EXHIBIT 11

<& /claims/inclusions/header.htm &>
GYRODYNE v. THE STATE OF NEW YORK, # 2010-033-604, Claim No. 112279

Synopsis

Case information

UID:	2010-033-604
Claimant(s):	GYRODYNE COMPANY OF AMERICA, INC.
Claimant short name:	GYRODYNE
Footnote (claimant name) :	
Defendant(s):	THE STATE OF NEW YORK
Footnote (defendant name) :	
Third-party claimant(s):	
Third-party defendant(s):	
Claim number(s):	112279
Motion number(s):	
Cross-motion number(s):	
Judge:	James J. Lack
Claimant's attorney:	Robinson & Cole LLP By: Joseph L. Clasen, Esq. and David E. Ross, Esq.
Defendant's attorney:	Andrew M. Cuomo, New York State Attorney General By: J. Gardner Ryan, Assistant Attorney General
Third-party defendant's attorney:	
Signature date:	June 21, 2010
City:	Hauppauge
Comments:	
Official citation:	
Appellate results:	
See also (multicaptioned case)	

Decision

This is a timely filed claim for the partial taking of property owned by Gyrodyne Company of America, Inc. (hereinafter "Gyrodyne" or "claimant") pursuant to the Eminent Domain Procedure Law (hereinafter "EDPL") and New York Education Law in a proceeding entitled "Stony Brook University Research and Development Campus Project, No. 5091, Maps D 0200-S 273-B 01-L 003.000; D 0800-S40-B 02-L 011.000, Parcels N: 1224728.745; E: 268179.244 (permanent appropriation), Towns of Brookhaven and Smithtown, County of Suffolk, State of New York. Vesting occurred on November 2, 2005. The claim was filed on May 1, 2006. The appropriation maps and descriptions contained therein are adopted by the Court and incorporated by reference. The process of condemnation of property by a public entity is set forth in the EDPL. Prior to condemnation taking place, a public hearing is held to explain the reasons for the condemnation (EDPL Art. 2). After the hearing, the condemning authority publishes its findings as to whether the condemnation is warranted. If the condemning authority is an agency of the State of New York, it files the map of the taking in the Clerk's office of the county where the subject property is located. No order of a court is necessary for the State of New York to proceed with the condemnation. The condemnee then turns to the Court of Claims to value the taking.

The date of valuation used by the Court is the vesting date. The vesting date is the date the State of New York filed the taking map in the county clerk's office. This date is used, frozen in time, without regard to any change in the economy in the months and years from vesting to trial.

The Court has made the required viewing of the property which is the subject of this claim. The appraisers of both parties conclude claimant is the owner of the property (Exhibits H and 3). Thus, the Court finds claimant has established title to the property.

The subject property, consisting of 307.89 acres[(1)], is located on the west side of Stony Brook Road (3,814 feet of frontage) and the southeast portion of North Country Road (2,737 feet of frontage) (a/k/a State Route 25A) and Mills Pond Road (530 feet of frontage). It is located in the Hamlet of Stony Brook, Town of Brookhaven and the Hamlet of St. James, Town of Smithtown, and is bordered to the south by residential homes and a public school.

The claim site is bisected by railroad tracks owned by the Long Island Rail Road.[(2)] Parcel A is the property located to the south of the railroad tracks consisting of approximately 245.46 acres, 181.7 acres of which is located within the Town of Brookhaven and 63.76 acres in the Town of Smithtown. Parcel A contains three masonry buildings totaling 49,458 square feet. Parcel B is the portion of property located to the north of the tracks consisting of 62.43 acres and is located almost wholly in the Town of Smithtown (claimant's Exhibit 3). Parcel B is improved by four masonry and metal buildings totaling 151,480 square feet. The improvements on both parcels are consistent with the zoning prior to the vesting date. The area acquired by defendant is the entirety of Parcel A.

Where a partial taking of land occurs, the Court must measure damages by finding the difference between the fair market value of the entire parcel prior to the taking and the fair market value of the remainder after the taking (*Diocese of Buffalo v State of New York*, 24 NY2d 320). The damages must reflect the fair market value of the property, on the vesting date, at its highest and best use, regardless of whether or not the property is so used at the time (*Matter of City of New York [Franklin Record Ctr.]*, 59 NY2d 57; *Centereach Car Care Ctr. v State of New York*, 271 AD2d 391).

The parties' appraisers do not agree with each other as to the highest and best use of the property. Defendant's expert finds the highest and best use of the property is "to create a light industrial/business park, as permitted under current zoning" (defendant's ex. H). Conversely, claimant's appraiser finds the highest and best use of the subject property is "for a change of zoning to Planned Development District (hereinafter PDD) and development with a multiple residence family residential community" (claimant's ex. 3). The Court, therefore, must examine the highest and best use proffered by the parties and determine which theory is the highest and best use.

Defendant's Highest and Best Use

Defendant's expert, Kenneth Golub (hereinafter "Golub"), has been an appraiser since 1968. He began his career in Binghamton, New York. At some point, he was transferred to Poughkeepsie, New York. In 1974, Golub opened his own business in Poughkeepsie which he then relocated to Westchester County, New York in 1980.

Golub testified that analyzing utilization is a critical step in determining highest and best use because it must be decided what the property is going to be used for to determine its highest valuation (T. 740).[(3)] He stated that he relied on the reports of others as well as his own research in making that determination. The witness began his analysis by eliminating, in his opinion, unacceptable uses for the subject property. He was left with two choices as the primary use: residential and industrial (T. 741).

According to the witness:

Analyzing the viability of residential use is very complicated, because the property is surrounded by homes. And it is in a very nice residential location, and I think most developers would normally tend to gravitate to residential use, simply because there are more home buyers out there, than any other kind of buyer. So if you want to do a project of this size and scope, you want to build momentum as quickly as possible. And the best way to build momentum is in a market sector that has the most number of buyers, the most activity, and that's residential. (T.

There are a few problems with residential. Largely that land has been nationalized in the New York metropolitan area. You don't really own the property, the local officials and the local residents have all the control - - they hold all the cards, and it's very difficult to get approval. In this case, residential is the more difficult path to follow, because it requires rezoning, and it requires a higher degree of study, because there are more alternatives, and it opens up more potential options, and greater time and greater risk than the approval process. The approval process is a huge obstacle to overcome in changing the existing use. (T. 742).

Golub testified if a use could be found consistent with existing zoning, then the subject property would be more beneficial to the developer.

In examining the existing zoning, Golub stated the property possessed a number of attributes in regard to industrial development consistent with the existing zoning (T. 742). First, the expert noted the proximity of the subject property to SUNY Stony Brook. According to Golub, this would make the subject property attractive to pharmaceutical companies for research and development.

