

NEW YORK STATE COURT OF CLAIMS  
HAUPPAUGE PART

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

Claim Number  
112279

Claimant,

- against -

Trial  
Appropriation

STATE OF NEW YORK,

8:06:30 a.m.

Defendant.

(DAY-1)

-----x

August 13, 2009

State Office Building, 3rd Floor  
Veterans Memorial Highway  
Hauppauge, New York 11787

Monitor: Susan Mauro

BEFORE: HONORABLE JAMES J. LACK  
Judge

APPEARANCES: JOSEPH L. CLASEN, ESQ.  
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**A SWIFT SCRIPT**

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(888) 866-5134 ♦ (800) 860-5722 fax

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CLAIMANT EXHIBITS

<u>NOS.</u>	<u>DESCRIPTION</u>	<u>I.D.</u>	<u>E.V.</u>
1	Zoning Analysis / Prepared by Daniel J. Gulizio (24 pp)	10	40
2	Town of Brookhaven Long Island, Final 1996 Comprehensive Land Use Plan	10	10
3	Self-Contained Appraisal Report / Prepared by Rogers & Taylor Appraisers, Inc.	10	40
4	Traffic Impact Study / Prepared by Cameron Engineering & Associates, LLP	10	10
5	Synchro Video Simulation of Traffic (CD) / Prepared by Cameron Engineering & Associates	10	10
6	Net New Trips Figure Chart / Prepared by Cameron Engineering & Associates, LLP as set forth in Exhibit 3	10	10
7	"Mailer" from SUNY Stony Brook regarding construction / placing an entrance for the Center for Excellence in Wireless & Information Technology on Stony Brook Road	10	10
8	Ecological Investigation of the Proposed Marriott Site Property of Gyrodyne Property Inspected by Orland J. Blanchard (18 pp)	10	10
9	Suffolk County Dept of Health Services, Sanitary Code Article 6, Groundwater Management Zones	10	10
10	Suffolk County Dept of Health Services, Sanitary Code Article 7, Groundwater Management Zones and Water Supply Sensitive Area	10	10

## CLAIMANT EXHIBITS

<u>NOS.</u>	<u>DESCRIPTION</u>	<u>I.D.</u>	<u>E.V.</u>
11	Suffolk County Sewer Maps	10	10
12	Gyrodyne's Notice of Claim dated April 27, 2006, including a true and correct copy of the Acquisition May filed by the State of New York around 11/2/05	10	10
13	2/1/00 Resolution Adopted by Brookhaven Town Board granting Gyrodyne's request to re-zone 10 acres from L-1 Industrial to PRCHC Resolution (3 pp)	10	10
14	11/13/02 Letter from Brookhaven granting Gyrodyne's Request to withdraw zoning application	10	10
15	Uniform Standards of Professional Appraisal Practice a/k/a USPAP Guidelines, 1/1/08-12/31/09 Edition	10	10
16	Photos and Deed of Comparable Land Sale 8510 as identified by the State's Appraiser, Kenneth L. Golub	10	10
17	Photos and Deed of Comparable Land Sale 8514 as identified by the State's Appraiser, Kenneth L. Golub	10	10

## STATE EXHIBITS

<u>NOS.</u>	<u>DESCRIPTION</u>	<u>I.D.</u>	<u>E.V.</u>
A	Laws of Suffolk County / Updated 7/30/09 / Part II Administrative Code Article XXX Code of Ethics A-30 (15 pp)	8	8
B	Laws of Suffolk County / Updated 7/30/09 / Part II Administrative Code Article XIV Department of Planning A-14 (23 pp)	8	8
C	Town Board of the Town of Brookhaven / Application of Gyrodyne to amend the zoning ordinance	143	145

**A SWIFT SCRIPT**

(888) 866-5134 ♦ (800) 860-5722 fax

1 THE MONITOR: Hello. Today's date is August 13,  
2 2009. My name is Susan Mauro. I'm the Court Monitor for  
3 the Hauppauge Court of Claims. This is in the case of  
4 Gyrodyne Company of America, Incorporated vs. The State of  
5 New York, Claim Number 112279. And this is for the  
6 Honorable J. Lack Presiding.

7 Testing Mic-1. Testing Mic-2. Testing Mic-3.  
8 And finally testing Mic-4.

9 (Off the record.)

10 THE COURT: This is Gyrodyne v. State of New  
11 York, Claim Number 112279. May I have appearances, please?

12 MR. CLASEN: Yes, for the Claimant, Your Honor,  
13 Joe Clasen from Robinson & Cole. I'm here with Dave Ross  
14 from my office.

15 MR. RYAN: J. Gardner Ryan, Assistant Attorney  
16 General on behalf of the Defendants, State of New York.

17 THE COURT: Good morning, Gentlemen.

18 MR. RYAN: Good morning, Your Honor.

19 MR. CLASEN: Good morning, Your Honor.

20 THE COURT: I take it, we're all ready to go?

21 MR. RYAN: Ready to proceed, Your Honor.

22 MR. CLASEN: Ready, Your Honor.

23 THE COURT: Do we have some stipulations, any  
24 agreements with respect to evidence and anything else?

25 MR. CLASEN: Yes, we do --

1 THE COURT: Is there anything else you want to  
2 discuss?

3 MR. CLASEN: We have stipulations, Your Honor.  
4 We've pre-marked all the exhibits. And we've agreed for  
5 the admissibility of all the exhibits that we marked. And  
6 we understand they're going to have three reports, which  
7 we've stipulated can come into evidence. Two reports --  
8 pardon me -- that are coming into evidence.

9 MR. RYAN: Right.

10 MR. CLASEN: And there was another document that  
11 was mentioned which I haven't seen yet. So, on one of the  
12 breaks, I'll see it. And then if I have any problem with  
13 it, I'll say it. Otherwise, that will be it.

14 THE COURT: Do you want to show it now, and get  
15 all that over with, Mr. Ryan?

16 MR. RYAN: I do not have it available to me now,  
17 Judge. I would have to search through my car for it. But  
18 I will do that and speak to Mr. Clasen about it.

19 Your Honor, I have one reservation, however; I do  
20 have an -- as the Court's aware, I have an objection I'll  
21 be making to Mr. Gulizio. And I will not consent to his  
22 report going in other than as part of his testimony. But I  
23 have no objection to his qualifications.

24 THE COURT: Fine. Then why don't we -- by the  
25 way, these are not amplified microphones. They're only

1 recording microphones. So, for the benefit of everybody,  
2 including myself, gentlemen will have to keep your voices  
3 up. Shouting into these will do nothing except bother our  
4 court monitor, who will start looking me and I'll look at  
5 you. And remember, unfortunately, they have to be taken  
6 with you to the podium and transferred.

7 Now, Mr. Ryan knows that having been through that  
8 before.

9 MR. RYAN: Yes, Your Honor.

10 THE COURT: Well, why don't we start going  
11 through then. Which exhibit -- trial exhibit for the  
12 Claimant are you not prepared to accept at this point in  
13 time, Mr. Ryan?

14 MR. RYAN: That would be Exhibit 1, Your Honor.

15 THE COURT: So, with respect to Exhibits 2  
16 through 17, you have no objection?

17 MR. RYAN: Well, Your Honor, Exhibit 3 does  
18 include a copy of Mr. Gulizio's report, so --

19 THE COURT: Well, with the exception of anything  
20 that pertains to Exhibit 1.

21 MR. RYAN: That's correct.

22 THE COURT: On Exhibits 2 through 17, you have no  
23 objection, is that correct?

24 MR. RYAN: That is correct.

25 THE COURT: Fine. So, with respect to Exhibits 2

1 through 17 by Claimant, we're putting those directly into  
2 evidence. Fair enough?

3 MR. CLASEN: Fair enough.

4 THE MONITOR: Can I just note that I didn't mark  
5 it yet.

6 THE COURT: I'm sorry?

7 THE MONITOR: I didn't mark it with a sticker. I  
8 didn't put a sticker on those exhibits yet.

9 THE COURT: We'll do that now.

10 THE MONITOR: Okay.

11 THE COURT: All right?

12 THE MONITOR: Okay.

13 THE COURT: Go ahead.

14 (Whereupon, the Monitor begins to mark the  
15 exhibits at this time.)

16 THE COURT: And then with respect to Exhibits A  
17 and B, that's all I have right now for --

18 MR. RYAN: At this point.

19 THE COURT: Yes.

20 MR. RYAN: That's correct, Your Honor.

21 THE COURT: For the Defendant, you have no  
22 objection, is that correct?

23 MR. CLASEN: We have no objection, Your Honor.

24 THE COURT: All right. So, Exhibits A and B of  
25 the Defendant will be put directly into evidence.

1 (Whereupon, the Defendant's Exhibits A and B were  
2 admitted in evidence on consent.)

3 Is there anything else?

4 MR. CLASEN: Yes, Your Honor. In additional, we  
5 have stipulated that all the experts are qualified.

6 THE COURT: Mm-hm.

7 MR. CLASEN: Okay? Subject to, he has one  
8 objection to Mr. Gulizio.

9 THE COURT: Mm-hm.

10 MR. CLASEN: Okay. Which he's going to raise.  
11 And I understand that to be the only objection to the  
12 reports' admissibility too. So, subject to that one  
13 objection, he has no objection to Mr. Gulizio as I  
14 understand it, and we're all stipulating that our experts  
15 are experts. Any challenges go to the weight, not the  
16 admissibility.

