we keep going through this, but I did not do an environmental analysis. I did not do an environmental impact statement").

Grover's report stated that there were four "specific impacts most likely to be important" in any State Environmental Quality Review ("SEQR") necessary for development of the Property. Ex. F, p. 15. Those were: (1) traffic; (2) schools, (3) open space/wildlife, and (4) groundwater. Ex. H, pp. 15-19. *See also* Tr. 567-571. When he was questioned as to each of these, however, Grover revealed the complete absence of support for his assessment.

First, with regard to traffic, Grover testified that he relied on the report of William Fitzpatrick ("Fitzpatrick"), the State's traffic expert. Tr. 596 ("you relied solely on the Fitzpatrick report, right? A: Yes, I did"). Grover admitted that he did not even know the names of the roads involved. Tr. 577. When questioned whether a traffic impact study differing from Fitzpatrick's report would change his opinion, he agreed that it would. Tr. 598-599. Importantly, Grover admitted that if such a study showed a reduced traffic impact from residential development, it would shorten the time he estimated for the SEQR. Tr. 599-600. Further, Grover testified that the date Fitzpatrick used for his study had no bearing on Grover's conclusion. Tr. 634 ("so he could have used any date and you would have come up with the

same result. A: I would have come up with the same opinion"). Thus, Grover had no independent view on the traffic impact.[6]

Regarding schools, Grover's Report states, "[t]here is insufficient information available at this time to quantify the potential school district impacts . . ." Ex. F., p. 17, *see also* Tr. 572, 600. As a result, Grover could not say what effect residential development of the Property would have on schools. Tr. 573-575, 600. Similarly, with regard to groundwater, Grover reported that "there is insufficient information to evaluate the specific groundwater impacts." Ex. F, p. 19; *see also* Tr. 603. What Grover could say, however, was a sewer system would be required. Tr. 603. "The proposed project would have to a have [sic] sewage treatment plant . . ." Tr. 604.

Thus, the only one of the impacts that Grover could address was open space/wildlife. On this point he testified that the Property contained "native grasslands." Tr. 567. When questioned further on this issue, Grover admitted:

> Q (MR. CLASEN): Okay-Well, native grasslands, you are talking about the fairgrounds, for example?
>
> A (MR. GROVER): Yes.
>
> Q: <u>That's a lawn they mow</u>, right?
>
> A: It is periodically mowed.

Tr. 600-601 (emphasis added). Further, Grover admitted that full "as of right" industrial development would damage the lawn as well. *Id.* As to wildlife, Grover testified, "I am not aware of any endangered species issues with this property." Tr. 601.

Not only did Grover have no support for his estimates of impacts on the SEQR process, but also he admitted that <u>either residential or industrial development</u> would have to go through the same process. Tr. 591 ("The SEQR process itself all those hoops have to be jumped through,

[6] The numerous flaws in Fitzpatrick's assessment are discussed in Section I.A.3 *infra*.

whether you're doing the industrial or the residential, right? A: Correct"); *see also* Tr. 610. As a result, regardless of whether the Property was rezoned, in Grover's opinion development (even "as of right" industrial development) would be delayed five years. Therefore, out of the seven years total that Grover estimated the process would take (Tr. 582), the rezoning portion would only add "another two years," if the rezoning did not proceed simultaneously with the SEQR (which it might). Tr. 610-611; *see also* Tr. 787.

When finally asked on cross-examination, about the critical issue of probability of rezoning the Property, Grover testified: **"I have never stated that it could not be rezoned for PDD."** Tr. 621 (emphasis added). Questioned further on this admission, Grover testified: "I have never said this is not appropriate for a PDD . . . I've not said that it won't be approved." Tr. 622 (emphasis added). Grover admitted not only that his report did not address reasonable probability of rezoning (*id*) but then went further to say he "would agree there was a reasonable probability" of rezoning to residential multi-unit per acre (at least two). *Id.* (emphasis added). Grover simply did not bother to determine the probability or density, which is understandable since the State never asked him to do that.

Golub, the State's expert appraiser, described the Property as "beautiful land. It looks like it's ripe for development, and is eminently buildable." Tr. 739. Golub agreed that in considering highest and best use of the Property, one possibility was residential. Tr. 779. "And it is in a very nice residential location, and I think most developers would normally tend to gravitate to residential use . . ." Tr. 741. However, he "did not fully develop the value scenario" for residential in his report. Tr. 780. When questioned directly as to the reasonable probability of such rezoning, Golub testified "If they went in for one acre lots or two acre lots I'd say the chances are excellent." *Id.* (emphasis added). Golub then said that half-acre lots were possible

but he could not say how possible. Tr. 781. Golub at first tried to diminish his reliance on Grover (Tr. 769), but after being shown his own report (Ex. H, p. 1) admitted that Grover had a "significant influence on my analysis and conclusions . . ." Tr. 771 (emphasis added); *see* also Exhibit H, p. 1. Still Golub remained unwilling to say that Grover's conclusion that two units per acre – or half-acre lots – was reasonably probable. Tr. 781. Golub did testify that he was not "aware of any opposition that has been lodged at any time to any residential development of the Gyrodyne property." Tr. 807.

Repeatedly, Golub was forced to admit that a reasonable probability of residential rezoning existed, notwithstanding his failure to appraise the Property for such use. When asked about rezoning for residential use along with a golf course, for example, Golub testified:

> Q (MR. CLASEN): . . . was there any reasonable probability of being rezoned for golf? What do you decide it was going to take?
>
> A (MR. GOLUB): I would say there's a reasonable probability.