Next, the expert testified there are in excess of one hundred residential neighbors,[(4)] who would have to be notified of any public hearing for a change of zone. He presumed there would be a lot of opposition - "torches and pitchforks" (T. 744) - to any application for rezoning to residential.

Golub testified any development would be slowed by the approval process, which he stated is a political process (T. 744). The witness proposes a business park with flexible sites. Basically, he would subdivide the subject property into five or ten acre lots, with the possibility of combining lots for larger parcels. These could be sold for commercial development consistent with Golub's business park idea (T. 745).

In further support of his highest and best use theory, the expert analyzed ten projects on large lots of land. Eight were located in Brookhaven, while the other two were located in Smithtown. The expert's conclusion was that rezoning applications can take longer to process than anticipated. This is due to opposition at public hearings, the number of applications being reviewed, change in administration due to elections, and post approval lawsuits brought by neighbors. In light of these factors, Golub found the highest and best use for the subject property was to maintain the existing industrial park and creating a business park (T. 748). On cross-examination, Golub stated it would take at least ten years to develop this plan (T. 787).

Further, during cross-examination, Golub testified the main reason for not valuing the subject property as residential was the uncertainty as to the number of units to be approved (T. 766). Golub also concluded the subject property did not have a reasonable probability of being rezoned to residential, and therefore, did not appraise the property for residential use. However, when pressed about residential development, Golub agreed the property did have a reasonable probability of being rezoned residential if the plan were for one or two acre lots (T. 780).

Golub also admitted he agreed with Robert Grover's testimony.[(5)] Grover opined the subject property had a reasonable probability to be rezoned as a mixed use zoning (T. 772). Golub testified he would have had a hard time appraising the property as mixed use. He would need a "model, some type of prototype" on which to base his evaluation (T. 773). Golub also testified the subject property had a reasonable probability of being rezoned for a golf course community (T. 790). However, since Golub was unsure as to the length of time it would take to have this approved, he did not consider it to be the highest and best use (T. 789).

Golub agreed that the site had a reasonable probability of being rezoned for mixed use (T. 791). He stated there had been an approval for 120 units of an adult home on ten acres, which could be one component of mixed use. Another component use could be apartments on 25 acres and the rest could be low density, single family homes (T. 792). Golub testified he did not appraise the property for this type of use because there was nothing specific at the time of the appraisal. While Golub agreed it is his job to think of and appraise what the most profitable use of a property could be, the mixed use for the subject property did not get past the "contemplation stage" (T. 793). In contrast, although Golub was not given any particulars for an industrial park, he managed to envision an industrial park at the subject property by using comparables (T. 793).

During cross-examination, Golub was questioned as to the possible square footage of his industrial park.

Under questioning, Golub agreed that 35% of the 256 acres or 89.6 acres could be developed.[6] Multiplying the 89.6 acres by 43,560[7], the expert conceded the development could be just over 3.9 million square feet. Adding this figure to the existing 200,000 square feet of industrial space, gives a maximum build out of 4.1 million square feet of industrial space. Golub testified he did not contemplate maximum density when he wrote his appraisal. However, as he admitted on cross-examination, he did not prohibit maximum density in his appraisal (T. 802). In contemplating the highest and best use for the subject property, Golub testified he did not consider the traffic implications (T. 806).

Another witness defendant called to support its highest and best use of the subject property was Robert Grover (hereinafter "Grover"). Grover was called as an expert in environmental planning. He has worked on numerous projects on Long Island and is familiar with the processes for approval for the development of private property in the Towns of Brookhaven and Smithtown (T. 547). The expert was retained to assess the "likely prospects of success of a residential type planned development district on the entire Gyrodyne property with, and this is the key really, a yield of somewhere in the range of five to seven residential units per acre" (T. 548).

Grover also testified that in order for the subject property to be residentially developed, it would need to be rezoned in the Towns of Brookhaven and Smithtown. First, both Towns would need to complete a successful review of a submitted site plan. In addition, the property would need to be the subject of a State Environmental Quality Review (hereinafter "SEQR"). The community would be able to review and comment during the site plan review, environmental review and zoning review.

Grover described the process by which a SEQR would, in all likelihood, be required. He testified claimant would need to include alternatives in its statement for the agencies to consider. According to the expert, the "beauty" of a PDD would allow for both residential and industrial or a combination of both uses (T. 557). After the SEQR is done, the project would go to the planning boards in the Towns of Brookhaven and Smithtown. In addition, the expert was sure the Suffolk County Planning Commission would also have to review any project for the subject property.

The expert also testified a number of issues would have to be studied before any development of the subject property could take place. Groundwater, traffic and the impact on the schools are three issues which need to be addressed before any residential development.

While going through all the various reviews, public comment and scrutiny of two towns, Grover opined the project, when approved, would be smaller than what would be proposed at the outset of the process (T. 581). He also opined the process would take a minimum of seven years (T. 582).

On cross-examination, Grover reiterated his opinion that the highest and best use of the subject property would be light industrial build out (T. 591). However, he recognizes the nature of the light industrial build out could have its own set of industrial problems (T. 591).

According to Grover's report, he expressed concern over the loss of native grasslands and the effect on wildlife on the subject property. During cross-examination, Grover admitted the "native grasslands" were what is commonly referred to as the fairgrounds at the subject property. While he acknowledged the fairgrounds are mowed, he insisted mowing is proper maintenance for native grasslands, otherwise it will not remain native grasslands (T. 601).[8] As to the wildlife, Grover testified he was not aware of any endangered species at the subject property.

Grover acknowledged the Town of Brookhaven, in its comprehensive plan, wished to eliminate areas of industrial spot zoning, such as the subject property (T. 618). However, he remained steadfast in his opinion the subject property would not be rezoned to residential for claimant's proposed use. On the other hand, if the density were to be reduced to one or two units per acre, Grover testified a change of zone would be likely (T. 623).

William Fitzpatrick (hereinafter "Fitzpatrick") testified on the defendant's behalf as a traffic expert. The witness was employed by New York State Department of Transportation from 1969 through 2004. Fitzpatrick spent his entire career in the Traffic, Engineering and Safety Group of Region 8. Region 8 consists of the counties of Westchester, Rockland, Orange, Ulster, Putnam, Dutchess and Columbia. Subsequent to working for defendant,

Fitzpatrick testified he has reviewed hundreds of traffic impact studies and also conducted studies. In order to conduct a traffic study for the subject property, he reviewed a Final Generic Environmental Impact Statement (hereinafter "FGEIS") conducted by SUNY Stony Brook (T. 640). In addition, the expert testified he was aware of other studies done concerning the intersection level of service and safety of the infrastructure around the subject property and he brought himself "up-to-date with that" (T. 640). After reviewing these materials, visiting the subject property and surrounding intersections, Fitzpatrick made an assessment of the capacity, the operations and the safety of some intersections that might be impacted (T. 641).

