

STATE OF NEW YORK : COURT OF CLAIMS

-----X
GYRODYNE COMPANY OF AMERICA, INC.,

Claimant,

-against-

CLAIM NO. 112279

THE STATE OF NEW YORK,

HON. JAMES J. LACK

Defendant.
-----X

MEMORANDUM OF LAW AND FACT

I

PRELIMINARY STATEMENT

The claimant, Gyrodyne Corporation of America, Inc., owned 312 contiguous acres of industrially zoned and improved lands in Suffolk County. The lightly developed property, on the border of the Towns of Smithtown and Brookhaven, is the largest singly owned parcel of industrial property in either Town.

On November 2, 2005, the State of New York appropriated a total of 245 acres, including two buildings and land improvements, from the parcel for an expansion of the neighboring campus and facilities of the State University of New York at Stony Brook. The lands taken are now being used for the University's Center for Excellence in Wireless and Information Technology and an Advanced Energy Research and Technology

Center.

Fair compensation is due to the claimant for the partial appropriation of its property and that compensation is to be calculated by comparing the market value of the claimant's lands in their highest and best use before the appropriation to the market value of the lands remaining to the claimant after the taking.

A trial was held in August, 2009 at which the claimant and the State gave proof of the value of the property and the damages caused by the appropriation. The parties' appraisers do not agree on the highest and best use of the property.

This post-trial memorandum of law and facts is submitted, by leave of the court, as an aid to its determination of the just compensation to be paid to the claimant by the State for the taking.

II

STATEMENT OF FACTS AND HISTORY OF THE GYRODYNE PROPERTY

The Gyrodyne Corporation of America, Inc. (Gyrodyne), like Fairchild-Republic Aviation and Grumman Aircraft, is part of Long Island's history and its legacy as a cradle of aviation. Gyrodyne was established by Peter James Papadakos in 1946 to further develop and promote a helicopter with a coaxial design -

a helicopter with twin rotors on concentric shafts and no tail rotor. Until the mid-1970s, it developed, tested and manufactured drone and manned versions of such helicopters. Most famously it produced a drone version of its aircraft as part of an anti-submarine weapons system used by the United States Navy.

In 1951, Gyrodyne moved its operations from the former Fitzmaurice Field in Massapequa to a large parcel of land it purchased in the hamlets of St. James and Stony Brook.

The site it purchased was approximately half of a former estate used in a commercial bulb and seed production operation known as "Flowerfield." Residual areas of the estate are located to the north and west in the Village of Head of the Harbor and continue their historic agrarian use today as open fields and a vegetable farm.

Gyrodyne constructed its headquarters, research, testing, manufacturing, assembly facilities and private airfield over a portion of the tract and disposed of the excess lands extraneous to its needs. That divestment included approximately 180 acres located in the Town of Brookhaven, east of Stony Brook Road, which were given to the State of New York, joined with lands purchased by the State and donated by others, and developed as the campus of what is today the State University at Stony Brook.

The last and most recent sale by Gyrodyne from the property was in 2002. A 12.5 acre parcel that had been leased and improved with the "Flowerfield" catering facility was sold to the operator of the facility.

The remaining 308¹ acres of Gyrodyne's property are irregularly shaped. They lie in two towns, with 181± acres in the Town of Brookhaven and 127± acres² in the Town of Smithtown. They are surrounded on three sides by roads: North Country Road/State Route 25A, a designated State scenic and historic highway, and; two town roads, Mills Pond Road in the St. James hamlet of the Town of Smithtown to the west, and; Stony Brook Road in Brookhaven Township's hamlet of Stony Brook to the east.

There is a 3,814± foot frontage along Stony Brook Road, 530± feet on Mill Pond Road and 2,717± feet along North Country Road/Route 25A. The southerly border of the property has no road frontage. It abuts the rear yards of homes and a public school in University Heights, a residential area developed over the years since the founding of the University.

The property is also bisected by the Port Jefferson Branch of the Long Island rail Road. This active rail line crosses the

¹ The property area used by Claimant and Defendant differs since Defendant's appraisal includes two lots , totaling 5.2 acres owned by Flowerfield Realty, Inc. Claimant omits that acreage. Claimant's area calculation is accepted.

² Exhibit H, American Property Counselor's appraisal report, p. 8, adjusted per note 1, above.

property on a southwest - northeast axis, entering the property after a grade crossing of Mill Pond Road and departing by way of a trestle over Stony Brook Road. A gated, grade crossing and a narrow underpass connect the railroad-severed areas of the property. Some 245.46± acres of land lie east of the tracks and 62.43± acres of land lie west of the track³.

Each abutting roadway has two lanes and although various improvements have been made to the roadways since Gyrodyne's arrival, in an effort to accommodate Long Island's and the area's decades of increasing population and traffic volumes, Route 25A in the neighborhood of the property, as a designated historic and scenic highway, and the abutting Town roadways have undergone no substantial widening or modernization. They remain narrow and winding country roads without sidewalks, curbing, shoulders, turn lanes or enclosed drainage systems. The Town roads terminate at North Country Road at un-signalized intersections.