Tr. 788; *see also* 789-90. Similarly, when asked if there was a reasonable probability of mixed use – assisted living, senior housing and other residential – Golub replied: "[i]t could have been rezoned for mixed use." Tr. 791. Given that he had admitted that even industrial park development would not be complete within 10 years (*see* Tr. 787), Golub was forced in the end to conclude, "there's a reasonable probability of they're getting rezoned for residential right? A: Over time . . . yes." Tr. 852.

Before the State's experts made their admission that rezoning was reasonably probable, the State had attempted to argue that the lack of development of the Property in the past indicated rezoning was not probable. *See, e.g.,* Tr. 88; 92-93; 95-97; 103-105; and 112-113. However, Peter Pitsiokos, the Chief Operating Officer of Gyrodyne testified that, after the founding family (which controlled Gyrodyne for many years) was no longer in charge (*see*

Tr. 460-461), the company's management sought development opportunities for the Property. Tr. 465. One development project with Marriott in 2000 resulted in an approved rezoning of a portion of the Property to residential for assisted living. That proposal was for 126 units on 10 acres, for a density of 12.6 units per acre. Tr. 463. The project did not go forward only because Marriott got out of the assisted living business. Tr. 463-464; 513.

Pitsiokos testified that a second project considered included a golf course community with a density of approximately 5 units per acre. Tr. 465-467; 509. This proposal was pending and a public hearing in Smithtown had been held, when the process stalled due to the planned SUNY appropriation. Tr. 465-470. *See, e.g., In the Matter of the City of New York (Jomar Real Estate Corp.)*, 94 A.D.2d 724 (2d Dept. 1982) (in holding claimant proved a reasonable probability of rezoning, court noted "[p]lans for the shopping center were drawn, but were refused filing and approval by reason of the impending condemnation"). Gulizio testified that the golf community proposal was never acted on by Brookhaven because the Town Board "indicated it was currently under consideration by the university for acquisition and they'd best just leave it alone at that time . . ." Tr. 177. Gulizio had direct knowledge of the basis for Brookhaven's lack of action. He testified (*id.*):

> I attended at least one, and I believe two meetings with the university and the [town] back in 2004 where they expressed their interest in developing the property as a wireless technology center. I believe that was in April of 2004 and I met at that time with the supervisor, the chief of staff George Hoffman, Shirley Strump (phonetic) Kenny the president of the university and Reed Cooperman (phonetic), one of their planning consultants and two other administrators. I believe a Richard Mann and I can't remember – Mr. Foberdy (phonetic). I met with them back in April of 2004.

Thus, the record demonstrates that Gyrodyne had pursued development of the Property before the appropriation interfered and that those efforts supported a probability of rezoning.

The probative value of past efforts to develop the Property ultimately became irrelevant once the State's own experts conceded a reasonable probability of rezoning. By the end of trial, there was no dispute among the experts that there was a reasonable probability of rezoning the Property from light industrial to residential.

3. <u>The Traffic Evidence Confirmed The Reasonable Probability Of Rezoning</u>

Supporting the experts' conclusions on probability of rezoning is the evidence concerning the devastating impact on traffic from "as of right" industrial development. Case law recognizes that "the impact of rezoning on the flow and movement of traffic is a factor meriting consideration," in deciding reasonable probability. *Spriggs v. State of New York*, 54 A.D.2d 1080, 1081 (4th Dept. 1976); *see also Masten*, 11 A.D.2d at 371 ("that highway traffic became increasingly heavy"). In the present case, Gyrodyne offered evidence from Alan King ("King"), a traffic engineer, concerning the traffic impact studies he did for the potential development of [the] Property. Tr. 178-181; Exs. 4 and 5. King did multiple traffic studies, beginning with a baseline "no build" with no development, and then considering four potential development scenarios: (1) residential development of the entire Property, (2) residential development of the remainder, non-condemned Property, (3) industrial/commercial development of the entire Property and (4) industrial/commercial development of the remainder. Tr. 182, 214.

These studies had dramatic results. Residential development would add just over 300 vehicles per hour at peak rush (323 in the morning and 343 in the evening) (Tr. 196-7), which King testified would not have a measurable effect. Tr. 304. On the other hand, "as of right" industrial development would result in <u>almost 5,000 additional vehicles</u> per hour (4,224 in the morning rush hour and 4,804 in the evening). Tr. 196-7, 209. These figures represent new

vehicle trips beyond the traffic related to the present usage of the Property. Tr. 221. The effect on the local roads of the traffic from industrial development would be disastrous. King presented a video simulation (Ex. 5), "a very accepted and realistic representation of traffic conditions" (Tr. 198), demonstrating that traffic from industrial development would backup over 1,000 feet at multiple intersections. Tr. 199-201; *see also* Tr. 306-7 (calculating additional time delay for each car). As King testified, "[t]his is thousands of feet in both directions because of the industrial 'as of right' additional traffic, where you don't see that at all in the proposed residential development." Tr. 204.

The Court's own questions brought out that clogging the roads with heavy traffic would occur even without considering the additional trucks that would come with "as of right" industrial development. Since he was being conservative, King did not alter the existing mix of vehicles in preparing the scenarios. Tr. 211-212. King testified, "[i]f we did consider increased trucks, the expected increased queues would be that much longer, traffic conditions would be slower." Tr. 212. This evidence further supports the conclusion that the Towns would probably rezone the Property as multi-unit residential rather than confront the traffic nightmare from as of right industrial development.

The State's traffic presentation did not contradict King's evidence. The State called Fitzpatrick to testify. In contrast to King (*see* Tr. 180), Fitzpatrick's had no experience in Suffolk County. Tr. 635-638. More importantly, unlike King, Fitzpatrick did no traffic impact studies.

Q (MR. CLASEN): When you did your report, right, you could have done a traffic impact study, analyze the impact of

the so-called Gyrodyne scenario, right? You could've done that. [7]

A (MR. FITZPATRICK): Yes, certainly.