Fitzpatrick testified a build out at the subject property of 336 single family units and an 18 hole golf course would generate the following trips: A.M.:96 vehicles entering the property and 196 exiting; P.M.: 237 vehicles entering and 152 exiting (T. 673). The expert opined that this increased trip generation would be a difficult problem to mitigate. As to the proposed 1,500 units for the subject property, the expert opined the greater the density of the development, then the greater the problems for the congested roadways.

On cross-examination, Fitzpatrick testified he did not analyze the traffic impact of defendant's highest and best use as of the vesting date (T. 682). Fitzpatrick's analysis of the traffic in the area is based upon the FGEIS report (Exhibit I) conducted in 2004, one year prior to the vesting date. Fitzpatrick next looked at the growth for the year 2007, as did the FGEIS report and adopted those findings as his own (T. 683). The assumption in the witness' report is that no build out would have taken place through 2007 and that the property is being used as it existed prior to the vesting date. According to Fitzpatrick, the 2007 growth rate does not analyze either party's scenario, it is simply a "basis for comparison" (T. 689).

Claimant's Highest and Best Use

The appraiser called by claimant was Gary Taylor (hereinafter "Taylor"). The witness has been a real estate appraiser on Long Island for approximately 36 years. In addition, the witness lives in Setauket, New York.[9]

The witness stated the property straddles the two Townships of Brookhaven and Smithtown and is primarily a residential area (T. 324). North of the property, on the opposite side of NYS Route 25A, is a large farm. Across Mills Pond Road from the subject property is a historic house.

In trying to decide upon the highest and best use for the subject property, Taylor indicated he looked at the general character of the surrounding area and his own personal experience of living nearby for 30 years. Taylor opined the subject property seems more suitable for residential development rather than industrial development (T. 326). The road system feeding the area is limited. New York State Route 25A winds in front of the property and "comes down a fairly steep curve as you head towards the eastern side of the property" (T. 327). Mills Pond Road and Stony Brook Road are narrow and winding in the area of the subject property.

Taylor believes the subject property is an extremely poor location for industrial purposes. It is remote from the main thoroughfares and there is no easy transportation in and out of the site (T. 327). According to the witness, most industrial parks in Nassau and Suffolk Counties are located along the Long Island Expressway in order to be able to easily move goods and people in and out of Long Island.

In contrast, Taylor describes the subject property as "pristine"and the surrounding area as "bucolic" (T. 328). The surrounding neighborhood, according to him, is surrounded by expensive homes and is situated within two very good school districts (T. 328).

In examining the property, Taylor decided to look at the property as raw, undeveloped land. While the property does contain industrial buildings, they were built in the 1950's as industrial space and later cut up into incubator space.[10] If the subject property were to be developed for industrial purposes, Taylor stated the buildings should be razed and more modern buildings built (T. 330).

In determining the highest and best use of the subject property, Taylor utilized the report of Daniel Gulizio (hereinafter "Gulizio"), claimant's planning and zoning expert. From his own experience, Taylor agreed with the possibility of rezoning the subject property to a PDD. In valuing the property, Taylor would make adjustments for the probability of rezoning.

determining the highest and best use of the subject property he had to analyze what was physically possible, legally permissible, economically feasible and maximally productive as of November 2005.

In regard to the physical characteristics of the property, the witness did not see any limit to the type of use for the property (e.g. residential, industrial, or retail) (T. 388). However, the witness stated the physical access to the property and the physical characteristics of the surrounding area are a significant deterrent to the industrial development of the subject property (T. 392). He further stated the roadways are fine for residential use but the narrow winding roads would not be suitable for commercial development (T. 393).

Based upon the witness' 36 years of experience as a real estate appraiser, AAG Ryan[(11)], on cross-examination, asked the witness about public response to development of vacant land as to the new traffic that would be generated. The witness was asked if new traffic generators were welcomed by neighbors. The witness testified neighbors never want development, but if forced to choose between industrial development and residential, then it would "appear to be almost a no-brainer for them, they would go with the residential" (T. 397).

AAG Ryan turned his questions to what was legally permissible. The subject property was zoned light industrial and according to the witness, it could be developed industrial as of right. While Taylor admitted that industrial is legally permissible, each factor could not be taken on its own, as AAG Ryan attempted during cross-examination. The witness indicated if one of the factors was knocked out, then a particular use could not be the highest and best use (T. 407).

When examining the economic feasibility and maximum productivity of an industrial use, Taylor explained it is not that industrial use does not provide a return, but it is not the greatest return. While AAG Ryan agreed residential development would provide the subject property with a higher value (T. 409), he pointed out to the witness such development was not legally permissible under the current zoning as of the date of vesting. However, the expert testified he made adjustments for the change of zone.

It was Taylor's testimony the highest and best use for the subject property was a change of zone to a PDD and for residential development of three to six units per acre.

Claimant next called Daniel Gulizio. Gulizio is presently employed as Deputy Director of the County of Suffolk's Planning Department. Based upon the witness' present employment, AAG Ryan moved to preclude Gulizio from testifying. Ryan did not so move prior to the witness taking the stand, rather he made his application during his *voir dire* of the witness' expert qualifications. Instead of using the *voir dire* to challenge this witness' credentials, AAG Ryan questioned the witness concerning the Administrative Code of the County of Suffolk (defendant's Exhibits A and B).[(12)]

Specifically, Gulizio was asked about 你30-1 of the Code, which prevents employees of Suffolk County from accepting paid or unpaid employment for any private entity which may create a conflict of interest or impair the proper discharge of the witness' duty as a county employee. AAG Ryan declared that he raised this as a basis of seemingly unethical behavior by the witness because claimant would need to make any application for a change of zone to the Suffolk County Planning Commission which is staffed by the county department employing the witness.[(13)]

However, according to 你30-1(C), the situation in which Gulizio finds himself in is an enumerated exception, in that Gulizio entered his contract with claimant prior to becoming an employee of the County of Suffolk. Thus, this Court sees no breach of the County's Code.[(14)] After, dispensing with this issue, AAG Ryan had no objection to the witness' expert credentials.