The Gyrodyne property has one entrance from North County Road/Route 25A. The highway, west to east, descends a curving grade as it passes the Old Mill Road intersection and the start of the frontage of the Gyrodyne property. The abutting lands

³ Exhibit 3, Rogers & Taylor Appraisers, Inc. report, p. 45

rise to either side as the highway passes the property and the highway reaches its low point near the Stony Brook Road intersection. The Gyrodyne entrance is located on the grade, at the end of the property's frontage on the highway, approximately at the midpoint of the grade in the distance between the two intersections.

Over the remaining distance to the east, between the Gyrodyne driveway and the Stony Brook Road intersection, the property's northerly border is the rail line, not the highway. The parcel is set back from the highway by the rail line and the lands of others. Those lands with frontage on the highway are improved with a private school, the Stony Brook Girls School⁴. The lands across the highway, opposite the property across the highway, are residentially improved, farmed, or open fields and woods.

Stony Brook Road is also winding along its extensive frontage with the parcel. While at grade with the property to the south, it descends through a rocky gorge, passing beneath the trestle carrying the tracks, to its ending in a "Y" shaped intersection on a north-bending curve of Route 25A. The property east of Stony Brook Road is residential except for the wooded

⁴ Exhibit I, Stony Brook University Final Generic Environmental Impact Statement, plate ES-2

frontage of the campus of the State University of New York at Stony Brook. There are two access drives for the property on that road, one is near the property's southerly border with the University Heights area, the second is near the mid-point of the frontage.

A driveway near the ending of Mill Pond Road at North Country Road is currently the primary point of access for the property. It is closest to the existing improvements on the property. It, and each driveway, enters a network of 22 foot wide, curbed and paved, interior roads that give access to all buildings on the site, cross the track at the grade crossing and wend through all undeveloped areas of the property.

After some twenty five years of operations, in 1975, Gyrodyne ended it operations in the aviation and defense industry. It ceased producing aircraft for the military at the site as détente, technological changes, and a build-down of military weapons systems ended the need for its products.

All aviation development, fabrication and testing on the property stopped and Gyrodyne took on a new role. Much reduced in size, Gyrodyne continued as the owner, operator and manager of its headquarters location as a multi-tenanted industrial park.

With the ending of its own industrial activities, the accoutrements of its aviation-related use of the property, the airstrip, control tower, fuel farm facilities, etc., were removed. The other, more generalized industrial features, however, were retained, renovated, subdivided, and converted for industrial use by tenants.

In all seven buildings containing approximately 202,000 sq. ft. of usable space, were converted to accommodate an extensive roster of tenants. At the time of the taking, there were 50 tenants on the property. A small portion of the available space and out buildings were retained and occupied by Gyrodyne for its property management and maintenance functions.

The retained building improvements were clustered about the railroad right of way. The surrounding acreage of lawns, landscape plantings, existing fallow, overgrown, grasslands, brushy coverts, woodlands, and the former airstrip and testing grounds, which occupied the far greater area of the site, were largely left undisturbed. The large expanse of groomed fields and lawns were regularly made available for use as an annual fairgrounds, picnic, or show ground venue and a limited area of field, near the building improvements, was prepared, paved and used by one tenant as a school bus parking depot.

Aside from the limited improvements and minor modifications needed to accommodate the desires of particular tenants, or as needed for the maintenance and outfitting of the existing structures as rental spaces, no significant expansion of use of the site was undertaken in the more than quarter century since the site began operating as a multi-tenanted industrial park. Much of the parcel was kept as open native grasslands and brushy cover.

Gyrodyne, over the years, however, did have an evolving conceptual plan for the eventual and optimum development of the under-utilized areas of its property. That plan recognized the deficiencies of the existing roads serving its property, the desirability of maintaining the rural qualities of the area, preserving the quietude and ambience of surrounding single-family residential properties, and the impact of the growth of the University, as well as the additional impacts that inevitably would arise from a more intensive use of its lands.

Its plan included continuing and expanding the light industrial use of the property with "incubator" offices and research spaces for enterprises that would benefit from the facilities and resources of the University, the addition of housing, such as single family homes and rental apartments to

meet the needs of a burgeoning population, and a performing arts center. The development it envisioned, however, would have impacts on the surrounding area and those impacts required adequate mitigation if the municipal cooperation and approvals were to be expected.

Recognizing the severe limits to development that flowed from the inadequacy of the surrounding roads, Gyrodyne participated in traffic studies seeking to improve the public road system. The construction of a new roadway linking County Route 97/Nicholls Road to North Country Road through the campus of the State University and the Gyrodyne property was first proposed in the early 1990s as part of the failed statewide Jobs Bond Act. A similar proposal was made again in a 1996 study for the Town of Brookhaven, supported by Gyrodyne and paid for by the Town of Brookhaven Industrial Development Agency. A version of the improvement, an internal roadway linking the University's main campus to is proposed by the The benefit of the new road was that it would ease existing and anticipated traffic congestion by diverting traffic from the rural and residential Mill Pond and Stony Brook Roads and route it directly between more suitable highways. Such an improvement was not perfect.

The 1996 study found that the Mill Pond and Stony Brook intersections were already failing due to congestion and that existing traffic volumes exceeded the capacity of Route 25A in the area. In order to demonstrate the need for the new highway, the study projected local traffic conditions to the year 2015, when it was anticipated that impacts from a possible development of the Gyrodyne site and the improvements already in planning for the University campus likely would be felt. That projection was persuasive.