17 THE COURT: And you're in agreement with that, is  
18 that correct, Mr. Ryan?

19 MR. RYAN: I am, Your Honor.

20 THE COURT: Fine. Thank you. Now, with respect  
21 to the way I conduct trials, since there is no jury  
22 present, I take opening statements. You then get to  
23 present your case. Of course, Claimant first, Defendant  
24 next. And I do not take closing statements.

25 The reason I don't take closing statements is



1 that we will all be spending a large amount of time  
2 together; you will be putting your cases forward. If you  
3 haven't convinced me one way or another throughout your  
4 case, quite frankly, your closing statement is not going to  
5 do so.

6 I do, however, take a memorandum of law, post the  
7 receiving of transcripts by either side. That is one  
8 memorandum of law. They're not in competition with each  
9 other, they will be due 30 days from receipt of transcript.  
10 When will the receipt of transcript be, well whenever that  
11 is because I will get the transcript at the same time that  
12 you do. And when the Court gets it, that's when your 30  
13 days run.

14 But if, just to make something up; Defendant  
15 submits a memorandum of law in 20 days, and if you want to  
16 say, "Gee, I sent mine in, in 15, and I'm going to answer  
17 his", we will not accept the answering memorandum. So, one  
18 each. They're not in competition with each other. They're  
19 to sum up whatever points you think you wanted to make or  
20 you didn't think was emphasized enough and whatever direct  
21 or counter arguments you've made during the trial. Fair  
22 enough?

23 MR. RYAN: Very good, Your Honor.

24 MR. CLASEN: Understood.

25 THE COURT: Okay. Why don't you have a seat.

1 Susan, let me know when you -- it's going to take a little  
2 while?

3 THE MONITOR: Um --

4 THE COURT: Do you want me to put things --

5 THE MONITOR: Just for a minute, can we just  
6 take?

7 THE COURT: Okay. Why don't we go off the record  
8 then until all those exhibits are marked directly into  
9 evidence.

10 (Off the record.)

11 (Whereupon, Claimant's Exhibits 2 through 17 are  
12 admitted into evidence as stipulated to by counsel.)

13 THE COURT: Mr. Clasen, are you ready to go?

14 MR. CLASEN: Yes, I am, Your Honor. Thank you.

15 THE COURT: Go right ahead. You can either  
16 proceed from there or the podium; you're choice.

17 MR. CLASEN: You know what?

18 THE COURT: Don't let me influence whatever you  
19 want to do.

20 MR. CLASEN: Let me try the podium. This is my  
21 practice run during my opening to see how the podium works  
22 if I can do this without tripping and killing myself.

23 (Laughter.)

24 MR. CLASEN: Which I have my sincere doubts on.

25 THE COURT: Yeah, but please don't give rise to

1 an action against the State of New York.

2 (Laughter.)

3 THE COURT: I'd have to recuse myself.

4 (Laughter.)

5 MR. CLASEN: Your Honor, this case, it's a pretty  
6 simple case in many ways. It's somewhat unique in some  
7 other ways. There's a fundamental difference here as to  
8 what the highest and best use is. I think that's the key  
9 difference.

10 This property is currently zoned as light  
11 industrial. It's our position that there's a reasonable  
12 probability that it will be re-zoned for residences. And  
13 that the highest and best use is residences.

14 I don't think -- there is no admission in any of  
15 the reports from the Respondent (sic). But if you read  
16 their reports, I think they would agree, that the highest  
17 and best use is residences. Except they say, apparently  
18 that there's no reasonable probability of re-zoning. So,  
19 that's really the key.

20 Now, they haven't -- because they said there was  
21 no reasonable probability, they haven't appraised it as if  
22 it was residences. So, all you're left with is our report  
23 at that point in time. They've just appraised it as  
24 industrial, okay? And we have a lot of problems with how  
25 they appraise it as industrial. And we are going to

1 address those. Okay, but that's not the real battle here.  
2 The real battle is would it be re-zoned? Is there a  
3 reasonable probability of re-zoning? And the answer to  
4 that is yes.

5 I mean you're familiar with the property. This  
6 is a prime candidate for re-zoning. It's industrial that  
7 isn't suitable for industry, development of any kind. I  
8 mean the criteria for industrial property in Suffolk as you  
9 know, is you want to be close to the expressway, and you  
10 want to be west, okay. This one doesn't satisfy either one  
11 of them.

12 It also doesn't have access to major roads, which  
13 if you're going to industrial, that's what you'd want.  
14 It's in the middle of a residential area, except for Stony  
15 Brook, right? It's in the middle of a residential area  
16 here. Quite frankly, if there was an as-of right  
17 application to develop this thing as industry, the outcry  
18 would be tremendous. The residence aren't going to like  
19 it.

20 As you'll see from our traffic study that we  
21 have, if you did this as an as-of right industry or even  
22 substantially less, okay, it results in terrible gridlock  
23 of many intersections surrounding the property, which would  
24 just make nobody willing to do this. Everybody would be  
25 begging us, basically to do residences at that point in

1 time.

2 Now, the way you know this, our traffic expert  
3 showed you what the ramifications for as-of right for the  
4 full building, for the entire property, but he also  
5 analyzed it as if we just built out the remainder after the  
6 taking, which is only about 20 percent of what it would be  
7 if you did a full build out. And even at that reduced  
8 rate, there's gridlock around there.

9 Now, in contrast, if you look at the traffic  
10 results, if you do it as residence, there's one  
11 intersection if you build out the entire thing that has a  
12 significant negative impact which can be solved, okay. The  
13 rest of them are not negatively impacted by the residence.

14 Part of that is because remember if you build it  
15 as residence, to the extent it is today being used for some  
16 light industrial, you take those people out of the mix,  
17 which tend to be the rush hour people, which is what really  
18 causes problems.

19 Now, Mr. Gulizio, is going to testify about the  
20 probability of re-zoning. And Mr. Gulizio, he's been doing  
21 planning work for years in Suffolk. He's worked for  
22 various towns, including Brookhaven. Like he was working  
23 for Brookhaven at the time that the application that  
24 Gyrodyne had to do a different type of residential project.  
25 This was a golf course community was pending.

1 He is very knowledgeable about how things were  
2 re-zoned and what did get re-zoned. And he's going to  
3 testify that if you look at the factors, which are one,  
4 what does the surrounding area already look like? It's  
5 residence. What's the suitability for doing it? For as-  
6 zoned vs. re-zoned. It's very suitable for residence. Not  
7 suitable at all for industry. Okay.

8 He looks at the town plan. You know the  
9 comprehensive plan. And we have a map up here right now,  
10 okay. The comprehensive plan says some very critical  
11 things in Brookhaven. Which was done in the 90's -- mid-  
12 90s. And it says, you know look, we've got to get rid of  
13 these zoned industrial properties that aren't really  
14 suitable for being developed for industry and aren't going  
15 to get developed.

16 We also have to get rid of the spot zoning that  
17 we have. There are little pockets of zoning. You can see  
18 it on the map some of the pockets of zoning. And they  
19 identify specifically one property, among others, which  
20 should be re-zoned for PDD, the Gyrodyne property. That's  
21 what you see up there. So, the comprehensive plan  
22 contemplates this.

23 He'd then testify that if you look at what were  
24 the two towns doing. Remember this property straddles two  
25 towns, Brookhaven and Smithtown. Okay. What were they

1 doing during this period of time? And he'll go through all  
2 the properties that got re-zoned. Okay. Because that was  
3 what the town was doing -- both towns were doing. And  
4 he'll also show you the density levels that they were  
5 getting for this. Which are more than the density levels  
6 we're putting in. Okay.

7 So, the ultimate conclusion he comes to is --

8 THE COURT: Excuse me. Mr. Ryan?

9 MR. RYAN: I'm hearing chAlanged, Judge. I just  
10 wanted to move up so I could hear Mr. Clasen because I'm  
11 behind him. If that would not be a problem.

12 THE COURT: Pick a place.

13 MR. RYAN: Sorry. I didn't mean --

14 THE COURT: Some convenient place for you to go?

15 MR. RYAN: Thank you.

16 THE COURT: Well, Mr. Ryan?

17 MR. RYAN: Your Honor, I'll see.

18 THE COURT: George, would you please get a chair.  
19 I won't have Mr. Ryan standing.

20 MR. RYAN: Thank you, Judge.

21 THE COURT: Take your time; get comfortable.  
22 We've got a long trial and I don't want you in any  
23 discomfort whatsoever.

24 MR. RYAN: I appreciate that.

25 THE COURT: You're welcome. Sorry for the

1 interruption. If you need a moment to get yourself back,  
2 go right ahead.

3 MR. CLASEN: No, I think I can keep going.

4 THE COURT: Fair enough.

5 MR. CLASEN: He's going to walk -- he'll walk us  
6 through the properties that were re-zoned, and he's going  
7 to show you that that's what was happening here at the  
8 time.

9 Our position about the probability of re-zoning  
10 is backed up by all the factors I was talking about. But  
11 what we've got going for us is common sense. I mean this  
12 is what was going to happen here. Their experts point out  
13 that re-zoning is a political process, and we agree. Okay.  
14 It is a political process. But you have to remember how  
15 politicians are going to deal with this particular problem.

16 We're not faced with the possibility of leaving  
17 this land fallow, as open land that all the town can use.  
18 That's not an option. The option is going to be facing  
19 people when they get the application news. Are we going to  
20 have it developed for industry? Or is it going to be  
21 developed for residence? And faced with those two options,  
22 the community and the politicians, everyone is going to say  
23 residences. It's a no-brainer at that point. Because the  
24 option is as-of right development for industry. Okay. The  
25 option is not let's leave it fallow and do nothing on this



1 site.