As previously indicated, claimant called Gulizio as an expert in planning and zoning. He graduated from college in 1986 and went to work in the Town of Islip planning department. The witness obtained a Master of Science degree in urban planning and a law degree. Gulizio worked for the Town of Islip from 1986 until 2002. From 2002 until 2005, the witness worked at the Town of Brookhaven as the Commissioner of Department of Planning Environment and Land Management. During his career, Gulizio indicated he had been involved with a few hundred rezoning applications.

neighborhood. The limitations of the subject property must be considered. Another would be the municipality's comprehensive plan for the area. Finally, any history of zoning applications would also be examined (T. 42).

In examining the subject property, the witness noted the property is zoned for light industrial and could be developed for various uses, as of right. The witness noted under the zoning approximately 4.5 million square feet of industrial space could be developed. However, Gulizio felt it was more likely something less than maximum development would be approved and estimated approximately 3 million square feet for development.(15) As this Court has observed with the other witnesses, Gulizio also noted the residential nature of the area surrounding the subject property and its inconsistency with the current zoning.(16) The witness testified the residential units, in the surrounding area, are approximately two to three per acre.(17)

The limitations of the surrounding roadways influenced the witness in examining the physical constraints of the subject property. Getting traffic on and off the property is a problem for the site. It is remote from the Long Island Expressway, and remote from any major arterial roadway.

According to the witness, the Town of Brookhaven adopted a comprehensive plan in 1996 (Exhibit 2). The plan addresses rezoning industrial properties that are underdeveloped (T. 50). The witness considered it would be many years into the future before any further industrial development took place. The bulk of industrial development was still occurring further west in Hauppauge, or on Veterans Memorial Highway in the area of MacArthur Airport in the Town of Islip. The witness testified the Veterans Memorial Highway area was not experiencing intense pressure for development (T. 51).

Gulizio declared that the comprehensive plan also recommends eliminating isolated industrial properties or spot zoning (T. 51). In examining the surrounding area, which is entirely residential, the witness opined the subject property fit this category of the comprehensive plan for rezoning. In addition, the subject property intruded into a residential area. He also stated that the subject property could not justify the additional traffic that accompanies more industrial development (T. 52) and that the Brookhaven comprehensive plan identifies the subject property specifically and designates it for a change of zone to a PDD.

The Town of Smithtown was in the process of updating its comprehensive plan when the witness was writing his report. The last comprehensive plan from Smithtown was during the 1950's. Therefore, the witness did not give much weight to Smithtown's comprehensive plan (T. 55).

Gulizio also examined other properties which were rezoned in the Towns of Brookhaven and Smithtown. He identified nine properties in the Town of Brookhaven and two in the Town of Smithtown which were rezoned from industrial to a high density residential use (claimant's Exhibit 1). Based upon his research, Gulizio opined there was a trend in both Towns to consider rezoning properties, particularly commercial properties, to "moderate and low density multi-family, planned retired community designations" (T. 60).

The witness also testified the town boards would take into account practical factors when deciding a zone change or allowing a property to develop "as of right". The witness foresees greater opposition to an industrial build out which would allow four story buildings with a 35% floor area ratio, as opposed to a moderate density residential use which only allows a 25% floor area ratio (T. 66).

The expert's ultimate conclusion was that a change of zone to residential would occur. The probability he assigned to a zone change in the Town of Brookhaven was 90% to 95%. In the Town of Smithtown, the probability of rezoning was 70% to 75%. This lower percentage is due to a lack of a comprehensive plan in Smithtown. More specifically, he said a PDD would be allowed with a density of 3 to 6 units per acre (T. 68).

During cross-examination, Gulizio stated the definition of a PDD allows for uses other than residential development. However, it is his opinion a PDD allows for the greatest flexibility for the subject property and the highest and best use for the subject property would be a PDD allowing residential zoning. Gulizio considered industrial zoning but decided it was not the highest and best use. When asked if the permitted build out under the existing zoning is too dense for the subject property, the expert stated "[b]ased upon the surrounding nature and character of development of the property, the potential of the access to the property, the limited nature of the roadway access to the property, I felt that there would have been significant adverse impacts with development

The expert reiterated on cross-examination his opinion the likelihood of rezoning of the subject property in the Town of Brookhaven was 90% to 95%. He was not 100% sure because there is never a guarantee on a change of zone (T. 139). Gulizio's opinion of 70% to 75% for a change of zone in the Town of Smithtown was based upon a number of factors. Smithtown has less history of rezoning for low to moderate density housing.(19) There is no comprehensive plan specifically referenced to the level of Brookhaven's plan (T. 140).

The claimant called Alan King, Jr. (hereinafter "King"), a licensed professional engineer, to testify as a traffic expert. King was asked to conduct a traffic impact study of the subject property (claimant's Exhibit 4). According to the witness, a traffic impact study evaluates the traffic as it exists in the present and how it may operate in the future (T. 181). King testified he was retained to evaluate traffic conditions surrounding the subject property under various scenarios as of November 2005 (T. 182). The first scenario was a "no build" condition. This would contemplate the status quo remaining as to the industrial property and no further development.(20) The next scenario was to develop the remainder industrially, "as of right". The expert also considered developing the entirety of the property industrially, "as of right". The last two scenarios were to develop the remainder as residential property and to develop the entirety of the subject property as residential (claimant's Exhibit 4, p. 1-1). (21)

King's firm was retained in 2006. At that time, he identified thirteen intersections as significant to the subject property. The witness testified his firm needed to freeze the traffic count of the intersections as of the vesting date - November 2005. In order to accomplish this task, King's firm conducted its own traffic count of most of the thirteen intersections in 2006. As to the remaining intersections, the witness used the Draft Generic Environmental Impact Study which was prepared in 2004. King used traffic counts from the NYS Department of Transportation and seasonal adjustments which are published by NYS Department of Transportation and adjusted the two counts to arrive at a traffic count for the subject property in November 2005 (T. 184 - 185). The resulting count gave King the "no build" base line count.

King then utilized the Institute of Transportation Engineers' Trip Generation Manual. According to the witness, this is a manual to predict traffic generated by various types of land uses. In addition, the witness studied the "no build" traffic patterns to determine how traffic is flowing. This was done to find which intersections and roadways are being used. According to King's report (claimant's Exhibit 4), the trips generated during the morning peak time, in the "no build" scenario was 136. The trips generated during the afternoon peak time, in the "no build" scenario was 222. The trips generated in the "as of right" build out were 4,360 in the morning (3,206% greater) and 5,026 in the afternoon (2,264%). Thus, there is a net increase of 4,224 trips in the morning and 4,804 trips in the afternoon. The trips generated in the residential development were 459 in the morning (338%) and 565 in the afternoon (255%). Under the residential scenario, there is a net increase of 323 trips in the morning and 343 trips in the afternoon.