The need for the new roadway was shown to the satisfaction of the University, the State Department of Transportation, the County of Suffolk, the Town of Brookhaven and the Town of Smithtown, although the Village of Head of the Harbor expressed objections to any new roadway or development that would open the Gyrodyne property to more intensive use and bring additional traffic to Route 25A along its southern border. The study notes that even with the addition of the new collector road and regardless of the anticipated development of Gyrodyne's property, existing traffic conditions and the expected area growth warranted additional roadway improvements and traffic mitigation measures, including the installation of a traffic signal and turn lanes at the Mill Pond Road intersection, and

possible reconstruction of the Stony Brook Road intersection. The study reports that additional highway right of way likely would be needed to implement those measures⁵.

Despite a general agreement that the linking roadway was an appropriate and reasonable measure to reduce the impacts of traffic in the area, it remained a concept. The detailed studies, design and funding needed to implement the roadway expansion were not pursued and the new roadway was not built.

Even without benefit of the new road or any highway improvements, in subsequent years, Gyrodyne attempted to partner with developers under long-term lease arrangements to develop sections of its property. None of those efforts succeeded. One failed effort was made with a developer, Trammel-Crowe, to improve a 25 acre portion of the parcel with an apartment complex. Another venture, with the Marriott Corporation, progressed furthest. It proposed the development of an age-restricted, assisted living complex on 10 acres of vacant lands near Stony Brook Road.

The proposal required a change of zone for 10 acres of the site near Stony Brook road to be zoned PHRCHC Residential⁶ by the Town of Brookhaven. Gyrodyne asked for the change of zoning in

⁵ Exhibit J, Town of Brookhaven Collector Road Study, p. 33

1999 to allow the proposal to move ahead. It was approved by the Town Board in February, 2000⁷, but the approval was conditional.

The Town Board allowed the requested change of zone only if the site was developed with certain restrictions: its allowed density was less than that generally available under the ordinance; it must provide more extensive front, rear and side buffer and setback areas, and; it could have no direct access to and from Stony Brook Road. The Town Board also required that Gyrodyne agree not to seek any approvals for development of its adjacent lands in the Town of Brookhaven until the Town Board considered and issued approvals for the development of all adjacent lands as a Planned Development District.

The effect of those restrictions on the particular proposed development is not known, but the assisted living project did not move forward. It was abandoned. The restrictive and conditional zone change allowed by the Town Board never became effective, and eventually the application for the change of zoning for the 10 acre portion of the property was withdrawn⁸.

No comprehensive plan for re-development of the site was put forward by Gyrodyne until after the University

⁶ Planned Retirement Congregate Housing Community

⁷ Exhibit 13, Town of Brookhaven Zoning Resolution, dated February 1, 2000

⁸ Exhibit 14, Town of Brookhaven letter, dated November 13, 2002

unsuccessfully attempted to purchase a substantial portion of the property and was moving to annex the lands using eminent domain. Gyrodyne's most inclusive plan, developed in conjunction with the Landmark Land Company, was offered in 2002 - 2003. It proposed to retain the existing industrial uses in the Town of Smithtown and to obtain changes of zoning and approvals in both Towns for development of the remaining acreage as a golf course community⁹.

Gyrodyne applied for a change of zoning from the Town Board of the Town of Brookhaven in 2002. The application was rejected on advice of the Suffolk County Planning Commission, however, since the proposed development required a coordinated change of zoning in both towns of Brookhaven and Smithtown. Gyrodyne resubmitted its application to both Towns the next year, but neither Town acted on the applications. The applications were held in abeyance due to the pending appropriation of the lands. The applications became moot with the State's filing of its taking map on November 2, 2005.

⁹ Exhibit N

III

THE TESTIMONY AT TRIAL

A

CLAIMANT

The claimant offered evidence at trial tending to minimize the impediments to the development of its property and in support of its belief that current zoning should not be considered relevant in defining the lawful allowed use of the property. It contends that:

- Re-zoning of the property in each municipality is imminent;
- It is virtually assured that future re-zoning of the property in the Town of Smithtown will allow a residential use;
- The future re-zoning in the Town of Brookhaven will be to a Planned Development District (PDD) zone following the Town Board's approval of a Master Plan for the development of the property;
- The yet to be drafted, reviewed and approved Master Plan for the lands in the Town of Brookhaven will provide for an exclusively residential clustered development with between 3-6 units per acre;

- Such a Master Plan when presented will be approved by the Town of Brookhaven Town Board;
- The future re-zoning of that portion of the property in the Town of Smithtown will be to a compatible zone that provides for clustered residential development of similar density, and;
- Both the Town of Brookhaven and the Town of Smithtown will give coordinated and compatible zoning changes, site plan and subdivision approvals needed for the unitary development of the entire property as a clustered residential community with a density of between 3 and 6 units per acre.

The proposal for an exclusively residential development of the entire property, the largest residential development to be proposed for either Town, and the prognostication of the proposal's success through affirmative, serial and coordinated discretionary municipal actions and decisions, was made by Daniel Gulizio, the claimant's retained land use planning expert.