Q: Okay.

A: I could've. That's not what I was asked to do.

Q: Right.

A: and I'm not sure – or I'm sorry, yes, I did not do that.

Q: In fact, none of what you've done here is a traffic impact study, right?

A: Right.

Tr. 706-707. Rather than a traffic impact study, the State requested that Fitzpatrick do an assessment, which Fitzpatrick acknowledged on direct: "this is an assessment. This is not a traffic impact study." Tr. 654 (emphasis added); *see also* Tr. 640-41.

Moreover, Fitzpatrick's "assessment" did not even look at the same scenarios that either the State's or Gyrodyne's appraiser used. For example, instead of considering building an industrial park on the entire Property, Fitzpatrick relied on an EIS done by SUNY in 2004 that only "defines the existing conditions at that point in time." Tr. 682. The SUNY EIS then projected a growth rate to 2007 based on what SUNY proposed to build, which was not full industrial development. Tr. 683. Further, the SUNY EIS assumed that the portion of the Property not condemned would remain the same and not be developed. Tr. 696. *See* also Tr. 640-41; 682-3. Concerning this information, Fitzpatrick testified, "I did not do the analysis, I adopted the analysis from SUNY. Tr. 687.

[7] The "Gyrodyne scenario," described a residential development of the Property at a density of 3 to 6 units per acre. Tr. 704.

Fitzpatrick then compared this irrelevant SUNY information to a hypothetical proposal for a golf community that had been abandoned, rather than the residential development that King and the other experts considered. Tr. 640-41; 673; 676; 678-9; 697. Fitzpatrick admitted that his use of the SUNY report from 2004 and a golf community concept in 2007 (neither as of the date of taking in November 2005) resulted in his assessing traffic for scenarios that were not used by the experts in determining reasonable probability of rezoning or valuation:

> Q (MR. CLASEN): Okay. And that scenario that we are looking at, right, that's not the scenario that was looked at by any of the appraisers or Mr. Grover; isn't that correct?
>
> A (MR. FITZPATRICK):Correct.
>
> Q: So you're not analyzing the impact of any of those in this scenario at this point in time?
>
> A: Correct

Tr. 699; *see also* Tr. 703 ("its not what any of the people looked at as a possible highest investment"). Since Fitzpatrick never did an impact study and only "assessed" scenarios, which were unrelated to the highest and best use, his "simplistic" conclusion that the golf course would add more cars to what SUNY was constructing in no way contradicts King's expert opinion. Nor does it provide a basis to conclude – contrary to the State's other experts – that rezoning to multi-unit per acre residential was not reasonably probable. The real traffic evidence overwhelmingly supported the conclusion that rezoning was probable.

B. Gyrodyne Demonstrated The Value Of The Condemned Property As Rezoned

In condemnation actions, "the measure of damages for a partial taking of real property is the difference between the value of the whole property before taking and the value of the remainder after the taking." *Chester Industrial Park Assocs.*, 65 A.D.3d at 514, quoting,

Chemical Corp., 298 A.D.2d at 420; *see also In the Matter of Acquisition of Real Property (Hartman)*, 278 A.D.2d 236 (2d Dept. 2000). That amount is based on the fair market value of the Property in its highest and best use (in this case as rezoned) on the date of the taking. *627 Smith Street Corp.*, 289 A.D.2d at 473. Market value "at the time of appropriation ... is the price a willing buyer would have paid a willing seller for the property." *Mascioli*, 49 N.Y.2d at 360. Gyrodyne's expert appraiser, Taylor, following the proper methodology, valued the Property as presently zoned, and then valued it as rezoned and finally applied deductions to calculate the value based on the probability of rezoning. As noted previously, the State's appraiser failed to consider the value as rezoned, leaving Taylor's appraisal as the only valid, relevant evidence upon which this Court can rest its decision.

1. **Gyrodyne's Expert Properly Valued The Property At Highest And Best Use**

Taylor, an appraiser with over 36 years experience, has worked primarily on Long Island, with the highest percentage of his work in Suffolk County. Tr. 322-323. Taylor is a past president of the National Appraisal Institute and a member of the National Appraisal Qualifications Board. Tr. 323. Taylor prepared an appraisal of the Property as of the date of the taking, November 2, 2005. Tr. 326; Ex. 3. He described the Property as "a prime piece for development for residential purposes," (Tr. 327) set amid fairly expensive homes and in good school districts. Tr. 628. At the same time he pointed out its remoteness from major thoroughfares made it "an extremely poor location for industrial purposes." *Id.* This contributes to what Taylor testified appraisers call "friction of space ... how easy is it to get from Point A to Point B." Tr. 328. Here friction of space is caused not only by the distance from major highways but also the nature of the local roads. Taylor testified, "the road system that feeds into this area is pretty limited" (Tr. 327) with "country kind of bucolic roads winding" through it. Tr. 325; *see also* Tr. 327 ("but again kind of winding in front of the property, [25A] comes down

around a fairly steep curve as you head towards the eastern side of the property. And both Mills Road and Stony Brook Road are narrow winding roads coming through this particular area").

To determine value, Taylor looked for comparable sales, first of raw industrial land as the Property is presently zoned, and then as rezoned residential. Tr. 329, 331. Sales prices of comparable properties located in the same general area are the "most accurate standard" for determining market value. *Penthouse Manufacturing v. Assessor of Freeport*, 102 A.D.2d 870 (2d Dept. 1984); *see also Nimby Food Service v. State of New York,* 241 A.D.2d 542, 543 (2d Dept. 1997). Taylor found seven sales of raw industrial land in Suffolk County in the two years prior to the appropriation. Tr. 331-333; *see also* Ex. 3, pp. 62, 96-111. Taylor stated in looking for comparables "you don't want to go back too far if you don't have to. So I went back a couple of years from the vesting date of 2005." Tr. 332.