2 Now, after you hear from Mr. Gulizio and Mr.  
3 King, he's our traffic guy; you're then going to hear from  
4 our appraiser. And he does what you're supposed to do;  
5 appraise the property as zoned, okay. And remember it's as  
6 zoned, it's raw acreage. So, what you have to do is find  
7 comparable properties that area being sold for development  
8 but that have not yet been developed. All right. Because  
9 this is not developed land yet. And there's not a plan  
10 that's been approved for the development of it.

11 He identifies those, runs the numbers, okay, and  
12 shows you what the value is as zoned. And then he does  
13 what you also have to do. You have to determine highest  
14 and best use. Is there any other use? And of course the  
15 other use that's possible is re-zoned as a residential. He  
16 does that, runs through the analysis. He carefully then  
17 applies adjustments for the probability of re-zoning.

18 And as you'll see, he does that several ways. He  
19 deducts it from Mr. Gulizio's percentages. Mr. Gulizio has  
20 Brookhaven probability as 90 to 95. And Smithtown  
21 probability as 70 to 75. But he also makes other  
22 deductions for that probability, okay? He takes 5 percent  
23 off, as you'll see. And he also has adjusted the  
24 properties that he used as comparable because they had  
25 already gotten approvals for what they were doing, which is

1 what would happen as part of the re-zoning process here.

2 So, Mr. Taylor, our appraiser, has made several  
3 adjustments to his figures to take into account the fact  
4 that this property was not yet re-zoned and there is an  
5 issue as to the probability. He then uses the mid-point of  
6 the density that Mr. Gulizio -- Mr. Gulizio is going to  
7 show you that he's projecting numbers of 3 to 6 and he's  
8 purposely picking 3 to 6 because that's on the low end of  
9 what's getting approved. That's why he's so confident in  
10 his percentages because he's not picking a density of 15 or  
11 10 or 12 or anything like that.

12 He's picking a conservative density, okay. Which  
13 is probably what would result if either it got approved  
14 after negotiations or there was a disapproval, the inevitable  
15 law suit and the negotiations to a settlement. Okay.  
16 There's always a give and take. You're not going to get  
17 the 10. But he picked the low end of it. That's what that  
18 appraisal is based upon.

19 Now, you're also going to hear, Your Honor, two  
20 fact witnesses. One is Pete Pitsiokos from the company.  
21 And he's going to describe basically the factual  
22 surroundings, what the company is about, what the company  
23 was doing on this property and what it intended to do on  
24 the property. In part to set it up for the expert  
25 testimony that we've given, and also to rebut some of the

1 factual errors that are in opposing counsel's reports.  
2 There are some factual errors there as to what was  
3 happening, what wasn't happening, and why it wasn't  
4 happening. Okay.

5 You're also going to hear from Jerry Barton.  
6 Jerry Barton was the principal in Landmark, which was the  
7 company that was developing this property for a golf course  
8 at that time. It's a golf course community. It's  
9 residences just clustered around a golf course. What that  
10 really does is it gives you a lot of open space, you know.  
11 So, people pay more for a house if it's clustered around a  
12 golf course because you know you're not going to have 20  
13 houses behind you at that point in time.

14 But he's going to testify again about the facts  
15 surrounding that and what the status of that was. Because  
16 in their reports, it would lead you to believe that that  
17 was just dead in the water and was never going to happen.  
18 And he can explain that that's not the case, what the  
19 status was, and all the other facts surrounding it.

20 So, that's going to be our case, Your Honor.  
21 Which is quite frankly that as as-zoned, their numbers are  
22 terribly low. Okay. It should be a lot higher. But more  
23 importantly, it wasn't going to be -- that's not the  
24 highest and best use. The highest and best use is as re-  
25 zoned.

1           Now, you're going to hear from them -- I'm not  
2           sure what you're going to hear from them, because if you  
3           read their reports, they've got a traffic report, which  
4           really isn't a traffic report. And we'll go through that  
5           when I'm cross examining the witness. What you'll see,  
6           there'll be a stark difference between our traffic report,  
7           which is based on the ITE standards, and which is a true  
8           report. Which is showing the traffic flow, what the  
9           increase traffic will be, and their report.

10           Which if you look at their report, it looks at  
11           the traffic conditions for the property as was going to be  
12           developed by SUNY Stony Brook. And it also looks at the  
13           traffic conditions if the property was developed under the  
14           golf course community.

15           The difficulty with that is, the Claimant's  
16           appraisal is not based on either one of those scenarios,  
17           and the Respondent's appraisal is not based on either one  
18           of those scenarios. So, we have a traffic report, which  
19           is based upon two scenarios which while were being  
20           discussed, isn't what anybody says is the highest and best  
21           use.

22           You're going have Mr. Grover testify for them. I  
23           assume he's -- although he's an environmental engineer,  
24           they're putting him in to say that there's no probability  
25           of re-zoning. And you'll have him talk about a whole lot

1 of things. But when you talk about the time spent on  
2 getting the re-zoning, it's not a lot of additional time,  
3 because his basic objection is going to take a long time.  
4 And he clearly doesn't describe any of the things that Mr.  
5 Gulizio says about all the factors that you go into when  
6 you're analyzing the probability. And they basically  
7 pretty much ignore the comprehensive plan from Brookhaven.

8 Then the last witness you're going to hear is  
9 from their expert or their appraiser, Mr. Golub. Who quite  
10 frankly, I don't think should be any surprise, we're going  
11 to contend he not only ignored the highest and best use  
12 analysis that he was compelled to do; but he appraised it  
13 using developed properties, which is not the way you're  
14 supposed to do this here.

15 And you know, again, for purposes of bench trial,  
16 and we all know it's going to come in, well, we think that  
17 goes to the weight of this so much so that I think you  
18 should ignore it, the appraisal.

19 So, in conclusion, Your Honor, we have property  
20 here which is suitable for residences, it is residential  
21 property. It's beautiful property. And it's property that  
22 if anybody tried to develop it as zoned, there'd be an  
23 uproar. And I think you can reasonably anticipate that  
24 there's certainly a reasonable probability of re-zoning.  
25 And that is quantified on our side, and is totally ignored

1 by the other side. We'll conclude that there's absolutely  
2 no reasonable probability even of re-zoning it for a much  
3 higher -- pardon me -- lower density. That's basically  
4 where we're going, Your Honor, and thank you very much.

5 THE COURT: Thank you very much. Mr. Ryan?

6 MR. RYAN: Your Honor, the Claimant, Gyrodyne of  
7 America, Inc., back in 2005, owned 308 beautiful acres of  
8 land on Long Island's north shore on Route 25, surrounded  
9 by rural -- across from a farm, surrounded by residential  
10 roadways of narrow configuration and largely undeveloped.

11 It had 6-7-8 industrial buildings from its hey  
12 day in the 40's. It's in zoned industrial since 1951.  
13 Never any change up until 2005.

14 While beautiful, it's not an Eden, it's a promise  
15 land. It has a potential. The New York State University  
16 appreciated that potential and appropriated 245 of those  
17 acres to build a campus. A campus of research and  
18 industrial -- light industrial -- research and development,  
19 light industrial buildings, consistent with the zoning of  
20 the property.

21 The configuration had limits. The limits were  
22 traffic. A concern always in zoning, always to any  
23 resident of Long Island, always to any developer. These  
24 roadways could not be improved without taking lands  
25 adjacent that a private developer could never do.

1           The current owner, Gyrodyne of America, Inc.,  
2           claims that it could have put I think 1500 clustered  
3           townhouses or homes on this property without any  
4           significant impact, without any need to improve the  
5           infrastructure surrounding it that it could not do. The  
6           State disagrees.

7           And the Court will hear from the witnesses the  
8           basis for that disagreement. This property was zoned  
9           industrial at the time although it's potential use as  
10          residential certainly had to be considered.

11          Whether or not any reasonable person in the  
12          market place would view that change to a residential  
13          development as imminent is what we are concerned with here  
14          because that's what would effect it's value. And there was  
15          no imminence to that because of the physical constraints  
16          and the condition of the property. Thank you.

17          THE COURT: Thank you, Mr. Ryan. Counsel, are  
18          you ready to go --

19          MR. CLASEN: Yes, I am, Your Honor. .

20          THE COURT: -- or would you like a couple of  
21          minutes?

22          MR. CLASEN: No, I'm ready if you are.

23          THE COURT: I'm ready. Go right ahead.

24          MR. CLASEN: I'd like to call my first witness,  
25          Mr. Dan Gulizio.

1 (Whereupon, the witness was brought into the  
2 courtroom at this time.)

3 THE COURT: Mr. Gulizio, come right up to the  
4 side, please.

5 THE MONITOR: Please raise your right hand.  
6 (Whereupon, the witness complies.)

7 THE MONITOR: Do you solemnly swear that the  
8 testimony you're about to give is the truth, the whole  
9 truth and nothing but the truth, so, help you God?

10 MR. GULIZIO: I do.

11 THE MONITOR: Thank you. Be seated. In a loud  
12 clear voice, please say and spell your name, and also state  
13 your business address if you don't mind.

14 MR. GULIZIO: My name is Daniel J. Gulizio. It's  
15 G-U-L-I-Z-I-O. I reside at 18 Sabbath Day Path in  
16 Huntington. I work for the Suffolk County Department of  
17 Planning at Veterans Memorial Highway directly west of the  
18 courthouse.

19 THE MONITOR: Could you just move the mic closer  
20 -- move this closer to you?

21 (Whereupon, the witness complies.)