He bases his conceptual use for the property on an assessment of the site, its current zoning, limitations on development, the surrounding neighborhood and the zoning

policies of each Town. He weighs the possibility for his concept's success in gaining needed municipal approvals on his understanding of each Town's zoning ordinances, policies and practices, and on selected examples of resolutions in each Town approving similar, but significantly smaller, clustered residential development projects in a range of densities for different, scattered, locations of unknown and unexplained comparability. All of the selected examples have only a fraction of the total number of new living units that he believes will be approved for this property and all have better surrounding roadway infrastructure.

The only alternate development for the property he considers is a maximum build-out under the current zoning, a development of more than a three million square feet of industrial and office space, and a suggested use that all who considered the range of possible uses of the property agree is neither feasible, nor practical given the property's location and its limitations of access.

The factual details that might support the immanence of a change of use for the property to an exclusively residential use and the feasibility of a clustered residential development are not provided. Rather, the scheme proposed merely presumes a

complete residential use of the property under new zoning and assumes that it will be approved and implemented in the density suggested given the dimensions, configuration, topography and access of the site. Mr. Gulizio does not discuss any possible negative factors that may bear on his proposal. There was no mention or discussion of the relatively greater demands of residential development on municipal and community services, the tax revenue consequences for either municipality, the potential effects of the addition of between 924 and 1,848 new living units on the local school districts, or whether the additional traffic from those new residences would adversely affect traffic conditions in the area.

Mr. Gulizio did not rely on any study of the projected effects on traffic from his proposed residential development in forming his opinions as to the probable use of the property. However, a limited traffic impact study was prepared for claimant. The traffic impact study presented by Alan King, Jr. P.E., assessed traffic impacts from the proposed residential development and contrasted them to the impacts that might be expected from a full build-out for industrial use. Traffic impacts from both the residential and industrial project were contrasted as of November 2005, the time of the State's taking.

This severely curtails the value of the study.

Mr. King agreed that the traffic impacts that would be considered relevant by the municipalities in reviewing a proposed development of the property would not be those reported in his study for 2005 when the taking occurred. What would be of interest were the impacts projected to occur years later when a proposed development for the property, whatever its nature, was completed and generating traffic.

Mr. King made no projections of traffic conditions to any future year when it may be likely that traffic from any development of the Gyrodyne property could occur. He did not assess those traffic conditions, or the need for and ability to provide mitigation for the traffic generated from the property due to development a residential use, or a low density industrial use. The study was insufficient for purposes of evaluating the potential traffic impact from residential or industrial development of the property for purposes of any municipal review.

The lack of any detailed traffic analysis of the likely effect of implementing Mr. Gulizio's proposed residential development is significant, as traffic is the key impediment to the development of the property for any use. Also, Mr. Gulizio

neither attempts to project the length of time, nor analyze the expenses for the design, planning, municipal review process, site preparation and construction work needed to advance the proposed residential development scheme from imagination to approval and immanent actuality. There is no effort to quantify the sums that a developer would have at risk in promoting the plan should any one of the discretionary municipal determinations needed for the project be denied. Further, Gulizio provides no information from which the feasibility of a residential project can be assessed should any approval that may be issued fall below the range of his predictions, or bear conditions that impede its implementation.

Mr. Gulizio readily admits that as a land use planner he has no authority to make decisions, nor any special prescience to know the future zoning and land use decisions of any municipality. Those decisions are made by public boards acting in the public interest. All that he can do is assess and recommend a particular plan for the development of lands without any guarantee that that the plan will succeed in gaining the required zoning and approvals needed for its construction. He similarly can give no guarantee, that the plan ultimately approved, will resemble the plan proposed, or be a practical and

financially viable project for the improvement of the property.

He has greater familiarity with the zoning policies of the Town of Brookhaven, having worked for a time as its Director of Planning, and that leads to differing levels of confidence in his prediction of the ultimate success of his proposal for each Town. He expressed his level of confidence in his own predictions as a "percentage of probability." Although there are no plans drawn, nor any particular development scheme to be studied, he believes that the general concept for a clustered residential development for the property, with a density in the range of between 3 and 6 units per acre has a 90% to 95% chance of succeeding in the Town of Brookhaven, but only a 70% to 75% chance of succeeding in the Town of Smithtown. Curiously, he made no prediction when the anticipated residential use of the property might be achieved, or when the involved Town Boards reasonably could have the issue of the needed re-zoning for the property before them and ripe for determination.

Gary Taylor, the claimant's real estate appraiser, accepted Mr. Gulizio's predictions and asserted levels of confidence in what the future holds for the property. He incorporates those predictions into his analysis of the property's highest and best use and applied Mr. Gulizio's level of confidence in his

predictions of in calculating its value.