To insure he was comparing like to like, Taylor applied a series of adjustments to each comparable sale of raw industrial land to compensate for their differences from the Property. The first and largest of these adjustments was for location, "for industrial properties key components are western location" and proximity to a major highway. Tr. 335. The Property does not have these two key components. *Id.* Taylor testified, "I was aware that location adjustments would be fairly substantial because of the poor location of the subject for industrial development. <u>It's just not well suited where it's located</u>." *Id.* (emphasis added). *See also* Tr. 336 ("it is not a prime industrial area, what we would consider prime location industrial").

The next adjustment Taylor made was for utility: "the prime concern for utility was the access in and out of the site itself." Tr. 336. Utility was the second largest adjustment Taylor made to the comparable sales because of poor access to the Property itself due to "limited access

points, difficult access points distance. Again that friction of space is increased." Tr. 337 (emphasis added); *see also* Tr. 339.

Next Taylor adjusted for lot size, "to reflect the fact that a buyer purchasing a larger parcel of property will pay less on a per unit basis." Tr. 339 (emphasis added). Here the Property was much larger than any of the comparables. There just were no sales of properties more than 80 acres in the relevant period. Tr. 449; *see also* Tr. 421-2. However, as Taylor explained, above a certain point (60 to 80 acres) the premium for smaller lot size dissipates because the price-per-unit is no longer affected. Tr. 449-450.

Finally, Taylor made an adjustment for market conditions. "Market conditions reflects what has been going on between the date of sale and the appraisal date." Tr. 342. In this case, "between [2003 and 2005] there was an upward trend in the industrial commercial market." *Id.*

As adjusted, the sales prices for the comparables ranged between $133,000 per acre and $173,000 per acre. Exhibit 3, p. 62. Based on his expertise, Taylor stated he appraised the Property as presently zoned at $150,000 per acre (Tr. 350) making the value of the Property $46,185,000. Tr. 351.

The State questioned Taylor about the future use of his industrial-zoned land sales comparables. The State's counsel pointed out that many of the comparables were purchased for retail development. However, Taylor testified that the buyer and the anticipated use is irrelevant to value: "[i]t matters who the seller is . . . He is setting up the asking price." Tr. 444. Taylor explained:

> the seller is looking at what price can I get for my Property as industrial use. He's not looking around for a buyer who says, oh, there's a retailer buyer. I can charge more. They're going to offer a price out on the open market and they're offering it out as vacant, industrial land on the open marketplace.

Tr. 420-21.

The State's counsel also questioned whether some of the sales were to purchasers who intended a single use rather than subdivision. Tr. 425-428. Again, Taylor explained that it did not "matter if it's a single user," with regard to the sales price; "they're going to pay what the market is for the property. What they choose to put in there for multiple use or not is a decision that's made afterwards. They're paying a price for it." Tr. 445. Notably, the State's expert appraiser, Golub, never testified that Taylor's appraisal was in error because his comparables included sales to retail developers or single users.[8]

After appraising the Property as presently zoned, Taylor considered the probability of rezoning. "Next I had to take a look at the possibilities on rezoning as to what would the value of the property be rezoned as of the vesting date 2005." Tr. 352. Based on his knowledge of the Property itself and his years of experience in valuing land in Suffolk County, Taylor testified "when I looked at his [Gulizio's] report, I wasn't shocked to see that there was a potential for rezoning to residential." *Id.* Having determined that a probability of rezoning existed, Taylor then valued the Property to reflect that consideration.

Again, Taylor looked for comparable sales of vacant land used for multi-unit residential development in Suffolk County. Tr. 354. For these sales, Taylor "stayed between 2004/2005 actually" because this "was a fairly robust market." Tr. 355. Taylor identified all of the seven such sales that occurred in the period. Tr. 355-356; Ex. 3, pp. 65, 112-126. Here as well, Taylor applied adjustments to insure comparing like items, although the adjustments for residential property were "slightly different." Tr. 357.

[8] As discussed *infra* Section II.B., Golub used a different and incorrect methodology to select his comparables.

One adjustment that did not change was location. As with industrial zoning, location was the primary adjustment. Tr. 357. The location adjustment for residential, however, was sometimes in the opposite direction – up not down – because the Property is "an excellent location" for residential development. Further an upward market adjustment was made, since in 2005 "[t]he market was really strong. And it was going up and it was continuing to go up." Tr. 359 (emphasis added).

Another adjustment was for yield density, the number of units per acre. Tr. 360. Relying on Gulizio's expert opinion that the Property could be zoned between 3 to 6 units per acre, Taylor adjusted for the sales where developers had built to a higher density. Tr. 360-361. In some cases, the comparables had up to 8 units per acre. Tr. 361; *see also* Ex. 3, p. 65 (showing other examples of 6.99 and 7.4 units per acre). Taylor used the midpoint of Gulizio's numbers, 4.5 units per acre, for comparison. Tr. 360.

An important adjustment Taylor had to make was for a sewage treatment plant. As Taylor testified, the Property "would be developed beyond the density required allowed under Article 6" of the Suffolk County Health Department Sanitary Code which "restricts the amount of effluence you can have per unit." Tr. 361. Sewage treatment is a very sensitive issue in Suffolk County. Tr. 361-362. Under Article 6, development of the Property would require construction of a sewage treatment plant, which is "fairly expensive" from the purchaser's perspective. Tr. 367,

Finally, Taylor made a downward "approval adjustment." Tr. 364. This reflected that the comparables had zoning approvals in place at the time of their sale, while the Property at the time of vesting, had not been rezoned. Tr. 364-365.