The report identifies intersections which are significantly impacted, in a negative way, in the different scenarios. The impact referred to in the report is the amount of delay a vehicle would experience at the intersection. The report identifies a negative impact on twelve of the thirteen intersections under the "as of right" build out. Only one of the thirteen intersections was identified as negatively impacted under the residential build out scenario (claimant's Exhibit 4, p. 8-1). In developing the subject property as residential, one of the intersections would be positively impacted in the afternoon. Any intersection which is negatively impacted will require some type of mitigation. Mitigation would include some type of traffic control device.

On cross-examination, King testified he used the numbers in Gulizio's report for the full industrial build out. King did not inquire as to whether the space could actually be built (T. 216). The expert repeatedly answered he did not create the assumptions he relied on for his scientific model. Instead, King testified, he relied upon the expertise of others for the basic assumptions. The witness testified his expertise was in traffic and transportation, not in zoning or building. King also testified he did not do anything less than a full build out of the subject property as to the entirety of the subject property. Thus, the traffic conditions under the industrial build out anticipate approximately 4,000,000 square feet of industrial/office space.

During his cross-examination, King admitted the report he prepared for trial would not be adequate for a town board unless the project was to be built within a year. King explained a typical traffic study, presented to a town board, would reflect the impact over the time a development is built. The witness further explained his

Peter Pitsiokos (hereinafter "Pitsiokos"), the Chief Operating Officer of Gyrodyne, testified for claimant. He began working for claimant in 1992 as counsel. The witness gave a brief history of Gyrodyne and the subject property. As stated, Gyrodyne was formed in 1946 in Massapequa, New York and as it grew, the company needed a larger piece of property for testing helicopters. The subject property was purchased in 1950 or 1951 consisting of approximately 360 acres. At that time, it was zoned residential and the company hired an attorney to rezone the subject property to industrial. By the late 1960's, Gyrodyne was transitioning out of the helicopter business. Most of the industrial buildings on the subject property were leased to "mom and pop" type businesses (T. 460). The leasing of the buildings continues to present day.

While the company is publicly traded, approximately 40% of the company is family owned. According to Pitsiokos, the company is resistant to do anything which would "get in the way of keeping the company going and keeping those people employed" (T. 460).[(22)] The family explored several options to develop the subject property. However, nothing was ever finalized. At one point, Gyrodyne attempted to redevelop the property to put 126 units of senior living on 10 acres. According to claimant's Exhibit 13, the Town of Brookhaven approved a change of zone to residential to build the facility in February 2000. In November 2002, the Town of Brookhaven granted claimant's request to withdraw the change of zone request.[(23)]

At the same time claimant was withdrawing its change of zone request to build assisted living housing, it was submitting an application to build a residential golf course community.[(24)] Pitsiokos testified the management and board of directors had two goals in developing the property: maximize value to the company's shareholders and do something which would be of benefit to the community (T. 466).

According to Pitsiokos, the Town of Brookhaven initially rejected this application because it wanted the proposal submitted in Brookhaven and Smithtown simultaneously. The Town of Smithtown granted claimant a public hearing. The witness testified the project received minimal opposition (T. 469). Pitsiokos was not aware of any community opposition to this project in either Smithtown or Brookhaven, except from the two or three individuals who voiced an objection at the Smithtown hearing.

On cross-examination, Pitsiokos testified the rental income from the "mom and pop" businesses is approximately $2,000,000.00 annually. Pitsiokos conceded claimant never made an application to any town board to develop the entirety of the subject property with 1,500 to 1,800 residential units.

Gerald Barton (hereinafter "Barton") was the last witness to testify for claimant. Barton described a long career which included being a lawyer in the Army, working for the Justice Department, a local developer in Oklahoma, and chief of staff for the Governor of Oklahoma. In 1971, Barton bought a company, which became known as Landmark Land Company (hereinafter "Landmark") and began developing communities, in particular, world class golf and luxury residential communities.

In 2000, Barton came to New York to look at land in the Town of Riverhead for possible residential development. After approximately two to three months, the witness told his potential partners they would never get a zone change and walked away. These same partners requested Barton to return to look at the Gyrodyne property. Barton and Landmark spent about three months exploring the various aspects of the subject property to determine if it was a venture Landmark wanted to be involved with. After this period of investigation, Barton came to the conclusion the subject property was best suited for a residential community - a world class golf and luxury residential community.

LAW

Highest and Best Use

As previously stated, damages must reflect the fair market value of the property on the vesting date, at its highest and best use, and which the subject property could or would be made reasonably in the near future (*Matter of City of New York [Broadway Cary Corp.]* 34 NY2d 535; *Matter of City of New York [Franklin Record Ctr.]*, 59 NY2d 57; *Zappavigna v State of New York*, 186 AD2d 557; *Matter of City of New York*, 18 Misc 3d 1118[A]), regardless of whether or not the property is so used at the time (*627 Smith St. Corp. v Bureau of Waste Disposal of Dept. of Sanitation of City. of N.Y.*, 289 AD2d 472 *app. dism'd* 98 NY2d 646; *Centereach Car Care Ctr. v State*

condemnee is charged with the burden of proving the highest and best use and it would or could have been put to such use in the reasonably near future (*Matter of City of New York [Jomar Real Estate Corp.]*, 61 NY2d 843; *Matter of the City of New York [Wilson]*, 21 AD2d 652; *IIT Realty Corp. v State of New York*, 120 AD2d 706).

While it is not essential to demonstrate either that the property had been used as its projected highest and best use or that there had been an *ante litem* plan for such use (*Keator v State of New York*, 23 NY2d 337, 339), it is, of course, necessary to show that there is a reasonable probability that its asserted use could or would have been made within the reasonably near future (*Matter of City of New York [Wilson]*, 21 AD2d 652, 653, *affd* 16 NY2d 814); an 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]*, 25 NY2d 146, 149; *Triple Cities Shopping Center v State of New York* 26 AD2d 744, *affd* 22 NY2d 683).

(Matter of City of New York [Broadway Cary Corp.], 34 NY2d 535, *supra* at 536).

In *Matter of City of New York [Franklin Record Ctr.]*, 59 NY2d 57, *supra,* plaintiff owned a 10 story loft building which defendant appropriated. Prior to the condemnation, plaintiff rented space in the building for record storage. By using movable metal walls, plaintiff was able to accommodate tenants actual space needs and tenants were more willing to pay a greater per foot rental. Both appraisers found the income approach to be the best method in valuing this property. Plaintiff's expert used the entire rent paid by the tenants as rental income. Defendant's appraiser used only a portion of the rent paid as rental income. He considered the rest of the rent as a fee for services rendered. The trial court adopted the defendant's view of the case. As to the issue of the highest and best use, the Court of Appeals cited the First Department's holding:

"In the determination of the fair market value, the condemnee is entitled to have the appraisal based on the highest and best available use of the property irrespective of whether he is so using it". (*Keator v State of New York*, 23 NY2d 337, 339.) Claimant is actually putting the building to its highest and best use. The fact that its neighbors are not doing likewise should not deprive this claimant of the benefits of its ability to find an even higher and better use than envisioned by the others. (69 AD2d 111, 114).