Although the property has been industrially zoned and has supported low density industrial uses for more than 50 years and is in process of being developed as a research campus, in his opinion, the site is physically unsuitable for any industrial use. He made no evaluation of the prospects for development of the property for in an industrial use and limited his analysis of value to the proposal made by Mr. Gulizio, recognizing that no residential development project of the magnitude proposed by Mr. Gulizio has been initiated or successfully advanced in either Town. His conclusion was that, since "[a]s of the date of vesting, the residential housing market was experiencing unprecedented strength with demand and market values at all-time highs,"¹⁰ the highest and best use of the Gyrodyne property, both before and after the taking is, "for a change of zone to Planned Development District and development with a multi-family residential community."¹¹

While Mr. Taylor concluded that the highest and best use of the property is for the development of a multi-family community, he did not value it as such in consideration of the current zoning that precludes that proposed use. Rather, his analysis of

¹⁰ Exhibit 3, p. 49

value is an arithmetic exercise through which he purported to quantify the percentages of probability or confidence given by Mr. Gulizio for his predictions of the future zoning and approval determinations that must be made by the Towns if the development of a multi-family community is to be realized. In the exercise, Mr. Taylor assumed that any prospective developer seeking to purchase the Gyrodyne lands will have the same level of confidence in predicting the future as Mr. Gulizio.

First he purported to value the property as raw industrial lands available for development consistent with current zoning in comparison to the sale price of selected, allegedly comparable properties. Only one, sale 3, has the same zoning, all are significantly smaller, the largest having an area of only 43 acres, and the total acreage of all seven comparable sale together is less than the area of the Gyrodyne lands. Five of the seven properties were sold either with approvals, or in anticipation of approvals for "big box" and shopping center retail uses prohibited on Gyrodyne's lands. No adjustment was made for any increased value due to the anticipated retail uses of the properties. Only two, sales 2 and 7, were sold for uses allowed on the Gyrodyne lands and both of those sales were of

¹¹ Exhibit 3, pp. 50 and 80

sites to be improved by the purchaser in a single use, rather than for the development of a potential multi-user industrial park. The industrial value he arrives at for the 308 acre property before the appropriation is \$46,185,000.00

He also calculated the value of the property as if it were residentially zoned and available for multi-family development. He used the prices paid for much smaller residential project sites, the largest having less than a quarter of the area of the Gyrodyne lands. The comparable sales were the closings of contracts for the sites after their contingencies in obtaining zoning changes and building approvals had been met.

He divided the area of the sites by the number of approved units to assess their value on a per unit basis. The total units of all comparable sales taken together are fewer than the number projected for the Gyrodyne property. He adjusts the indicated unit value minimally except for location, and includes either a 5% or 10% adjustment for the approvals depending whether the grantor or grantee obtained them. Based on that analysis he projected a \$130,000.00 unit value for the proposed residential development on the Gyrodyne lands.

The determined unit rate according to Mr. Taylor's approach, when applied in the densities projected by Mr. Gulizio

for the entire 308 acres, if re-zoned and if possessing municipal approvals for construction of a residential development, indicate that on the taking date the land had a market value falling between \$120,120,000.00 and \$240,240,000.00.

The projected value difference of 100% for the property using that approach is problematic and the securing of re-zoning and approvals, uncertain. In view of that problem and those uncertainties, in his appraisal Mr. Taylor, seemingly arbitrarily and merely to simplify the appraisal problem, narrowed Mr. Gulizio's selected range of projected housing density.¹²

Mr. Taylor assumed approvals for either 4 or 5 residential units per acre, rather than the 3 to 6 units projected by Mr. Gulizio. That adjustment of density made Mr. Gulizio's predictions more precise, but did not alter Mr. Gulizio's less defined prediction.

Taylor reduced the developed unit rate to reflect the uncertainty that Mr. Gulizio applied to his re-zoning prediction for each Town, and multiplied that resulting unit value by the number of potential units that he assumed will be approved

¹² T. p. 360, l. 19

within the broader range selected by Mr. Gulizio. The calculated value for the property, if re-zoned and if a density of either 4 or 5 units per acre is allowed, was calculated as \$154,000,000.00 and \$192,500,000.00 and produced a more acceptable range with which to work further calculations.

Further calculations are needed. Mr. Taylor subtracted the value of the property as zoned from its value as re-zoned. The difference purportedly represents the amount by which the property value increases if a change of zoning is obtained. He then applied Mr. Gulizio's level of uncertainty or inaccuracy for his predictions to the differential. This calculation, it is represented, measured the risk that even if re-zoned, the required site plan approvals needed to achieve the development in a density of either 4 or 5 units per acre may not be gotten from the Towns.

That result was then added back to as zoned value and those final calculated values are projected as the values that the Gyrodyne land had as of the taking date in its highest and best use as industrial property awaiting eventual re-zoning and approvals to achieve an optimal use as the site of a multi-family housing development, either 139,550,000.00 or \$165,680,000.00.

Gerald Barton, a principal of Landmark Land Company, a real estate developer, testified for the claimant. Mr. Barton was involved in Gyrodyne's 2003 project proposing to retain some of the existing industrial uses and develop the remainder of the property as a luxury golf course community with less than 500 residences. Mr. Barton indicated that after studying the property and the community, he believes that a residential golf course community was most suitable for the property and the plan most likely to gain municipal approval given the community concern over traffic growth.

No potential value of the lands in such a use was developed.

B

DEFENDANT

Kenneth Golub, defendant's appraiser, indicated that the development potential of this property includes the possibility of obtaining changes of zoning and approvals from the municipalities for a residential use, or some mix of light industrial and residential uses, but that such a project could not be considered the highest and best use of the property.