22 THE MONITOR: Thank you.

23 MR. CLASEN: May I proceed now?

24 THE COURT: You may.

25 MR. CLASEN: Thanks.



1 D A N I E L J G U L I Z I O , was called as a witness herein  
2 after having been duly sworn and testified as  
3 follows:

4 DIRECT EXAMINATION

5 BY MR. CLASEN:

6 Q. Mr. Gulizio, tell me a little bit about yourself.  
7 Just very quickly and generally, your educational background.

8 A. Okay. I received my Bachelor of Arts degree from  
9 Colby College in Waterville, Maine in 1986. From there I  
10 started work with the Town of Islip, Department of Planning.

11 During that time I obtained my Masters of Science  
12 degree in Urban Planning from Columbia University. I then went  
13 onto night school at St. John's University where I received my  
14 law degree.

15 Q. Okay. And when did you graduate college?

16 A. 1986.

17 Q. What have you been doing job-wise from '86 to the  
18 present?

19 A. From 1986 to the present, with some brief  
20 interruptions, I've been working as a public sect planner for a  
21 variety of towns and for two counties.

22 Q. Okay. What towns did you work for?

23 A. I started my career at the Town of Islip in their  
24 Department of Planning as a summer intern. I worked for the  
25 Town of Islip for approximately 17 years from 1986 to 2002.

1           During that time, I held virtually every position  
2 there was in the Planning Department from summer intern to  
3 planning aide to planner, senior planner, chief planner, to  
4 Commissioner of the Department of Planning and Development.

5           Q.    Okay.  Have you worked for the town of Brookhaven?

6           A.    Yes, I have.  I worked for the Town of Brookhaven from  
7 roughly 2002 through 2005 as their Commissioner of the  
8 Department of Planning Environment, Land Management.

9           Q.    What did you do as Commissioner?

10          A.    As Commissioner, I was responsible for the day-to-day  
11 administration of the department.  And we had a number of  
12 divisions within the department that included a traffic safety  
13 division, an environmental protection division, a building  
14 division, a planning division, and so I was responsible for that  
15 day-to-day administration of a staff of about 80 to 100 people  
16 depending upon staffing levels.

17                   And also represented the Town Board at all Public  
18 Hearing related to land use matters, the planning board on all  
19 public hearings related to sub-division and site-plan matters,  
20 and special use permits.  And again, day-to-day managed the  
21 overall department.

22          Q.    Did you do the same -- similar things for Islip?

23          A.    Yes, I did.  During my three years as commissioner of  
24 the Department of Planning and Development in Islip, again,  
25 managed multiple divisions, division of building and

1 engineering, engineering and contracts, planning. And again we  
2 had a staff of about 100 during my tenure in Islip. And was  
3 responsible for again running the day-to-day administration of  
4 the department, representing the Town Board at public hearings  
5 regarding re-zoning applications, Town Board on motions, code  
6 amendments, and the planning board for similar processes.

7 Q. How many re-zoning applications have you been involved  
8 in over the past 20 years?

9 A. I haven't kept track over the last 20 years. But it's  
10 fair to say I've been involved in a few hundred re-zoning  
11 applications.

12 Q. Okay. And that included Islip, Brookhaven, and some  
13 other municipalities?

14 A. It included Islip and Brookhaven. I've also again  
15 worked on land use matters related to zoning applications for  
16 Nassau County and Suffolk County.

17 MR. CLASEN: Your Honor, at this point in time, I  
18 move that he be qualified as an expert on planning and re-  
19 zoning.

20 THE COURT: Mr. Ryan?

21 MR. RYAN: Voir dire?

22 THE COURT: Yes. Go right ahead, Mr. Ryan. You  
23 requested it before.

24 MR. RYAN: Do you know if I could grab some  
25 water?

1 THE COURT: Help yourself.

2 MR. RYAN: Thank you.

3 VOIR DIRE

4 BY MR. RYAN:

5 Q. Mr. Gulizio, you've identified yourself apparently as  
6 being an employee of the Suffolk County Department of Planning?

7 A. That's correct.

8 Q. Please tell us about that position. What's your  
9 title?

10 A. It's the Deputy Director of Planning.

11 Q. And as a Deputy Director -- how many deputy directors  
12 of planning are there?

13 A. There's one.

14 Q. And as Deputy Director for Planning, what are your  
15 personal responsibilities?

16 A. I assist the director of planning in the day-to-day  
17 administration of the office, that involves working with the  
18 Suffolk County Planning Commission in the referral process,  
19 reviewing RFPs, requests for proposals on individual  
20 applications, and a variety of other matters.

21 Q. All right. Now, you mentioned the Planning  
22 Commission. What's its role?

23 A. The Planning Commission is setup under General  
24 Municipal Law, Section 239, to hear referral applications from  
25 local towns and villages.

1 Q. What types of applications?

2 A. It could be either zoning applications or subdivision  
3 related matters.

4 Q. A zoning application like a change of zoning to a PDD?

5 A. It could be a change of zone application; that's  
6 correct.

7 Q. Are matters required to go before the Commission or is  
8 it just a voluntary submission?

9 A. It depends on the geographic location of the matter  
10 and the nature of the action. If it's within 500 feet within a  
11 town or village boundary or state or a county road, there are  
12 triggers under General Municipal Law Section 239 that dictate  
13 what types of applications are required to go to the Planning  
14 Commission. If they do trigger those conditions, they are  
15 mandated to go to the Commission prior to make a final  
16 determination.

17 Q. In regard to Gyrodyne's property, I believe it's  
18 depicted in light blue on the left of the map shown. Is that a  
19 property for which any zoning application or a change of zone  
20 would have to go before the Commission?

21 A. It's within 500 feet of a municipal boundary. It  
22 would therefore be required to be referred to the Commission  
23 prior to a final determination.

24 Q. And is Gyrodyne's property within 500 feet of a  
25 municipal boundary?

1 A. Yes.

2 Q. So, it's a mandatory submission to the Commission?

3 A. As a change of zone it would be, yes.

4 Q. Your relationship to the Commission is to oversee it's  
5 review process?

6 A. I provide staff support to the Commission as does the  
7 rest of the Department.

8 Q. Reading from your resume, Mr. Gulizio, you make a  
9 statement that your additional responsibilities include  
10 oversight of SEQR Review processes and the Suffolk County  
11 Planning Commission review process. Is that statement true?

12 A. Yes.

13 Q. So, you provide oversight of the Commission's review  
14 process?

15 A. Again I provide staff support to the Commission, yes.

16 Q. In your own words, oversight?

17 A. Yes.

18 Q. Mr. Gulizio, are you under subpoena?

19 A. No.

20 Q. Are you testifying voluntarily on behalf of the  
21 Claimant in this matter?

22 A. Yes, I am.

23 Q. Mr. Gulizio, will any application for a change of  
24 zoning of Gyrodyne's properties have to come before the  
25 Commission you have oversight?

1           A.    I'm not sure if Gyrodyne is going to be submitting any  
2 future applications to the Planning Commission, so I'm not sure  
3 how to answer that.

4           Q.    Well, are you aware that Gyrodyne has submitted an  
5 application to the Town of Smithtown for a change of zoning?

6           A.    I know there's a pending application in the Town of  
7 Smithtown. I'm not familiar with the specifics of it.

8           Q.    Did you inquire?

9           A.    Did I inquire of whom?

10          Q.    Of your principals? Those who've retained you.

11          A.    No.

12          Q.    You knew that any application by Gyrodyne for a change  
13 of zoning would need to come before the Commission you oversee?

14          A.    Yes.

15          Q.    You knew that an application had been made to one of  
16 the municipalities in your county --

17          A.    Yes.

18          Q.    -- for something?

19          A.    Yes.

20          Q.    Did you make any inquire, Mr. Gulizio of anyone the  
21 nature of that application so that you could determine whether  
22 or not it would have to come before the Commission you oversaw?

23          A.    No.

24          Q.    Mr. Gulizio, if I told you that Gyrodyne of America,  
25 Inc. has filed an application in the Town of Smithtown for a

1 change of zone that must come before the Commission you oversee,  
2 would that have any bearing on your ability as a county employee  
3 to testify in this matter today?

4 A. My understanding is it would require me to recuse  
5 myself from any action before the Planning Commission, but that  
6 it would not interfere with my ability to testify here today.

7 MR. RYAN: The marked exhibits, Your Honor.

8 (Handing document to Mr. Ryan.)

9 MR. RYAN: Thank you.

10 Q. Mr. Gulizio, I'm showing you what's been marked as  
11 Defendant's Exhibit "A."

12 MR. RYAN: Which I believe is in evidence, Your  
13 Honor, by stipulation?

14 Q. I direct your attention to Section A30-1 and I will  
15 read it to you. Correct me if I misread it. "No officer or  
16 employee of the County of Suffolk, whether paid or unpaid shall  
17 (3) engage it, solicit, negotiate for or promise to accept  
18 private employment or render services for private interest which  
19 such employment of services creates or might reasonably tend to  
20 create a conflict or impair the proper discharge of his official  
21 duties." Did I read that correctly, Mr. Gulizio?

22 THE COURT: Mr. Clasen?

23 MR. CLASEN: Your Honor, at this point in time  
24 we're having a legal argument. The purpose of the voir  
25 dire is to gather facts, okay. He's just arguing. He's



1 got the facts, some of the facts, okay? If he's got a  
2 motion to make or --

3 THE COURT: Yes. I quite agree. Mr. Ryan, is  
4 there some place you seem to be going here? We're way  
5 beyond -- I've let it go, but now that, in fact, we have an  
6 objection I'm not going to let it go. We're way beyond  
7 anything to do with voir dire of a witness. Do you have  
8 anything further with respect to the qualifications of the  
9 witness?