The raw land sales unadjusted ranged from $75,000 to $195,000 per acre. Tr. 373. Each of them was developed and almost all the units constructed sold out. Tr. 372; Ex. 3, p. 49. Taylor testified that these actually sold from a low of $450,000 per unit to a high of $800,000 per unit. Applying the adjustments, Taylor concluded that the adjusted raw land sales for comparison purposes ranged between $121,000 and $146,000 per unit. Based on all the data, in his opinion, the value for the Property as rezoned residential would be $130,000 per unit.

To that figure, Taylor applied two further adjustments reflecting the probability of rezoning. First, Taylor adjusted the price per unit down 5 per cent for the time and cost of obtaining rezoning of the Property. Tr. 374. Then Taylor further adjusted to reflect the percentages of probability that Gulizio had laid out, 90-95% for Brookhaven and 70-75% for Smithtown. Tr. 375-377. To avoid extremes, Taylor used the mid point of units per acre and the midpoint of the percentages. Tr. 377. In all, Taylor made three separate adjustments to reflect the fact that the Property had not been rezoned as of November 2, 2005. Tr. 377-379. Considering the probability of rezoning, the value of the entire Property was $153 million. Tr. 380; Ex. 3, p. 69. Deducting the value of the remainder, the value of the condemned portion is $125 million. Tr. 383; Ex. 3, p. 2.

Given the evidence, Taylor's appraisal was sound, and if anything, quite conservative. Although Gulizio placed the units per acre at 3 to 6, he testified that industrial property had been rezoned in these two towns for 11 or even 14 units per acre. The Marriott proposal, for a portion of the Property, received Brookhaven's approval for rezoning at 12.6 units per acre. Use of merely an average of these actual examples, (12.5 units per acre) would have tripled the number of units per acre used in Taylor's calculation.[9] When Gulizio said he was being "conservative"

[9] Even the comparables used by Taylor included sales that developed 7.4 and 8.1 units per acre, numbers almost double what Taylor actually used.

he was understating his position. Further, Taylor, in his effort to avoid "the extremes," did not use Gulizio's top estimate of 6, or even 5, units per acre.

Similarly, Taylor did not use only the top percentages Gulizio provided on probability of rezoning. The full 95% could certainly be justified given the fact that the Brookhaven Plan, recognized as the most important factor in determining probability of rezoning, specifically called for the Property to be rezoned from industrial and Brookhaven had a demonstrated pattern of rezoning to residential rather than face substantial industrial development. The Brookhaven Plan covers almost two thirds of the Property. *See* Tr. 107. Further, a reduction of 20% from Brookhaven to Smithtown, because Smithtown had no comprehensive plan, was extremely generous, especially when Smithtown also showed a trend of recent rezoning from industrial to multi-unit residential. Throughout their testimony, both Taylor and Gulizio consistently chose the appropriate path avoiding unreasonable extremes. The valuation of $125 million, therefore, does not represent a maximum, resolving any questions in Gyrodyne's favor. Rather, it is a rock solid price, based upon a conservative appraisal that is clearly supported by the overwhelming evidence adduced at trial.

2. <u>The State's Appraiser Failed to Consider Highest And Best Use</u>

As discussed above (Section I.A. *supra*), where there is a reasonable probability of rezoning, a valuation of the condemned property must include such. *See, e.g., Mascioli*, 49 N.Y.2d at 360. Golub, the State's appraiser, agreed that this was necessary.

> Q (MR. CLASEN): Okay. If it had a reasonable probability of being rezoned for that, you would've had to do so, right?
>
> A (MR. GOLUB): If I felt that reasonable probability existed, I would have developed that value.

Tr. 785; *see also* Tr. 766-767. However, even though the State's experts – including Golub himself – conceded at trial that rezoning of the Property was probable (*see* Tr. 780-81, 789-91), Golub never valued the Property for such residential development.[10]

Since Golub failed to appraise the Property as rezoned residential, this Court cannot give his appraisal any weight.[11] This Court has discretion "to accept or reject expert testimony in determining the value of condemned property." *In the Matter of the Acquisition of Real Property by CNG Transmission Corp.*, 273 A.D.2d 726, 728 (3d Dept. 2000). Courts have regularly refused to rely upon appraisals that failed to consider the value of property as rezoned. *See, e.g., Berwick v. State of New York*, 159 A.D.2d 544, 545 (2d Dept. 1990) ("the State valued the properties as though it were legally and economically unfeasible to develop them. As a result, the State's comparable valuations of these properties were properly rejected by the Court of Claims"); *Bienenstock v. State of New York*, 287 A.D.2d 587, 588 (2d Dept. 2001) ('We agree the highest and best use of the subject parcel at the time of vesting was for retail purposes in a B-H Zone. Since the defendant's appraiser valued the damages as if the property were in a B-Sc Zone . . . the Court of Claims should not have relied on his appraisal"). *See also Jomar Real Estate Corp.*, 94 A.D.2d at 724 ("Of significance is the fact that the city's expert conceded that the property in question would be worth more as a commercial property") (emphasis added); *Masten*, 11 A.D.2d at 373-4. Similarly here, this Court cannot give weight to the State's expert

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[10] Golub's failure to appraise the Property under any residential scenario is especially egregious considering that Golub's affidavit in support of the State's Motion to extend time to submit appraisals, stated that "depending on the outcome of the highest and best use analysis, I may need to appraise this property based on industrial use or residential use, or both. My objective with an eminent domain appraisal is to appraise the highest market value, so it may be necessary to make several appraisals and let the highest value prove which use is highest and best." (Affidavit of Kenneth L. Golub sworn to November 1, 2007, and filed with this Court on November 5, 2007) (emphasis added). Although the State obtained additional time for Golub to do an appraisal for residential use, he never made such an appraisal.