He explained that the property's extraordinary size, its prominence, location, neighborhood, deficiencies of access, the

involvement of two Towns and two school districts, the expense and length of the required environmental review and approval processes, and the anticipated objections of neighboring landowners and area residents to the community impacts that inevitably arise with a large scale development project, would make any development of the property risky and problematic. Any proposed project seeking to develop the property "as zoned" predictably would be scaled back and ultimately defined in the course of the municipal review and approval process.

The risks attending a re-development of so large a property increase significantly where success of the project is contingent on discretionary municipal approvals for changes of zone and use. The decision of each municipality whether to allow the required changes of zone and use is not simply a determination of the optimal use of the property, but one that measures and responds to expected community opposition to any large scale development. What response will be made cannot be predicted.

A denial by either Town would prevent the project from proceeding and the approvals, if issued, may be conditioned in ways that defeat any feasibility or financial viability for the project.

In view of those uncertainties, and in view of the deficiencies of access and the local traffic burdens indicated by the assessment done by William FitzPatrick, P.E., the State's traffic engineer, and the complicated and lengthy municipal review process needed to obtain the re-zonings, a residential development of the entire property must be dismissed. Mr. Golub agreed that while a possible residential or mixed use of the property might be relevant and considered for the property under a contingent sale arrangement, the potential for such development is remote and both the nature and extent of any approvals by the municipalities for residential development is speculative. In his view, any informed developer seeking to purchase the property would consider its most optimal and expedient use to be for development as zoned to create a low density business and industrial park, and that, after the taking, "...the highest and best use of the remainder is essentially unchanged."¹³

He valued the property as its likely development will occur under its existing zoning. Recognizing the limitations of the site's access and traffic generation on that development, he projected a low density research and office park in a campus-

¹³ Exhibit H, pp. 39 and 78,

like setting, with improvements situated on large, 5 or 10 acre sub-divided parcels, with ample screening and buffers from the surrounding residential properties and separated one from another by expansive open areas. The lots could be combined to form larger sites to suit the needs of particular purchasers.

A land value per acre was found through an analysis of comparable sales of industrial zoned parcels.

Mr. Golub valued the improvements on the property that still contribute value using the income approach, capitalizing their net income based on existing rents and stabilized expenses. He also valued the improvements using the sales of comparable properties in the market. Allocating land area to each existing building as a supportive building site, he compared the improvements to the sales of comparable properties. After adjustments are made, and the indicated value of each approach reconciled, he concluded that the existing buildings have a value of \$15,000,000.00.

The lands allocated to the support of the existing improvements total 28 acres. The remaining acreage, excluding areas needed for internal roadways and service improvements, estimated at 10% of the available lands, or 28.5 acres, comprised the potential subdivision lands. A value for those

lands per acre of \$195,000.00 was developed from an analysis of comparable sales.

The value of the lands on the date of the appropriation was not calculated by Mr. Golub by simply multiplying the indicated value by the available land area as done by Mr. Taylor. The large size of the Gyrodyne property make it marketable as a potential site for development, and any large land development is an endeavor that requires the investment of both time and money, in the planning of development, the actual construction of the project, and in holding and maintaining the developed properties until sold when income is realized to recoup the expenses of the development and generate profit.

Mr. Golub recognized this factor through a cash flow analysis that estimates the costs needed for development of the project and the income expected to be realized from the sale of the sites developed over the anticipated term of the land development project. He estimated that, given the size of the project, the complexity of the development process, and the pace at which the sales of building sites can be expected, a ten year term is a reasonable period time for its conclusion. The net income from the sale of property over that period is discounted to arrive at a present value, a value as of the date of the

taking.

He concluded that before the taking the property had a reasonable market value of \$37,500,000.00 as improved with vacant lands available for subdivision and development.

The State taking removed three buildings and reduced the property size by 245.45 acres. The remainder contains buildings 1, 2, 7 and 8 and approximately 51 acres of vacant lands. While the appropriation clearly reduced the value of the property owned by the claimant, it also simplified any potential development of the vacant portions of the property. Subdivision and development of a smaller property is more manageable and less risky than that of an unusually large property. Mr. Golub estimated that a development of the available vacant lands of the remainder property can be achieved and completed in five years, rather than ten.

Analyzing the value of the buildings and vacant lands in the same manner he did for the entire property, he concluded that the remainder has a reasonable market value of \$15,400,000.00, allocating \$7,559,000.00 to the land and \$7,841,000.00. He calculated claimants damages to be \$22,100,000.00.

IV

**CLAIMANT FAILS TO PROVE THAT THE
HIGHEST AND BEST USE OF THE PROPERTY IS
FOR RESIDENTIAL DEVELOPMENT**

The accepted rule when land is taken by eminent domain is that its owner is compensated for the market value of the property in its highest and best use, (*In re County of Suffolk*, 47 NY2d 507; *Matter of Rochester Urban renewal Agency [Patchen Post]*, 45 NY2d 1) and the highest and best use of this property, as both appraisers agree, is its development. Mr. Taylor, however, asserts that the highest and best use for this property is one that can be implemented only if there are suitable changes of zone in both Towns.

In order to demonstrate that a particular potential use is more than speculative and has an appreciable contribution to the market value of the property, the proponent of that use must show that:

- "(1) The potential use must not require a substantial expenditure of capital;
- (2) The project must not be highly uncertain;
- (3) The property must be physically adaptable to the potential use, and
- (4) A market for the property must have existed, in fact, at the time of the taking, or must have been reasonably likely to exist in the near future."