In *Matter of City of New York [Jomar Real Estate Corp.]*, 94 AD2d 724, claimant and defendant each listed a different highest and best use for the subject property. Defendant contended the property's highest and best use was for industrial purposes. Claimant contended the highest and best use was a commercial use (*i.e.* a neighborhood shopping center). Several years prior to the vesting date, claimant began to clear the land and improve it. Claimant leveled the property, cleared debris and had sewers installed. Claimant's expert testified he was familiar with the area and based upon his experience, the neighborhood could support a local shopping center. Defendant's expert conceded the land was more valuable with a commercial use as opposed to an industrial use. However, defendant's expert believed a commercial enterprise would not do well in this area. The appellate division found the defense expert's "belief" was insufficient to rebut claimant's proof as to the highest and best use. Claimant had proven the likelihood of the highest and best use which would have occurred if condemnation had not taken the subject property.

Lack of Range of Expert Opinion

As previously mentioned, the parties present the Court with different highest and best uses of the subject property. Where the parties differ, the Court must examine the evidence and opt for one of the uses. Thereafter, once the Court chooses the highest and best use of the subject property, if there is no range of value to guide the Court in valuing the subject property, the Court is left with the valuation of the property by only one set of experts.

When, as in this case, the expert opinion of one of the parties is rejected as insubstantial and inadequate to support the court's finding, then no range of testimony exists and consequently the award made by the trial court and every element thereof, if at variance with the remaining expert opinion, must be supported by other evidence and a sufficient explanation provided by the court (*Matter of City of New York [A. & W. Realty Corp.]*, 1 N Y 2d 428; *Evans v State of New York*, 31 A D 2d 565; *Fredenburgh v State of New York*, 26 A D 2d 966; *Spyros v State of New York*, 25 A D 2d 696).

(Ridgeway Assc. v State of New York, 32 AD2d 851, 852; *see also Crosby v State of New York*, 54 AD2d 1064;

Significantly, other evidence could include alternative appraisals or cross-examination of the prevailing expert opinion leading to a diminishment of the award.

Discussion

During the respective cross-examinations of each appraiser, neither party pointed to a serious flaw in the methodology used by the experts. Thus, the Court is left with no range of value to guide it in adjusting the value of the subject property. Claimant's appraisal values the property at approximately $125,000,000.00, while defendant's appraisal values the subject property at approximately $22,450,000.00.(25)

The Court is cognizant of the additional interest and other fees which could be added to the judgment.

The outcome of the case hinges upon whether or not the Court accepts claimant's position, that the subject property would be rezoned to allow a PDD for residential use. The burden of proof is on claimant. In order to establish its case, in accordance with the previously cited law, claimant: (1) does not have to show the subject property is currently used at its highest and best use; (2) does not have to have a solid plan in place for the new highest and best use; but (3) must show a reasonable probability the asserted use would be made within the reasonably near future; and (4) the use cannot be speculative or hypothetical, in the mind of claimant.

In establishing its case, claimant presented the Court with: the background and history of the subject property (Pitsiokos); a businessman willing to invest time and money toward developing the subject property (Barton); a traffic study to compare and contrast the impact of traffic in an industrial scenario and a residential scenario (King); an expert in rezoning (Gulizio); and a real estate appraiser (Taylor). Each of claimant's experts were either local to Long Island or had experience on Long Island and had extensive backgrounds in their field.

According to Pitsiokos, the subject property was originally zoned residential. The parcel claimant owned was large enough to test the helicopters it built without interfering with its residential neighbors. Through the years, the area surrounding the subject property remained residential. In making its viewing of the subject property, the Court notes the surrounding area is an upper middle class residential neighborhood. There are two exceptions to the residential characteristics of this area: part of the subject property itself and a farm on the north side of State Route 25A across from the northern edge of the subject property. Each of the testifying witnesses agreed the subject property's zoning was not in conformity with the surrounding area. Defendant's witnesses agreed the subject property was a form of spot zoning.(26)

The majority of experts presented by defendant were not local. They had no familiarity with the local areas or the processes on the local level in regard to acquiring a change of zone. Defendant's planner, Grover, lists himself as an environmental scientist on his resume, but testified as a planner. During his cross-examination, Grover testified his resume was incomplete/inaccurate because it should reflect he is an environmental planner. It is inconceivable a witness being hired to provide expert testimony as a planner would not list himself as a planner in his *curriculum vitae*. As noted, this case is of significant importance to the parties. AAG Ryan hired Grover as a planner but did not review an exhibit in evidence which contradicts the qualifications his expert purports to possess.

The traffic study done by Fitzpatrick is not relevant to the proceedings before the Court. Fitzpatrick adopted the SUNY traffic analysis report which detailed the traffic in 2004. Fitzpatrick then extrapolated traffic numbers in 2007, the year he envisioned as the build year. However, for the purposes of the appropriation case before this Court the date of the value estimate was the vesting date, November 2, 2005.

The vesting date is a snapshot in time which the parties must use to prove the before and after value, as well as the highest and best use of the subject property. For purposes of eminent domain, the vesting date is a date on which the parties envision the property is being used at its highest and best use without regard to its actual use. In the event the property is not being used at its highest and best use, it is a legal fiction which values the property as though it were. Of course, if a party is using a highest and best use different than the actual use then the party proffering such use must prove the elements previously detailed.

Defendant's experts were inconsistent with their own reports and vague as to their testimony on cross-

traffic in 2004 and extrapolated to a point two years beyond the vesting date. Defendant's experts agreed that a change of zone for the subject property to residential was probable. However, due to the size of the subject property, the experts deemed it too difficult to value the property as residential. Thus, defendant's experts maintained the higher and best use of the property was industrial.

In contrast, claimant's experts were detailed in their analyses. Each claimed to have relied on the other experts and indeed, each of the experts was familiar with the other reports. Their testimony was focused on the valuation date. While these witnesses were dealing with a highest and best use different than the actual use, they pointed to solid facts in determining that the highest and best use would be for a change of zone to residential use.

The Town of Brookhaven, in which the largest piece of the subject property was located, had written a master plan. The master plan called for an end to spot zoning and cited the subject property as an example. In addition, the master plan suggested a change of zone for the subject property to a PDD. The Town of Brookhaven had previously granted a zone change for the subject property in accord with the highest and best use claimant now proffers. The application for the zone change was withdrawn and, therefore, never went into effect.