[11] The appraisal has other significant errors in the valuation Golub did do for industrial development which will be discussed in Section II *infra*.

regarding valuation for highest and best use, since Golub simply failed to provide evidence on that.[12]

Having failed to value the Property as rezoned, the State's appraiser left this Court with no choice but to value the condemned portion of the Property as Gyrodyne's expert did. A court's findings concerning value must be within the limits of expert testimony supported by the evidence. *See, e.g., Madowitz v. State of New York*, 288 A.D.2d 442, 443 (2d Dept. 2001); *Estate of Dresner v. State of New York*, 262 A.D.2d 274, 275 (2d Dept. 1999); *Chester Industrial Park Assocs.*, 65 A.D.3d at 515. In this case, the only evidence of value as rezoned came from Taylor. This Court is not free to determine a value on its own departing from the experts, where both sides agreed the Property had a reasonable probability of rezoning. *See In the Matter of the County of Suffolk (Basil Griffith)*, 41 N.Y.2d 1058, 1059 (1977) (where government's and claimant's experts agreed a property had a probability of rezoning, "it was error on the part of the trial court independently and on its own initiative, to depart from that hypothesis and to fix the value of the [property] without increment for probable rezoning"). Where only one expert addresses the highest and best use, the court should rely on that appraisal. *See Jomar Real Estate Corp.*, 94 A.D.2d at 724 ("In view of our holding as to highest and best use, and the fact that the only proof of value contained in the record on appeal as to such use is contained in the claimant's expert's appraisal, the value found by such expert must be given full weight and, accordingly, is the basis for our award") (emphasis added).

On the two central issues – what was the probability of rezoning and what density was likely – the State produced not a single piece of evidence, either in their reports or on direct

[12] In some circumstances the trial court may even strike an appraisal improperly prepared. *See Pritchard v. Ontario City Indus. Devel.*, 238 A.D.2d 974 (4th Dept. 1998); *In the Matter of the City of New York (Crown Heights 4th Amend)*, 1 Misc. 3d 913, 781 N.Y.S.2d 623, at *4-*5 (Kings Sup. Ct. 2004). However, that is not necessary here.

examination. The State cannot argue that its experts' concessions on cross-examination of a reasonable probability of residential rezoning represents evidence of some density or percentage less than that provided by Gulizio and used by Taylor. Grover admitted that prior to his testimony he mistakenly believed that the Brookhaven Plan did not specifically address the Property. After he stood corrected on that point (Tr. 618), Grover never analyzed the effect of the Brookhaven Plan on the probability of rezoning. Nor did he ever look at the other factors, such as the history of rezoning in the Towns, which he agreed "absolutely" had to be considered, to attempt to quantify in any way the probability of rezoning. He only "assessed it in qualitative terms." Tr. 580. Grover's testimony reveals that the State, for whatever reason, simply never asked him to give an opinion on the critical question regarding the probability of rezoning. Having failed to do so, the State cannot claim his surprising admission on cross-examination gives it any right to question the parameters of Taylor's valuation.

Similarly, nothing Golub came to admit on cross-examination provides an independent basis for determining value as rezoned. Although Golub knew he had a responsibility as an appraiser to value the Property as rezoned, he failed to do so. When confronted at trial, he did not attempt to provide an analysis of density but rather stated: "I'm not a bookmaker. I can't give you odds on that." Tr. 783. Of course, it was his job to value the Property as rezoned, including the increment for the probability. If he could not determine the density, he should have sought more information from Grover, the State's expert who had such a "significant influence" on Golub's analysis and conclusions. Tr. 771. Golub's failure leaves the State with no relevant evidence.

Gyrodyne's experts demonstrated that the Property had a reasonable probability of rezoning for multi-unit residential. The State's experts agreed with this conclusion. Only

Gyrodyne's appraiser, Taylor, followed the law and practices in the field to properly value the Property to consider this probability. Taylor did not simply provide the maximum value for which the Property could have sold if rezoned. Rather he applied three different downward adjustments to reflect the price a willing buyer would pay, recognizing the probability the Property would be rezoned. In contrast, the State's expert, Golub, offered nothing on this issue. In such a case this Court is not free to make its own choices and calculations of value. Given the evidence presented, this Court is constrained to value the portion of the Property condemned, as Taylor did, at $125 million.

II.

THE STATE'S VALUATION OF THE PROPERTY AS PRESENTLY ZONED WAS FUNDAMENTALLY FLAWED

As discussed above, the proper valuation of the Property is as rezoned residential. Moreover, the State's expert committed such serious errors in the valuation he provided that even his value of the Property as presently zoned cannot be relied upon. It has been long recognized that the proper method of valuing undeveloped property is by using sales of other raw land as comparables. *See Hewitt v. State of New York*, 18 A.D.2d 1128 (4th Dept. 1963). The court in *Hewitt* established that it was an error to use the sales price of developed land and then deduct the costs of development, stating, "[t]his method of valuation was highly speculative and improper." *Id. See also Tarricone v. State of New York*, 23 A.D.2d 804, 805 (4th Dept. 1965) (method of arriving at value as developed minus the costs of development, "is directly contra to the holding of" *Hewitt*). The Court of Appeals' decision *In the Matter of County of Suffolk (Firester)*, 37 N.Y.2d 649, 652-3 (1975) adopted the *Hewitt* rule. *See also Consolidated Edison v. Pearl Port*, 53 A.D.2d 623 (2d Dept. 1976). Notwithstanding this well established rule, Golub testified he never heard of *Hewitt*, Tr. 808.