(Nichols, Law of Eminent Domain, Third Edition, Vol 4, 12B.14, p 151)

It must show that there is a reasonable probability that

the asserted use could or would be realized for the property in the reasonably near future (See, *Matter of City of New York [Broadway Cary Corp.]*, 34 NY2d 535, 536; *Matter of City of New York [Shorefront High School - Rudnick]*, 25 NY2d 146, 148-49; *Matter of City of New York [Wilson]*, 21 AD2d 652, 653, *affd.* 16 NY2d 814). Any prospective "use which is no more than a speculative or hypothetical arrangement in the mind of the claimant may not be accepted as the basis for an award" *Matter of City of New York [Shorefront High School -- Rudnick]*, *supra.*, 149; *Triple Cities Shopping Center v. State of New York* 26 AD2d 744, *affd.* 22 NY2d 683).

Adequate proof of a claimed highest and best use is necessary where the use asserted is permitted by the applicable zoning for the property. See, *Broadway Assocs. v State*, 18 A.D.3d 687.

Where the proposed use is prohibited by the zoning of the property at the time of taking, it ordinarily cannot be considered its highest and best use unless the existing zoning is found unsuitable. See *Matter of Town of Islip [Mascioli]*, 49 NY2d 354, citing 4 Nichols, *Eminent Domain* [3d ed], § 12.322.

Here, there is no proof that the zoning is unsuitable to the property. Despite Mr. Taylor's opinion that its limitations of access make the property unsuitable for any industrial use,

the property, with that same access has been used as multi-tenanted industrial park for decades, and has maintained its primary industrial uses since Gyrodyne first owned it. Indeed, in all iterations for further development of the property, except this last conceived of by Mr. Gulizio, Gyrodyne has sought to keep an industrial use of the property and to supplement it with further development.

The property has been zoned for industrial uses for more than fifty years by two municipalities. Its size, its underutilization and the nature of the surrounding roadways, clearly identify it as a property for which any development for more intensive use must be closely watched, carefully planned, monitored and supervised so that the adverse effects of any development are minimized. That care and attention by the municipalities, however, is not a condition and continuing trend affecting the property that makes its early rezoning very nearly inevitable. Any potential adverse effects can be met by denying zoning changes and limiting the property's further industrial development to an intensity that can be absorbed by the surrounding roadways.

Where there is the probability of a zoning change, the probable use of the property in the likely new zoning is a

factor to be considered in the determining its value. (*Masten v. State*, 11 AD2d 370, *affd.* 9 NY2d 796). The zoning change foreseeable for the lands in the Town of Brookhaven, however, is one that gives the Town Board of the Town of Brokhaven virtually unrestrained authority to determine the use or mix of uses appropriate to the property. It need not choose between a full industrial build-out of the property or a residential development, but can impose any terms and conditions on the development of the property it considers appropriate to ensure that the neighboring areas are not affected adversely. It can grant, deny or so limit and condition development of the property, that no result of its actions can be predicted.

Similarly, in the Town of Smithtown the only likely foreseeable result of any municipal review of development of this site, is that whatever development is allowed, it will be limited. There is no competent evidence that there is a reasonable probability that any particular asserted use could or would have been made within the reasonably near future (*Matter of City of New York [Wilson]*, 21 A D 2d 652, 653, *affd.* 16 N Y 2d 814), since any significantly more intensive industrial uses can be limited through the planning process and a more intensive residential kept from fruition by the need to obtain a

discretionary change of zone. Authority cautions that a "use which is no more than a speculative or hypothetical arrangement in the mind of the claimant may not be accepted as the basis for an award" (*Matter of City of New York [Shorefront High School -- Rudnick]*, *supra*; *Triple Cities Shopping Center v. State of New York*, 26 A D 2d 744, *affd.* 22 NY 2d 683), and all that claimant offers as the highest and best use for the property is speculation.

As to the quality of proof needed to establish a particular prospective use as the highest and best use of vacant lands it "is likely that the expert would consider the availability of financing, costs of construction, taxes, possible profits and the like in arriving at his conclusion concerning the highest and best use of the land, and its probable market price." Claimants' evidence falls far short of the standard.

Planners and appraisers, as all experts, must base their opinions on facts in evidence before the court. The soundness of Gulizio's and Taylor's opinion that the highest and best use of this property was its development as a 924 to 1,848 unit residential development is tested by the same logic and common sense against which any assertion is measured. Their surmise and

speculation is entitled to no consideration and can be given no weight in the court's consideration of the evidence.

They have not provided those facts needed to support their opinions. It is conceded that the property is physically available for development in any allowed use, surrounded by largely residential uses, and hampered in its development by deficiencies of access. Those conditions, however, have existed since the property was first occupied by Gyrodyne. In proposing a particular and different future use as the highest and best use of the vacant parcel lands, a use precluded by current zoning, it is incumbent on claimant's witnesses to show by way of recent activity, demographic trends, economic factors, the availability and cost of financing, an assessment of particularized development costs relating to the project proposed, the likely financial return on investment, and documented or demonstrable trends in amendment or application of zoning ordinance by the municipalities that the asserted use is more probable and immanent now than the other possible uses of the land. Such a showing has not been made.