10 MR. RYAN: The suitability of this witness to  
11 testify as a witness.

12 THE COURT: Well, if you want to make that  
13 argument, you can make that argument, but are we finished  
14 with the voir dire? I mean reading the Suffolk County  
15 administrative code or whatever, it is that you're reading  
16 is all very interesting. But if you're going to make a  
17 point, let's get to that, make the point, and let's move  
18 on.

19 MR. RYAN: All right, Your Honor. I would move  
20 to preclude Mr. Guilizio from testifying in Court in this  
21 matter on behalf of Gyrodyne of America, Inc. on the basis  
22 that his appearance as a witness on behalf of the Claimant  
23 Gyrodyne of America, Inc. violates the requirements  
24 applicable to his employment as a deputy director of the  
25 Department of Planning with oversight of the Planning

1 Commission of the County of Suffolk in that he is rendering  
2 a service that might reasonably tend to create or conflict  
3 or impair the proper discharge of his official duties and  
4 that this behavior, if knowingly done, according to the  
5 administrative code is a violation of law.

6 MR. CLASEN: Your Honor, may I inquire of the  
7 witness just to elicit one or two more facts?

8 THE COURT: Okay.

9 MR. CLASEN: And then I'd like to make my  
10 argument, if I could.

11 CONT'D. DIRECT EXAMINATION

12 BY MR. CLASEN:

13 Q. Mr. Gulizio, when you were retained to provide expert  
14 testimony in this case, by whom were you employed?

15 A. I wasn't employed by the County of Suffolk at that  
16 time. I was actually --

17 Q. That's number one. Number two, have you -- as working  
18 for the County of Suffolk, have you ever received an application  
19 up 'til today that dealt with Gyrodyne?

20 A. Not that I'm aware of.

21 THE COURT: I'm going to interrupt you.

22 MR. CLASEN: I'm done with that.

23 THE COURT: We are going way beyond where --

24 MR. CLASEN: I'm done.

25 THE COURT: Okay.

1 MR. CLASEN: But I needed to set it up, Your  
2 Honor.

3 THE COURT: Fair enough.

4 MR. CLASEN: Okay. Right. There is a clear  
5 exception to the rule which provides for pre-existing  
6 contracts. We've cited in the letter that we wrote to Your  
7 Honor yesterday when we started this action, which clearly  
8 advised you. That was the purpose for the first question.

9 Secondly, Your Honor, this issue is not  
10 appropriate for his qualifications to testify here today at  
11 all, okay. If there's a conflict, it's a conflict that  
12 arises in a different situation with a different --

13 THE COURT: Well, I'm going to stop you right  
14 there because we have gone way far enough. There is no  
15 doubt that the administrative code of the County of Suffolk  
16 is not germane to a proceeding in the New York State Court  
17 of Claims nor is it germane to whether or not this witness  
18 can qualify as an expert based upon his background.

19 And indeed, Mr. Clasen, you're quite correct. If  
20 there is any issue at all, it would be between the witness  
21 and his employer, which is the County of Suffolk and this  
22 is a state court handling an appropriations matter. And it  
23 is certainly not handling whether he can do or not do  
24 anything or whether this pre-dates -- and this Court does  
25 not have an interest in his personal matters of employment

1 with the County of Suffolk period, end of question.

2 I would like to ask a question, though, I take it  
3 -- I can only ask a question, however, whenever something  
4 is in evidence. So Mr. Ryan, if we've gotten beyond this  
5 point, do you have any further objection with respect to  
6 Claimant's 1 marked for identification not yet in evidence?

7 MR. RYAN: Your Honor, if the Court has ruled  
8 that the issue of Mr. Gulizio's potential violation of the  
9 code of ethics of the County of Suffolk is irrelevant to  
10 this Court in this proceeding with his testimony here, then  
11 I would have no objection to Mr. Gulizio --

12 THE COURT: All right, then without objection  
13 Claimant's 1 marked for identification is now in evidence.

14 (Whereupon, Claimant's Exhibit was admitted in  
15 evidence without objection.)

16 THE COURT: And with respect to your comment of  
17 anything to do with an alleged violation of the Suffolk  
18 County Code of Ethics, Administrative Code, et cetera, I'm  
19 striking those remarks because there is no violation that  
20 is pending before this Court for any determination as to  
21 whether it's alleged or not alleged.

22 But Mr. Ryan, since we are on the subject of  
23 it -- well, I guess I'll ask Mr. Clasen this question.  
24 When was this, now in evidence, Claimant's one prepared?

25 MR. CLASEN: I believe it's dated --

1 MR. RYAN: I believe it's December 2007 is the  
2 date of its preparation, Your Honor.

3 MR. CLASEN: That's a date, Your Honor.  
4 Obviously, he worked on it before.

5 THE COURT: Well, I mean the Court notes that it  
6 received a copy on November 10, 2008.

7 MR. CLASEN: Right.

8 THE COURT: When was Defendant submitted a copy?

9 MR. CLASEN: The same time you got it, Your  
10 Honor.

11 MR. RYAN: No. I received my copy November 12,  
12 2008, Judge.

13 THE COURT: On November 12, 2008? Mr. Ryan, have  
14 you done anything with respect to the issues you raised as  
15 to the author of the report between November 12, 2008 and  
16 the date just before this trial began? Did you raise  
17 any -- did you contact anybody about any of the things  
18 you've raised today about the alleged violation?

19 MR. RYAN: Oh, yes, Your Honor. Of course, I  
20 did. On Monday or I believe it was early on Tuesday as  
21 soon as I realized --

22 THE COURT: You're talking about this week?

23 MR. RYAN: Yes. As soon as I realized that --

24 THE COURT: That wasn't my question, Mr. Ryan. I  
25 asked what you did between November 10, 2000 -- excuse me,

1 November 12, in your case, 2008, when you received this  
2 report and Monday of this week?

3 MR. RYAN: I thought that was what you'd asked.

4 THE COURT: What?

5 MR. RYAN: I thought you'd asked today. But Your  
6 Honor, as soon as I appreciated that Mr. Gulizio, in my  
7 view --

8 THE COURT: I'm just getting this straight. You  
9 appreciated it Monday of this week? That's the first time  
10 you realized that this could be an issue --

11 MR. RYAN: Yes, Your Honor.

12 THE COURT: -- and not on November 13, 2008? I  
13 assume you read it then. Not in January, February, March,  
14 April, May, June, or July?

15 MR. RYAN: If I may, Your Honor? A question of  
16 the witness's ethics is a subtle one. It is one that I was  
17 left to discovery on my own. It is Claimant's counsel who  
18 retained Mr. Gulizio who is responsible --

19 THE COURT: Mr. Ryan, I merely asked when this  
20 finally came to your attention. And you've rely, I assume,  
21 that it was Monday of this week before the trial began and  
22 you received the report in November 12. I'm just looking  
23 for a factual basis here. And is that all correct?

24 MR. RYAN: I'm sorry, Your Honor. I thought you  
25 were asking me what I had done, but that is correct. I

1 received it on the --

2 THE COURT: Thank you.

3 MR. RYAN: -- November 12.

4 THE COURT: I don't need to know anything more,  
5 Mr. Ryan. I think now we can certainly continue with  
6 respect to this trial. Do you have any further voir dire  
7 because we haven't gotten to the point of -- you said you  
8 had no professional questions with respect to the witness's  
9 background and all witnesses' background?

10 If that's the case, then I assume we can then  
11 proceed and the witness will be recognized as an expert for  
12 purposes of the report for which he is issued and to  
13 discuss traffic and zoning matters with respect to the  
14 subject property of the trial, unless you have a further  
15 objection of some kind?

16 MR. RYAN: Oh, no. My objection is to what I  
17 perceive as unethical.

18 THE COURT: Well, then we've settled, at least to  
19 my point of view and the Court's point of view, that  
20 objection. And so now we can proceed. Finally, we can get  
21 back to really beginning at 10:18 this morning the direct  
22 testimony of the witness.

23 MR. RYAN: All right. Your Honor, if I may? I  
24 appreciate it. It's not necessary. But I would like to  
25 take an exception to the Court's ruling. Thank you.

1 THE COURT: You most certainly may have an  
2 exception for whatever you would like to do with it.

3 MR. CLASEN: Your Honor, one other housekeeping  
4 matter.

5 THE COURT: Yes.

6 MR. CLASEN: Exhibit 3 --

7 THE COURT: Yes, that portion of Exhibit 3, which  
8 pertains to Exhibit 1 you no longer have an objection to,  
9 Mr. Ryan?

10 MR. RYAN: That is correct, Your Honor.

11 THE COURT: So the entire Exhibit 3 is now in  
12 evidence as Exhibit 3.

13 MR. RYAN: Subject to the Court's ruling that is  
14 true. It's not going in on stipulation. It's going in  
15 subject to the Court's ruling.

16 THE COURT: That's correct.

17 MR. RYAN: Correct.

18 THE COURT: As did Exhibit 1.

19 MR. RYAN: As did Exhibit 1.

20 THE COURT: So that portion of Exhibit 3 that  
21 pertains to Exhibit 1 is now in evidence.

22 (Whereupon, Claimant's Exhibits 1 and 3 were  
23 admitted in evidence.)

24 MR. RYAN: Very good.

25 MR. CLASEN: And so now everything is in



1 evidence?