The Town of Smithtown had held a hearing as to a zone change for the subject property. According to claimant, the hearing went well and was, overall, very positive. In addition, claimant proved the highest and best use offered was not hypothetical or speculative. Claimant, for some time, was intent on changing its business course. It was clear when a new board took over, claimant was going to utilize the subject property in a manner different than for what it was being used. Several plans, all of which required a change of zone, were developed and attempted. The luxury homes and golf course were abandoned only because of the appropriation. It is clear to the Court, the highest and best use, as found by claimant, was not speculative or hypothetical, nor did it exist solely in the mind of claimant.

While AAG Ryan submitted into evidence an appraisal which calls for an industrial build out as of right, he balked at such an idea during his cross-examination of claimant's experts. Claimant's experts compared and contrasted the residential and industrial highest and best uses. In doing so, claimant's experts viewed the industrial use as if it were built out. AAG Ryan chastised the witnesses for considering any build out under defendant's highest and best use. His questioning supposed the status quo for the subject property in comparing it to claimant's highest and best use. Rather than attempting to undermine claimant's valuation of the subject property, AAG Ryan seemed content on spending the bulk of his cross-examination on bullying and belittling claimant's witnesses. As previously noted, AAG Ryan submitted into evidence the Administrative Code ethics rules for the County of Suffolk (defendant's Exhibits A and B), to use in his cross-examination of Gulizio in his attempt to show the witness was violating an ethics rule of his current employer by testifying on behalf of claimant[(27)]. However, the Court noted the witness' work for the County Planning Commission was in the role of a support person and not a policy maker. As such, any role he served could be handed to another staff member in the event claimant were to actually go before the county commission.

Further, the rules submitted by defendant specifically exempt as a conflict any work which was started prior to a person's employment with the County of Suffolk. Gulizio testified he began working for claimant prior to his employment with the County of Suffolk. However, to avoid any appearance of working for "two masters", the witness completed his work for claimant without charging a fee.

Several times during the course of his cross-examination, AAG Ryan would ask an open ended question. Upon receiving an answer he did not anticipate, he would bellow at the witness "Now answer my question". The Court chastised AAG Ryan on several occasions for such tactics.[(28)] AAG Ryan attempted a similar tactic with the Court by demanding an exception to the ruling concerning Gulizio's ability to testify.[(29)],[(30)]

It is the Court's opinion that AAG Ryan would have been better served attempting to point out the potential flaws with the claimant's residential highest and best use.

One such missed opportunity is AAG Ryan's failure to question the experts concerning the Long Island Rail Road tracks which divide the property. In order for claimant's residential highest and best use to occur, the presence and effect of the railroad tracks would have to be considered, including questioning:

(3) How does siting proximity to the railroad affect land value?

(4) How many trains a day utilize the tracks?

None of these questions were asked. In fact, AAG Ryan never even mentioned the railroad.

The Court, however, is aware of the railroad's bifurcation of the site from its viewing of the property. Unfortunately, by failing to incorporate the presence of the railroad either in his valuation of the property or in his cross-examination of claimant's experts, AAG Ryan has made it impossible for this Court to use the railroad as a factor in determining an award in this case.

One item AAG Ryan attempted to elicit during cross-examination was the length of time it could take to, not only apply for a change of zone, but to build in accord with claimant's highest and best use. It was this point in which the testimony of Barton was most useful for claimant. Barton, a successful developer, made it clear his plans for any development were in terms of years and not for instant development. Thus, a willing developer would be aware of the potential delays in a change of zone (*e.g.* environmental reviews, local politics, community meetings, etc.) and plan and build in the cost for such delays in development. Even Golub, defendant's appraiser, testified it was not unusual for developers to wait ten years (T. 852).

Based upon the foregoing, the Court accepts the highest and best use as proffered by claimant in the before situation. Similarly, the Court accepts claimant's highest and best use for the subject property in the after situation. Claimant's highest and best use for the subject property after the taking is for a change of zone to a PDD with residential use. The remainder of 62.43 acres is wholly within the Town of Smithtown.

Valuation

The Court, unfortunately, because of the manner by which AAG Ryan presented his case, is without a range of values by which to be guided. Thus, the Court is left with no choice but to accept the before and after values and damages found by claimant (claimant's Exhibit 3). In determining the value of the property in the before situation, claimant arrived at a per unit value of $130,000.00 for the residences to be built. The per unit value was adjusted downward 5% by claimant to reflect the time and cost associated with obtaining the change of zone, giving claimant a per unit value of $125,000.00 (R).[(31)] In arriving at the before value claimant adjusted property value under two scenarios to reflect the probability of the change of zone in the Towns of Brookhaven and Smithtown. Under the first scenario claimant adjusted the Town of Brookhaven value by 95% and the Town of Smithtown value by 75% with 4 units per acre. These adjustments gave claimant a total value of $139,550,000.00.[(32)] In the second scenario, claimant adjusts the Town of Brookhaven value by 90% and the Town of Smithtown value by 70% with 5 units per acre, giving claimant a total value of $165,680,000.00.[(33)] Claimant reconciles the two values and estimates the before value of the subject property at $153,000,000.00.

In valuing the remainder of 62.43 acres, located in the Town of Smithtown, claimant uses the same approach. Claimant values the remainder using the zone change probabilities of 75% and 70%. This approach gives claimant values for the remainder of $25,680,000.00 (75% and 4 units per acre) and $30,110,000.00 (70% and 5 units per acre).[(34)] Claimant reconciles the two values and estimates the before value of the subject property at $28,000,000.00.

Accordingly, it is the finding of the Court that claimant is entitled to an award of $125,000,000.00 with statutory interest thereon from the vesting date of November 2, 2005, to the date of decision herein, and thereafter, to the date of entry of judgment for the permanent appropriation.

The award to claimant herein is exclusive of the claim, if any, of persons other than the owners of the appropriated property, their tenants, mortgages and lienors having any right or interest in any stream, lake, drainage and irrigation ditch or channel, street, road, highway or public or private right-of-way or the bed thereof within the limits of the appropriated property or contiguous thereto; and is exclusive also of claims, if any, for the value of or damage to easements and appurtenant facilities for the construction, operation or maintenance of publicly owned or public service electric, telephone, telegraph, pipe, water, sewer and railroad lines.

All other motions on which the Court may have previously reserved or which were not previously determined, are hereby denied.

Let judgment be entered accordingly.