No evidence was offered that the present light industrial zoning of the property is unsuitable to it. Such zoning has been in effect for more than fifty years. Mr. Taylor, Mr. Gulizio and

Mr. Golub all agree that what would be unsuitable is any full build-out of the property in its current zoning as such would snarl the highways with traffic and forever alter the character of the surrounding area.

The proof is clear that in analyzing the highest and best use of the property, Mr. Taylor made no independent investigation or evaluation of the zoning question, but relies exclusively on the opinions of Mr. Gulizio, both as to whether changes of zoning are likely and what type and density of development that would be allowed if the zoning was changed. The claimant produced no witnesses from either Town, or evidence that either Town granted applications for zone changes for properties of similar size or in similar circumstance. As stated by the Appellate Division Third Department in Reburg Corp. v State , 42 AD2d 801, at 802, a finding regarding a zoning question must "...be based upon sufficient evidence." Mr. Gulizio's opinion does not provide such evidence.

In Maloney v State, 48 AD2d 755, Motion for Leave to Appeal Denied, 37 NY2d 710, a claim arising out of an appropriation of property in the City of Albany, the Appellate Division Third Department, rejecting the testimony of the planning director of the City of Albany, who testified he would recommend a disputed

zoning change and that his recommendations were usually accepted, said that:

"proving the existence of a reasonable probability by means of expert opinion is not permissible, since this involves prognostication of future legislative action"

The report and opinion of Mr. Gulizio lacks the factual evidence needed to support it. Without such evidence it is mere speculation and "mere speculation is insufficient." *ITT Realty Corp. v State*, 120 AD2d 706, 707; also *Broadway Assocs. v State*, *supra.*; *J.W. Mays, Inc. v State*, 300 A.D.2d 545.

What Mr. Gulizio relies on is his analysis of the zoning codes and policies of the Towns, his understanding of each Town's zoning policies, and a selective illustration of his illustrates his conclusion by referencing zoning change resolutions he chose are exemplars of the policies he believes would apply to Gyrodyne's property.¹⁴

He was most familiar with the policies of the Town of Brookhaven, and testified to his near certainty that it would grant a change of zone for the 182 acres of land in its jurisdiction for development as a Planned Development District or PDD. That district, he noted was "recommended" for the

¹⁴ TT (Trial Transcript) pp. 122 - 126

Gyrodyne property in the Town of Brookhaven 1986 Master Land Use Plan¹⁵. The "recommendation" consisted of general statements for the Town to consider eliminating "spot" industrial zoning and inappropriately zoned and surplus industrial parcels, to consider rezoning under-utilized industrial properties and industrial properties along major roadways unlikely to be developed, and to consider using the PDD zone designation for large industrial properties to promote flexible development.

The application of some of the statements of the land use plan to the Gyrodyne property was shown by a map proposing it for the PDD zone and by the Town Board's condition attached to Gyrodyne's aborted attempt to develop part of its property in a residential use¹⁶.

Re-zoning of the acreage to PDD, however, does not make it more or less likely that some residential use would be allowed for some portion of the property. As Mr. Gulizio indicates, the PDD zone is intended to allow flexibility for the development of any large parcel of property, whether the parcel is to be developed for industrial use, commercial use, residential use, or some mix of uses. The only limit, and the measure of what uses will be allowed in a PDD, is the Town Board and what it

¹⁵ Exhibit 2

will allow at the time it reviews and approves a master plan for the property. A PDD zone would be appropriate for any development of Gyrodyne's lands in the Town of Brookhaven, regardless of what uses are sought for it.

Mr. Gulizio indicates the general policies supporting use of the PDD and bases his opinion on those policies. He gives no detail, however, of the standards the Town Board will use in its decision.

The Town of Brookhaven PDD ordinance is clear. The review the Town Board will make is based on a complete application that is developed in discussion with the Town planning department and requires the preparation of extensive, substantive and detailed plans. It is not the approval of a conceptual plan based on consideration of general policies, but a hard look at the details and particulars of the proposal. It requires a completed master plan submission, including a layout of the project, a complete environmental assessment, a yield study, traffic impact evaluations, program for the implementation of the project development, specification of the ownership, operation and maintenance of proposed improvements and preserved or dedicated open and public spaces, a complete analysis of any use changes,

¹⁶ Exhibit 13

definition of any special public benefits, construction phasing plans and specification of any covenants and restrictions affecting the project. Until all relevant information is gathered, analyzed and presented any projection of what particular uses the Board may allow is premature.

Mr. Gulizio's opinion as to the fate of any proposed residential use of the lands in the Town of Smithtown is even more ephemeral. All he can conclude is that some appropriate, but unspecified re-zoning will be allowed in Smithtown so that the property can be developed as he envisions. He references no particular policy of the Town, past history of re-zonings, trends in its application of the zoning ordinance, or any particular new feature or condition of the Gyrodyne property that supports his view that, after more than 50 years of industrial uses, the Town of Smithtown is now poised and inclined to alter the zoning of the property to an exclusively residential use.

V

CONCLUSION

Based upon the evidence presented, the claim should be

allowed to the extent of the proof of value of the appropriated
property offered by the defendant.

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Yours, etc.,

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