2 THE COURT: Everything we have. Mr. Ryan, you  
3 still have some outstanding document, which --

4 MR. RYAN: Yes, Your Honor.

5 THE COURT: -- Claimant's attorney has not seen  
6 yet, so we will sooner or later get to that?

7 MR. CLASEN: Correct.

8 THE COURT: You may proceed, sir.

9 MR. CLASEN: Thank you, Your Honor.

10 CONT'D DIRECT EXAMINATION

11 BY MR. CLASEN:

12 Q. Mr. Gulizio, you're familiar with the subject property  
13 here?

14 A. I am.

15 Q. Tell me a little bit about the property.

16 A. The property is located in the northwest corner of the  
17 Town of Brookhaven, the northeast corner of the Town of  
18 Smithtown. It totals approximately 308 acres in size with about  
19 two-thirds of that acreage or 182 acres being in the Town of  
20 Brookhaven and about 63 acres being in the Town of Smithtown.

21 Q. Now you were asked to render an opinion on the  
22 reasonable probability of this property being rezoned, is that  
23 correct?

24 A. That's correct.

25 Q. Just generally, before we get to that, what are the

1 factors you consider when you determine the reasonable  
2 probability of rezoning?

3 A. There's a number of factors that we would consider in  
4 connection with that type of an analysis. The first is the  
5 existing zoning of the property. We'd look at what the  
6 property's actually zone for currently and what type of yield  
7 and building types would be permitted under that existing  
8 zoning. We would also look at the nature and character  
9 developments surrounding the property. Is it predominately  
10 compatible with the existing zoning or incompatible with the  
11 existing zoning?

12 We'd also look at it in terms of on a site-specific  
13 level. What are the limitations on site in terms of set backs,  
14 landscaping requirements, buffer requirements, unique aspects of  
15 the property that may limit or promote a particular type of  
16 development pattern.

17 We would also look at the comprehensive plan. A  
18 comprehensive plan as been referred to as a blueprint for  
19 development. It's a guide that municipal officials are required  
20 to use in assessing rezoning applications. So we would  
21 certainly consider the general policies stated within a  
22 comprehensive plan as well as any specific policies within the  
23 comprehensive plan.

24 We'd also look at other factors such as the history of  
25 zoning applications within the town in a recent or reasonably

1 recent period to see what the pattern of policy has been in  
2 terms of recent Town Board action. So those four of five  
3 factors are what we would typically consider in terms of  
4 analysis of reasonable probability.

5 Q. Now you prepared a report in this case?

6 A. I did prepare a report.

7 MR. CLASEN: This has been marked as Exhibit 1.  
8 May I show him?

9 THE COURT: You may.

10 MR. CLASEN: Thank you.

11 (Handing document to the witness.)

12 THE WITNESS: Thank you.

13 Q. Is that the report you prepared?

14 A. That is.

15 Q. And in this report you're applying those factors you  
16 just described?

17 A. I did apply those factors.

18 Q. Apply them for us now. Show us how you applied them  
19 with respect to the first factor. I think it was the zoning.

20 A. Sure. The first thing we was look at the existing  
21 zoning, which L1 light industrial zoning and also light  
22 industrial zoning, both in the Town of Smithtown and as well as  
23 the Town of Brookhaven. It's called L1 Light Industrial  
24 District in the Town of Brookhaven. We look at it in terms of  
25 what would be the development yield under that existing zoning,

1 what would be the spectrum of permitted uses under that zoning.  
2 In this case it was a light industrial district. You'd be  
3 allowed a spectrum of uses from offices to manufacturing to  
4 research uses. There was also a variety of special permitted  
5 uses that are permitted under a light industrial district. That  
6 includes auto body repairs shops, adult uses, lumberyards,  
7 outside storage uses, all permitted via a special process to  
8 either planning board or Town Board.

9 We'd look it at in term of yield. Different lot area  
10 requirements were associated with individual zoning districts.  
11 In an L1 Light Industrial District in the Town of Brookhaven the  
12 minimum required lot area is 40,000 square foot going up to  
13 120,000 a square foot, depending upon the geographical location  
14 of the use.

15 We'd look at width of lot requirements, setback  
16 requirements, parking thresholds associated with those  
17 individual leases, that type of thing in terms of analysis of  
18 the existing zoning and that's what we did in this case.

19 Q. Now that's the -- what the term "as of right" zone is?

20 A. That's correct. That would be the existing "as of  
21 right" development.

22 Q. Okay. And you could develop this property for  
23 industry. How dense?

24 A. That's a great question. And in terms of the density,  
25 under the town code in the Town of Brookhaven a maximum floor

1 area ratio, which is the ratio between the gross square of the  
2 lot and the lot area itself is .35 or 0.35, meaning for every  
3 100,000 square foot of lot area you could have 35,000 square  
4 foot of building.

5           If you apply just that factor onto this property of  
6 the 308 acres, you'd get about 100 acres of development or  
7 roughly 4.5 million square feet of development. That isn't,  
8 however, typically the case where every property can maximize  
9 the amount of development potential. But even if you go down to  
10 a floor area ratio of about a third of that, going down to say  
11 25 percent, it's still a maximum gross floor area of something  
12 north of 3 million square feet.

13           Q.    Which is a whole lot of commercial space?

14           A.    It's a significant amount of commercial space.

15           Q.    Now the next factor I think you said you looked at is  
16 you looked at the surrounding area?

17           A.    Sure.

18           Q.    Tell me about the surrounding area and how compatible  
19 or incompatible it may be --

20           A.    Sure. We looked at the --

21           Q.    -- to the existing zoning for the subject property.

22           A.    I apologize. We looked at the nature and character of  
23 developments surrounding the property. To the east of the  
24 subject property is the university, obviously, and also a  
25 variety of single-family home residences. To the south is also

1 single-family residential development as it is to the west. If  
2 you look south and west along Route 25A or Northern Boulevard in  
3 western Suffolk County, you'd find some spattering of stripe  
4 commercial zoning, particularly further south and west of the  
5 property. There's a farm due north of the property, but  
6 overwhelmingly the character of the area is single-family  
7 residential development and based upon a density of between two  
8 units per acre and three units per acre.

9 Q. So the density of the surrounding residential area is  
10 about two to three acres -- two to three units per acre?

11 A. That's correct. In the Town of Brookhaven, I recall  
12 the zoning district. Specifically, it's a B1 zoning district  
13 for about half of the property, which is 22,500 square foot  
14 minimum lot size. There's also residences "B" district zoning  
15 for the south of the property and that requires a minimum lot  
16 area of 15,000 square feet for each residence. So roughly  
17 between two and three units per acre is permitted under the  
18 existing single-family zoning.

19 Q. So what's your conclusion on the surrounding area; is  
20 it consistent or inconsistent with the existing zoning?

21 A. I think it's fair to characterize that this is a  
22 uniquely zoned property. Some have referred it to a spot zone,  
23 but I would say that it's incompatible or inconsistent with the  
24 predominate land use pattern in the area.

25 Q. Now I think the third factor you mentioned was site

1 constraints to determine use of land. What site constraints are  
2 there or are there not for either residential or "as zoned?"

3 A. Sure. The time period is very important here in terms  
4 of the site constraints. And prior to 2003, there were  
5 virtually no buffer or landscaping requirements in the  
6 Brookhaven town code that would serve as a constraint to  
7 development. When we look at the ultimate build out of a  
8 property under a commercial district, we don't just look at the  
9 floor/area ratio. We look at things like buffers, minimum  
10 landscaping requirements, parking requirements, drainage  
11 requirements, and setback requirements. So we would look at all  
12 those characteristics also in looking at what the potential  
13 build out or compatibility of the development could be.

14 Q. And in this case how compatible or not compatible were  
15 these for industrial use?

16 A. Well, one of the primary constraints, which is well  
17 known about the property is the road network -- the access to  
18 the property. Mills Pond Road is a winding, narrow, two-lane  
19 roadway as is Stony Brook Road, running south from Route 25A.  
20 Route 25A in this location is also a two-lane roadway. So one  
21 of the main constraints to the property is actually getting  
22 traffic onto and off of the property with a property of this  
23 scale.

24 Q. Right. When you're developing ones for industrial  
25 purposes, you have to be able to get on and off the property

1 fairly easily, right?

2 A. That's correct.

3 Q. And this one you can't do that?

4 A. Certainly, with a property of this size, you would  
5 more typically like to see it located adjacent to a major  
6 arterial roadway or a connector roadway that has even a limited  
7 access roadway, such as the Expressway, Sunrise Highway,  
8 Southern State Parkway or Middle Country Road even.

9 Q. And also, industrial land in Suffolk it's important  
10 that it also be relatively close to the Expressway.

11 A. That's correct. Actually, in looking at the zoning  
12 map, the bulk of industrial lands is typically centered around  
13 the Expressway. And in Suffolk most of that existing developed  
14 industrial property is actually in western Suffolk.

15 Q. Okay. And how close is this property to the  
16 Expressway?

17 A. This property is a number of miles from the  
18 Expressway. It's actually north, not only of Middle Country  
19 Road, but all the way up to Route 25A. So it's a good distance  
20 from the Expressway.

21 Q. Now you also mentioned the comprehensive plan. Let's  
22 deal first with Brookhaven.

23 MR. CLASEN: Could we show the witness Exhibit 2,  
24 please.

25 (Handing document to the witness.)



1 THE WITNESS: Thank you.

2 Q. Do you recognize Exhibit 2?

3 A. I do. It's the 1996 comprehensive land use plan for  
4 the Town of Brookhaven.

5 Q. Was this plan in effect as of November 2005?

6 A. Yes, it was. It was prepared, my understanding, in  
7 1995 and adopted in 1996.

8 Q. What again do you -- it's about the comprehensive  
9 plan?

10 A. Again, zoning in New York State, as I understand it,  
11 is required to be in accordance with a comprehensive plan. So  
12 it's an important guiding document for municipal officials as  
13 they consider zoning applications. Typically, you would want to  
14 see that any rezoning action is consistent with the  
15 recommendations and the policies that are enumerated and  
16 incorporated within the comprehensive plan itself.