A. Gyrodyne's Expert Properly Valued The Property As Raw Land

For Gyrodyne, Taylor applied the proper method, finding seven comparable sales in Suffolk County of raw industrial land. Tr. 333. *See also,* Exhibit 3, p. 62. This represented all the sales of raw industrial land in the two years before the taking. *Id.* Taylor did not prescribe a value to the existing buildings, since he concluded "someone coming in there would probably level the buildings that are there and build something else." Tr. 330.[13] *See Lee*, 83 A.D.2d at 770 (affirming court's determination that "the age and deteriorated condition of the existing structure" supported valuing the land itself rather than the building). Based on Taylor's analysis, described fully *supra,* he valued the Property as presently zoned at $46,185,000. Tr. 351.

B. The State's Expert Did Not Value The Property As Raw Land

Golub's experience as an appraiser has been in Rockland and Westchester Counties. Tr. 731-733. Throughout his testimony, his lack of familiarity with Suffolk County property values surfaced repeatedly, leaving Golub to explain to this Court, "[w]ell, I've never lived in Suffolk County, so." Tr. 846.

Golub did not value the Property as raw land. Instead he separately analyzed the vacant land and the existing buildings on the Property. Tr. 749. Rather than using comparable sales of raw industrial land to calculate the value of the vacant portion, Golub used sales of developed industrial sites and then deducted costs of development. *See* Tr. 756-757. *See also* Tr. 829 (Q. "You valued this property as if it had already been developed into industrial, an industrial park, and then you backed out the costs, right? A. Yes"). Golub did this even though he testified on direct that the Property was not currently an industrial park. Tr. 756. Deducting development costs is the very method condemned by the court in *Hewitt* as "improper."

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[13] Taylor considered the present rent would offset the costs of destruction of the buildings, so he did not deduct for the demolition costs. Ex. 3, p. 45.

Golub did not contend that his method was more appropriate nor did he dispute the holding in *Hewitt*, of which he claimed not to have heard. Rather, he asserted that he was unable to find sales of raw industrial land. Tr. 829 ("you did that because you couldn't value it as raw undeveloped land, because you couldn't find enough comparable raw land sales, right? A. That's fair"); *see also* Tr. 757 ("I was not able to find any large track [sic] sales of industrial properties . . . If I had found other large industrial tracks [sic], or industrial tracts I would have used them") (emphasis added).

Golub's excuse, however, was contradicted not only by Taylor's seven comparable sales of raw industrial land, but also by the comparables Golub selected to use. Of the eleven comparables Golub relied upon, four were sales of vacant undeveloped land. Tr. 830-834. Golub tried to explain this contradiction by saying the raw land comparables were not as large as the Property. However, he was forced to admit that, notwithstanding the difference in size, he himself had relied upon them in calculating his values. Tr. 834-5.[14] Thus, Golub failed to apply the proper methodology and his excuse for this was discredited by his own report.

Golub's valuation was further flawed by his failure to consider the completely different nature of the developed industrial sites he attempted to use as comparables. First and foremost, Golub ignored the issue of sewers. Amazingly, Golub testified that he never heard of Article 6 of the Suffolk Sanitary Code. Tr. 838 ("I don't know, no, it doesn't ring a bell"). When asked about Suffolk County's sewer law, Golub replied "I'm not familiar with them." Tr. 838. Golub believed there were some density limitations imposed on property without sewers but did not know what that density level was. *Id.* Given the importance of Article 6's potential restrictions on development, failure to consider the sewer regulations undermines Golub's entire analysis.

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[14] Golub offered no explanation for not considering the other 3 sales of raw land that Taylor identified.

Ignorant of the requirements of Article 6, Golub testified that in his opinion a septic system would be adequate for full industrial development of the Property. Tr. 839. As a result, Golub did not contemplate the costs of building a sewage treatment plant in his analysis of development of the Property. *Id.* ("I didn't really deal with it"). Golub was forced to admit, however, that Grover's report on environmental issues did contemplate building a sewage treatment plant. Tr. 839 ("Well, apparently he did contemplate that"). Actually, Grover had testified only the day before that he "assumed the development would include a construction of a sewage treatment plant." Tr. 604. In fact, Grover testified Article 6 required a sewage treatment plant because "it exceeds the allowable flow of the Suffolk County Health Department." Tr. 624.

Golub also ignored the issue of sewers and the effect of Article 6 in selecting and analyzing his comparable sales. Tr. 840-841. When confronted with this failure to consider a critical issue in valuing property in Suffolk County, Golub attempted to bluster, asserting that he knew the comparable properties had sewers because he saw the property (but of course did not see the sewers) (Tr. 842), or that some unidentified person told him there were sewers, even though that does not appear anywhere in his report. Tr. 842-845.[15] Golub admitted that he never even looked at the sewer map admitted into evidence. Tr. 845; Exhibit 11. Disregarding the sewer issue makes Golub's opinion completely unreliable. *See e.g. Spriggs*, 54 A.D.2d at 1081 (state's error regarding sewer facilities supports decision in claimant's favor).

With regard to another alleged comparable, Golub failed to consider that almost 6 acres of an 8.2 acre property were wetlands. Tr. 847-8; *see also* Ex. 16. Golub admitted that he knew there were wetlands on the property, but did not know how they affected the zoning.

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[15] Since Golub had no knowledge of Article 6, he would have had no reason to make such an inquiry.