June 21, 2010

Hauppauge, New York

James J. Lack

Judge of the Court of Claims

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1. Defendant appraised the property at 313 acres. This total included 5.2 acres owned by Flowerfield Realty, Inc. At trial and in defendant's post-trial memorandum, defendant accepts and stipulates to the size as found by claimant.

2. For ease of reference the Court will refer to the bisected lands as parcels A and B, as identified in claimant's appraisal (claimant's Exhibit 3).

3. This is a reference to the trial transcript page where the witness' testimony can be found.

4. The witness obtained this figure from claimant's previous application for a change of zone to residential with 336 units and a golf course.

5. Robert Grover (hereinafter "Grover") was called by defendant as a zoning expert. His testimony as to the highest and best use will be discussed subsequent to defendant's appraiser.

6. Claimant's counsel actually arrived at a figure of 89.78 acres (T. 802). However, according to the Court's calculation, 256 x 35% = 89.6. Thus, the Court will adopt the 89.6 figure and substitute it for claimant's figure of 89.78.

7. The square footage per acre.

8. It seems to the Court mowing the grasslands would make that area "lawn" rather than "native grasslands".

9. The Court notes the appraiser lives within ten minutes of the subject property.

10. Incubator space is for a small start up company.

11. This is a reference to Assistant Attorney General J. Gardner Ryan, who represented the State of New York.

12. The Court notes these were exhibits that were entered into by stipulation of the parties.

13. Such an application would be necessary because the subject property is within 500 feet of a town border (T. 29).

14. This Court maintains, as it did at trial, had a breach occurred it would not prevent Gulizio from testifying. It would instead be an issue between the witness and the County of Suffolk. The only use this Court can imagine in raising the issue, is that the witness may become intimidated into not testifying. The Court, however, is not suggesting this was AAG Ryan's intent, even though this information was in AAG Ryan's possession since November 12, 2008, but not raised until trial. There is further discussion of this matter later in this opinion.

15. According to the testimony, this reduces the allowable area of development from 35% to 25%.

16. Gulizio referred to it as "spot zoning" for industrial purpose (T. 46).

18. The Court notes the audio recording of this quote, as reviewed by the Court, differs slightly from the written transcript. In the audio, the words " . . . I felt that there . . ." can be heard, as opposed to the written transcript which states " . . . I felt that it . . ."

19. Gulizio stated the Town of Smithown is a more mature suburban town with fewer zoning applications (T. 130).

20. The "no build" scenario is used by King as a base line to show the increase in traffic in each of the other scenarios.

21. In order to determine the highest and best use of the subject property, the Court is concerned with the scenario of a full build out of the entirety of the property as both industrial and residential. These two scenarios represent the highest and best uses of the parties.

22. Pitsiokos explained "those people" he referred to were the family of the founder.

23. The assisted living facility was being developed by claimant in partnership with Marriott. Shortly after the zone change approval in February 2000, Marriott got out of the assisted living business. Claimant did not pursue this opportunity.

24. It was noted by the witness the residential golf course community was a plan developed by claimant's new management team which was installed in 1999.

25. NYS EDPL §701 provides:

In instances where the order or award is substantially in excess of the amount of the condemnor's proof and where deemed necessary by the court for the condemnee to achieve just and adequate compensation, the court, upon application, notice and an opportunity for hearing, may in its discretion, award to the condemnee an additional amount, separately computed and stated, for actual and necessary costs, disbursements and expenses, including reasonable attorney, appraiser and engineer fees actually incurred by such condemnee. The application shall include affidavits of the condemnee and all parties that have incurred expenses on the condemnee's behalf, setting forth inter alia the amount of the expenses incurred.

The Court notes the industry standard in regard to attorney fees is 1/3 of any money over and above the advance payment. The 1/3 fee is calculated after interest has been added to the award (*Matter of Hoffman v Town of Malta*, 189 AD2d 968; *Sea Isle Foods v State of New York*, 40 Misc 2d 872). The Court is unaware what the advance payment was in this matter and is, therefore, unsure if §701 fees will be awarded.

In addition, interest is added to the judgment. NYS Finance Law §16 states "[t]he rate of interest to be paid by the state upon any judgment or accrued claim against the state shall not exceed nine per centum per annum." In *Denio v State of New York*, 7 NY3d 159, 168, the Court of Appeals held

To rebut the presumption of reasonableness accorded State Finance Law §16's maximum rate, the State bears the burden of proffering substantial evidence that rates of return on both public and private investments during the relevant period are below nine percent (*see generally Matter of Metropolitan Transp. Auth. v American Pen Corp.*, 94 NY2d 154, 158 n 1[1999]; *Matter of FMC. Corp. [Peroxygen Chems. Div.] v Unmack*, 92 NY2d 179, 187 [1998]). Substantial evidence " 'consists of proof within the whole record of such quality and quantity as to generate conviction in and persuade a fair and detached fact finder that, from that proof as a premise, a conclusion or ultimate fact may be extracted reasonably--probatively and logically' " (*FMC Corp.*, 92 NY2d at 188, quoting *300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 181 [1978]). Once the presumption has been rebutted, the claimant has the burden of coming forward with evidence tending to show that a higher rate, up to the statutory maximum, is reasonable.

The Court notes the cases have rarely varied from the finding of 9% which, in this matter, could lead to a significant addition of money to any judgment.

26. Changing the zoning of a particular piece of land without regard to the zoning plan for the area (Black's Law

28. While such a tactic might "play" for a jury, the Court was unimpressed.

29. AAG Ryan attempted to prevent Gulizio from testifying due to the perceived "violation" of the Suffolk County ethics laws.

30. Previously, litigants would have to take an exception to preserve an objection for appeal. On appeal, parties would file a bill of exceptions which was

[a] formal statement in writing of the objections or exceptions taken by a party during the trial of a cause to the decisions, rulings, or instructions of the trial judge, stating the objection, with the facts and circumstances on which it is founded, and, in order to attest its accuracy, signed by the judge; the object being to put the controverted rulings or decisions upon the record for the information of the appellate court . . .

(Black's Law Dictionary 6th Ed.). Exceptions, in New York, have long been eliminated. CPLR 4017 states:

Formal exceptions to rulings of the court are unnecessary. At the time a ruling or order of the court is requested or made a party shall make known the action which he requests the court to take or, if he has not already indicated it, his objection to the action of the court. Failure to so make known objections, as prescribed in this section or in section 4110-b, may restrict review upon appeal in accordance with paragraphs three and four of subdivision (a) of section 5501.

31. This number is rounded upward from $123,500.00 ($130,000.00 x 95%).

32. Claimant's Exhibit 3, p. 67.

33. Claimant's Exhibit 3, p. 68.

34. Claimant's Exhibit 3, p. 87.

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