17 Q. Now you looked at the plan and made some determination  
18 as to whether the plan was consistent or inconsistent with the  
19 rezoning; is that correct?

20 A. Yes, I did.

21 Q. Okay. What policies did you see in the plan that were  
22 relevant to this analysis?

23 A. I was actually quite surprised by some of policies  
24 that were specifically enumerated in the plan. Most  
25 comprehensive plans that I'm familiar with are very general in

1 terms of their descriptions. Many times elected officials are  
2 somewhat reluctant to tie their hands to specific zone policies  
3 within a comprehensive plan. This plan is a little unique in  
4 that respect in that it has very specific recommendations as it  
5 relates to industrial property, particularly.

6           Within the plan it talks about the need to consider  
7 rezoning of a series of categories of industrial properties and  
8 there are four or five categories, one category where industrial  
9 properties that were undeveloped or underutilize, such as the  
10 subject property. And we looked at that as a classic example of  
11 a property that a very small portion of the actual industrial  
12 land was actually in development or would likely be in  
13 development in the immediate future.

14           Q.    Okay. And this property you said was undeveloped  
15 virtually at this time, except for little spots?

16           A.    That's correct.

17                   MR. RYAN:  Objection to leading.

18                   MR. CLASEN:  Okay.

19                   THE COURT:  I'm sorry, Mr. Ryan?

20                   MR. RYAN:  Objection to leading.

21                   THE COURT:  Sustained.

22           Q.    What was the status of the development of this  
23 property?

24           A.    It was under -- what I would characterize as  
25 undeveloped. There was a very small portion of the property

1 that was actually in use as industrial property at the time.

2 Q. And did you come to any conclusions as to the likely  
3 development of the property for industrial purposes?

4 A. In terms of the industrial market, and I've had  
5 numerous conversations with the development community over the  
6 years in terms of the likelihood of industrial development into  
7 the future, it was that center for industrial development was  
8 still Hauppauge at the present time, that area in and around the  
9 Hauppauge Industrial Park as well as Veterans Memorial Highway  
10 in the vicinity of McArthur Airport.

11 Even that Veterans Memorial Highway corridor was not  
12 under intense pressure for development. And the town actually  
13 exacted a number of controls to make sure that existing surplus  
14 in industrial lands wasn't rezoned to other zoning categories so  
15 they could maintain it as a tax base.

16 So in terms of this property, I would have considered  
17 it to be years into the future that it would have been likely  
18 used for development of additional industrial property on a  
19 significant scale.

20 Q. Now were any the policies in the comprehensive plan as  
21 to identify it being zoned?

22 A. Yes. In addition to underdeveloped property, the plan  
23 specifically talks about industrial properties that are spot  
24 zoned or isolated as industrial tracts and surrounded by  
25 residential enclaves. And again, in looking at this property

1 that's predominately surrounding by residential single-family  
2 zoning, consistent with that policy enumerated with the plan it  
3 talks further about industrial properties that intrude into or  
4 access through residential communities.

5           And again, looking at the area immediately surrounding  
6 the subject property, both south along Stony Brook Road, south  
7 along Mills Pond Road as well as north along Route 25A, it's  
8 predominately a residential single-family development. The main  
9 access to the property, in addition to 25A, any access going  
10 south would, in fact, have to go down these predominately  
11 narrow, winding residential streets to the south.

12           Q.    Were there any other general policies that you  
13 identified?

14           A.    Yes.  There was a couple of others in terms of -- one  
15 was that it was underdeveloped industrial property, another was  
16 that it was surrounded or intruded into industrial zoning --  
17 residential zoning, excuse me.  Another was that it was  
18 representative of spot zoning.  And I think the final criteria  
19 that we looked at that we thought was applicable and consistent  
20 with this was the fact that it didn't have appropriate access to  
21 justify the intensive trip generation that would normally be  
22 associated with industrial and commercial development.

23           Q.    Now you have up on the screen, a map which is attached  
24 to your report.  It's the second exhibit to your report; do you  
25 recognize that map?

1 A. Yes, I do.

2 Q. Can you tell us where does that map come from?

3 A. This is a map with the appendix of a comprehensive  
4 plan from 1996. And it's the proposed land use map or the  
5 recommendation for future land use development in the town  
6 moving forward from 1996.

7 Q. Okay. Now where is the property on this map?

8 A. The property is in the northwest corner or the top  
9 left-hand corner of the map and it's essentially due west of  
10 that blue area that you can see.

11 MR. CLASEN: I've given the witness a pointer,  
12 Your Honor, so we can see if he can do it from a angle.

13 THE COURT: So noted.

14 THE WITNESS: See if I can work the pointer  
15 first.

16 MR. RYAN: Don't blind yourself.

17 MR. CLASEN: It should be a red button,  
18 Mr. Gulizio?

19 THE WITNESS: Oh, that red button?

20 THE COURT: The red button. There you go.

21 THE WITNESS: Oh, I got it. I'm sorry. So much  
22 for my expert status. It's right there.

23 MR. CLASEN: So much for the smoothness.

24 Q. Okay, that's the property that's in -- on this map  
25 it's in the upper left-hand corner, right?

1 A. That's correct.

2 Q. And it's blue, right? It's depicted as blue here?

3 A. That's correct. It's light blue right there.

4 Q. Light blue. And what's the significance of its being  
5 depicted in light blue?

6 A. That light blue designation is that it's proposed to  
7 be developed as a Planned development district or a PDD.

8 Q. And to jump ahead, what is your conclusion as to what  
9 the likely rezoning of this property is going to be?

10 A. Our recommendation was that the most likely,  
11 reasonable probability of development would be as a Planned  
12 development district or a PDD.

13 Q. Now you mentioned another factor that you dealt with,  
14 which was the actual rezoning policies as applied by the various  
15 towns; is that correct?

16 A. Uh-huh.

17 Q. Actually, before we get to that, what about Smithtown?  
18 Did Smithtown have a comprehensive plan?

19 A. Smithtown had a comprehensive plan. At the time of  
20 the draft of the report, they were in the process of updating  
21 their comprehensive plan. It was very dated. It was from --  
22 there were series -- portions of it adopted in the 1950s, I  
23 believe, going back to '57.

24 Q. So what consideration, if any, did you give to the  
25 Smithtown comprehensive plan?

1           A.     Again, in view of the fact that they were in the  
2 process of updating their comprehensive plan and that the  
3 existing comprehensive plan was so dated, I didn't give it much  
4 weight.

5           Q.     Now the last factor I think you mentioned, and I just  
6 said, was the actual rezoning history that both towns utilized;  
7 did you take a look at that?

8           A.     Yes. I took a look at several rezoning within each of  
9 the towns.

10          Q.     Let's take a look at your report, if we could, where  
11 you deal with those. Beginning on page 14, you identify several  
12 properties in the Town of Brookhaven; is that correct?

13          A.     That's correct.

14          Q.     Okay. Well, just generally, what were you trying to  
15 do here?

16          A.     We were trying to look at a pattern of the policies  
17 that the Town Board adopted with respect to rezoning in recent  
18 time periods at it relates to properties similar to the subject  
19 property.

20          Q.     Okay. The first property is the Silver Park  
21 Apartment; why is that included?

22          A.     Well, that property, which is located in the Hamlet of  
23 the Outbank is located actually on the Expressway at Exit 66,  
24 which is Mills Road also. It's in the northwest corner. It's  
25 about a 200-acre property, as I recall. That rezoning, which

1 was pending during my tenure with the Town of Brookhaven was a  
2 rezoning from L1, the Light Industrial District, of about a 135  
3 of the 200-acre property, to a PRCHC -- what's called a PRCHC,  
4 which was a Planned Retirement Congregate Housing Community  
5 zoning designation which allows for senior housing units.

6 We thought that was relevant because, again, it was an  
7 industrial zoned property -- actually, in much better proximity  
8 in terms of access than the subject project and was considered  
9 for rezoning by the town; and in fact, rezoned by the town.

10 Q. When you say "better access," better access for what?

11 A. In terms of the trip generation that would normally be  
12 associated with industrial development, which would be one of  
13 the major impacts associated with industrial development, this  
14 was located directly adjacent to the north service road of the  
15 Expressway, the westbound service road. So in terms of that  
16 type of geographic location, it was ideally suited, from my  
17 standpoint in terms of industrial development.

18 Q. And it got rezoned?

19 A. It did get rezoned.

20 Q. Did it get developed?

21 A. It's in litigation right now. It was approved by one  
22 town board; that zoning approval was rescinded by a subsequent  
23 town board. And I believe the developers are in the process of  
24 negotiating a settlement to that action.

25 Q. Now Inherited Spring, can you tell me about that



1 property --

2 A. Sure.

3 Q. -- and its relevance to your analysis?

4 A. Sure. That was another application in the Hamlet of  
5 Moriches and it was a rezoning from A1, which is one acre,  
6 single-family zoning district in the Town of Brookhaven with  
7 lots with a minimum square footage of 40,000 square feet, to  
8 what's called PRCHC again, a Planned Retirement Congregate  
9 Housing Community designation. That allowed ultimately for the  
10 development of, I believe, 582 units at a density of 11.4 units  
11 to the acre.