Tr. 848-849. As a result, he divided the sales price by the full 8.2 acres instead of the 2.5 useable acres. That resulted in an error in the price per acre of $375,000 – almost a factor of four. Tr. 849-850. *See, e.g., Chester Industrial Park Assocs.*, 65 A.D.3d at 515 (appraiser mistakenly failed to consider impact of wetlands on development). Further, instead of consulting experts in their fields (engineers, developers, insurance brokers) on the development and infrastructure costs he backed out, Golub admitted that "[p]retty much, I did guess . . ." Tr. 855 (emphasis added). Golub's use of an improper methodology, combined with the other grievous errors in his analysis, makes his valuation of vacant portions of the Property worthless to this Court.

C. The State's Expert Applied The Wrong Method To Value The Existing Buildings

To complete his valuation of the Property as presently zoned, Golub then separately considered the existing buildings. Under his analysis, a developer of a brand new industrial park would keep old buildings from the 1950s which had suffered physical deterioration, rather than tear them down. *See* Tr. 329-330. Exhibit 3, p. 45.[16]

In placing a value on these buildings (which in all likelihood would be demolished as part of any development) Golub again used the wrong methodology. Golub admitted that to carry out the income analysis approach he used, an appraiser must use market rents. Tr. 808; *see also* Tr. 816-817 ("that's why you're trying to figure out market rates because you use market rate not actual rates right? A. Right"). However, in this case Golub used the actual rents. Tr. 808.

As with using an improper methodology for the vacant portion of the Property, Golub tried to explain his way out of this mistake, claiming the actual rents were the market rents. Tr. 808. However, when questioned about particular buildings, Golub was forced to admit that not one leasee was paying what Golub claimed was the market rate. Tr. 809-816. Golub merely

[16] Golub admitted that some of the buildings would be torn down. Exhibit H, p. 62.

added up the total rent paid by lessees in a given building and divided that by the square footage. Tr. 812-814. This fails to address the fact that lessees in the same building were paying wildly different amounts of rent for the same approximate space. For example in Building 1, for which Golub said the market rate was $14.48, one lessee paid $25.71 per square foot for 420 square feet while another paid only $5.54 for 390 square feet. Tr. 809-811. Golub made no effort to determine why that was, or even to find out when the respective leases were entered into, although he did not contest that was needed to determine market rent. Tr. 811 ("you want to at least find rents for leases that are entered into as close to the magic date as possible"). For Building 2, Golub calculated the market rate at $11.43, yet testified that several lessees were paying in the $9.00 area, while at least one was paying $14.00. Tr. 814. Again, Golub did not know when that higher rent lease was entered into. Tr. 815. *See also* Tr. 816 (for Building 8 the actual average rent was $11.80 but one lessee paid $14.31).

Golub testified that he would have used market, not actual, rents if they "were significantly different" and then admitted the difference in Building 1 between $14.48 and $25.71 was a "significant difference," stating "[t]hat's a reasonable statement, yes, I will not disagree with you." Tr. 817. It is clear from Golub's own testimony that the rents he used were not market rents. Golub compounded that error by using cap rates and equity yield rates he derived by himself rather than those published by accepted surveys in the industry. *See* Tr. 820-822. Further, in using comparables, Golub made no adjustment to the price of a sale that occurred a year earlier than the Property's appropriation, even though it "was a strong market." Tr. 826. *See also* Tr. 827 ("It was a strong market but you didn't make any adjustment for the fact it sold the year before, right? A: Correct."). Golub's approach was if he couldn't figure it out, he would just "<u>forget about it</u>." Tr. 828 (emphasis added). As with his valuation of the

vacant portion of the Property, Golub's valuation of the existing buildings departs so dramatically from what even he admits is required of an appraisal that this Court cannot give it any weight.

The combination of all of these errors in the State's appraisal leads to the inescapable conclusion that its appraiser simply was looking for any way to present the lowest valuation possible, using information or his own guesses at every stage that would reduce the value rather than fairly determine it. That is the only explanation for Golub's amazing result that, after condemnation, the value of the remaining 62.5 acres with 60 year-old buildings was $15.4 million, but the open land "ripe for development" (Tr. 739) taken by the State totaling almost 200 acres more than the remainder was worth only $7 million more. Tr. 760-762. Golub's numbers just do not add up, and even as to the value of the land as presently zoned should not be relied upon by this Court.

CONCLUSION

On November 2, 2005, the State appropriated over 245 acres of the largest, privately owned open land remaining in Suffolk County, which the State's own experts declared was ripe for development and eminently buildable. Rather than pay its owners the fair market value as the law requires, the State at every turn has attempted to distort the valuation process. Here, trial fulfilled its role and revealed the truth. The State's own experts ultimately came to admit the obvious, what their reports tried to hide, that the highest and best use of the Property was as rezoned for multi-unit residential use. As that issue is no longer in dispute, the only remaining question for this Court is the value of the Property considering this probability. The law requires that the Property's valuation include an amount that reflects the probability the land will be

rezoned. The State's appraiser, however, failed to give any value for the rezoning that he himself admitted was reasonably probable.

The only credible and sustainable evidence the Court has to consider regarding valuation, therefore, is the appraisal by Mr. Taylor, who based his appraisal on years of experience in determining the value of land in Suffolk County. Taylor applied the methodology approved by case law in a fair and even-handed manner. He specifically applied multiple deductions to consider that, while the towns would probably rezone the Property to residential rather than suffer the effects of "as of right" industrial development with its roadway clogging traffic, rezoning had not yet occurred at the time of the taking. Taylor did not manipulate data to inflate the valuation. Rather, Taylor's appraisal is consistent with the best practices of expert appraisers and condemnation law in New York. Case law provides that a court in condemnation may not independently value a property but should award within the limits prescribed by the experts. In the particular circumstances of this case, with no other expert opinion as an option concerning the value at the highest and best use, this Court certainly should accept Taylor's well-reasoned, conservative conclusion and award Gyrodyne the market value of $125 million for the condemned land.

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