12 Q. So this was previously zoned as what?

13 A. This was single-family zoning.

14 Q. And it got rezoned for a density of?

15 A. To a much higher zoning designation. The original  
16 rezoning included a nursing home component also. That was  
17 subsequently dropped by a subsequent development proposal and  
18 they increased the number of actually -- to the senior units.

19 Q. By the way, are you familiar with the market for  
20 housing in this area in 2005?

21 A. Sure.

22 MR. RYAN: Objection, Your Honor, beyond the  
23 scope of this witness's expertise. That's an appraisal  
24 issue.

25 THE COURT: Overruled.

1           A.     In terms of the housing market, during my tenure in  
2 Brookhaven between 2002 and 2005, there was a great number of  
3 change of zone applications submitted for senior housing,  
4 multiple-family housing and planned retirement communities. That  
5 was probably one of the most typical applications during that  
6 three-year period to the extent that the Town Board actually  
7 enacted a moratorium to consider the volume of previously  
8 approved applications as well as the volume of pending  
9 applications.

10           Q.     The next one you have is the Mile Development?

11           A.     The Mile Development Corp. was a property in the  
12 Hamlet of Mastic (phonetic) in the southeastern portion in the  
13 Town of Brookhaven. It's located on Sunrise Highway, the north  
14 service road of Sunrise Highway. And that involved a rezoning  
15 from L1, L3, and A1 properties to PRC or Planned Retirement  
16 Community.

17                     And just to be clear, L1 is that light industrial  
18 zoning we spoke of before. L3 was an industrial park zoning  
19 designation. It's no longer incorporated within the code. It  
20 was eliminated sometime in 2004. And A1 is that one acre of  
21 single-family residential zoning district.

22                     We looked at this property again because it was a  
23 rezoning of a large tract that I think the total number of units  
24 was 477 units with a density of about 3.7 units to the acre that  
25 was ultimately approved by the Town Board. And again, it was a

1 rezoning of a large tract of industrial property with a portion  
2 that was zoned residential to a planned retirement community  
3 zoning designation, which is a moderate to high density, senior  
4 citizen housing designation.

5 Q. Ultimately, you identified, I think it was nine  
6 properties in the Town of Brookhaven alone that were rezoned,  
7 right?

8 A. That's correct.

9 Q. Okay. Now you also identified some properties in  
10 Smithtown; is that correct?

11 A. That's correct.

12 Q. There are two in Smithtown you have mentioned here.

13 A. Sure.

14 Q. One is the Hamlet Estates.

15 A. The Hamlet Estates, which is a development on the  
16 north side of 347 near the Smithaven Mall was a rezoning to what  
17 called R6, which was a residential townhouse district that  
18 allows for a maximum number of units and I believe six units to  
19 the acres and I believe are one unit for every 6,720 square  
20 feet. I believe in this case the number of units that were  
21 permitted by the Town Board through the zoning action was 767  
22 units at about 1.6 units per acre.

23 Q. And you also looked at a second property, Galleria?

24 A. The other property was Galleria, which is an Avalon  
25 development, a development also off 347 and I believe the Hamlet

1 of Nesconset. That was to a residential garden apartment  
2 complex zoning designation. That zoning designation allows for  
3 a much higher density, up to 17.4 units per acre or roughly one  
4 unit for ever 25 or 2600 square foot of lot area. Ultimately,  
5 that was approved at a density of, I believe, about 14 to 14.7  
6 units to the acre.

7 Q. Now as part of your preparing your report, did you  
8 come with an expert opinion as to what the trend was of rezoning  
9 in the Town of Brookhaven and then similarly, what were they  
10 doing in Smithtown?

11 A. I think the trend in Smithtown as well as in  
12 Brookhaven was to consider diversification of the housing stock  
13 and to consider rezonings, particularly, from commercially zoned  
14 designations to moderate and low density multi-family, planned  
15 retired community designations.

16 Q. Now when a board is reviewing a rezoning application,  
17 okay, is there any difference that they give to going from one  
18 type of residential to another type of residential versus  
19 industrial to residential?

20 A. Absolutely. And one of the --

21 Q. Can you explain what is the difference?

22 A. Sure. We mentioned earlier the idea that there was  
23 five factors that go into a zoning analysis. You look at the  
24 comprehensive plan. You look at the nature and character of  
25 developed surrounding the property. You look at the individual

1 site constraints. You would look at recent zoning policy and  
2 you would look at the existing zoning. That's one of the more  
3 relevant factors. The relevant comparison for most Town Boards  
4 when they consider change of zone application they'll listen to  
5 the policy as it's enumerated by the planning staff, but at the  
6 end of the day they're going to apply a balancing test. And  
7 they're going to look at whether development under the existing  
8 zoning is better or worse for the community or more -- less or  
9 well accepted by the community than development under the  
10 proposed zoning category.

11           And again, in that case, when you're looking from a  
12 zoning from say light industrial zoning or business zoning to  
13 residential zoning, even if it's moderate to high density,  
14 typically, the community as well as local boards will look at  
15 the impacts associated with the multiple family zoning  
16 designation or the planned retirement community as being much  
17 less significant than the development or the impacts associated  
18 with development under industrial zoning category.

19           Again, in large part because an industrial zoning  
20 category is going to eat up more of the land. You can't really  
21 cluster an industrial development very easily because you have  
22 parking requirements, drainage requirements and it's going to  
23 eat up more the ground floor because of the size of the  
24 structure. The floor/area ratio alone for an industrial  
25 property is larger than what's permitted for a residential

1 development and also because the impacts tend to be much greater  
2 for that type of commercial development.

3 A residential development, even if it's moderate  
4 density, can be clustered down to even 20 percent of the total  
5 footprint of the entire property, preserving 80 percent of the  
6 property as open space or for whatever purpose of passive  
7 recreational purpose. So yes, I do apply those standards  
8 differently, based upon the existing zoning.

9 Q. If you go from residential -- one type of residential  
10 to a higher density residential, is it harder to get that  
11 approved from an industrial to higher density?

12 A. My experience over the last 22 years has been very  
13 clear that going from a residential single-family zoning  
14 designation to a higher density zoning designation is much more  
15 difficult than going from a commercial zoning designation to  
16 even a moderate to high density zoning designation.

17 Q. And why is it more difficult?

18 A. Because, again, the impacts associated with the  
19 existing zoning are typically looked at more severely by both  
20 the public as well as board members than the impacts associated  
21 with residential single-family zoning.

22 Q. There's a discussion in one of the other reports that  
23 rezoning is essentially a political process; is that correct?

24 A. Politics are a part of every change of zone  
25 application to a greater or lesser degree. Yes.

1 Q. Did you consider the politics --

2 A. Yes.

3 Q. -- in deciding whether there was a probability of  
4 rezoning?

5 A. Yes. I have stood before many town boards, you know,  
6 pontificating on policy and why something ought to be approved  
7 based on policy. But the pragmatic aspect of it is that many  
8 times town boards are going to look at the practical aspect to  
9 whether or not there's support or opposition for an individual  
10 project, regardless of the consistency with the comprehensive  
11 plan. And in this case, based upon the intensive nature of the  
12 variety of permitted uses of "as of right," under the existing  
13 zoning, it seemed to us that certainly that was going to be a  
14 large consideration --

15 MR. RYAN: Objection.

16 A. -- for the town board.

17 THE COURT: Mr. Ryan, you're objecting?

18 MR. RYAN: Yes, Your Honor. It's certainly  
19 beyond the scope of the report and we're talking about a  
20 political view -- of whom?

21 THE COURT: Is the Attorney General's Office is  
22 saying that politics doesn't play any role whatsoever in  
23 zoning in the State of New York?

24 MR. RYAN: Certainly, not, Your Honor. And the  
25 Attorney General does not pretend to be an expert in it.

1 THE COURT: Well, politics is known --

2 MR. RYAN: And this witness is testifying as an  
3 expert and giving us an opinion. I did not that he was a  
4 political commentator as well as a planner.

5 THE COURT: I don't know if he's giving an  
6 opinion. He's answering a question as to his 24 years of  
7 experience in administering and working with town zoning  
8 boards.

9 MR. RYAN: Your Honor, I did not --

10 THE COURT: And I'm listening to that. The only  
11 opinion, Mr. Ryan, I've heard is yours.

12 MR. RYAN: Your Honor, I did not stand up to  
13 object until the witness started getting into the view --  
14 the political view as to this property.

15 THE COURT: Well, the objection is overruled.

16 MR. RYAN: Okay.

17 Q. Can you answer the question, please, Mr. Gulizio?

18 A. Sure. Again, just refresh --

19 Q. How did the politics come into play with your  
20 determination of the rezoning?

21 A. Again, with every rezoning we're going to look at the  
22 likelihood of opposition under development of the existing  
23 zoning, in this case the light industrial development versus  
24 opposition under the scenario of rezoning to a moderate density  
25 or a low density residential development and what type of



1 community reaction there would be for that because that would  
2 have a direct influence, typically, based upon my experience, on  
3 the determination -- the ultimate determination of a town board.

4 Q. And here would you expect significant opposition for  
5 industrial use?

6 A. Again, I --

7 MR. RYAN: Objection, Your Honor.

8 THE COURT: Your objection now is?

9 MR. RYAN: Speculative.

10 MR. CLASEN: It's in his report. He's saying  
11 this is one of the reasons why.

12 THE COURT: Sustained to the extent that, yes,  
13 it's speculative. But that's part of the determination  
14 that the Court goes into. So yes, it is a speculative  
15 determination, but that's his determination. Go on.

16 MR. CLASEN: Everything here is always  
17 speculative to what's going to happen. He's been doing  
18 this for 22 years. He has a reasonable basis for  
19 anticipating opposition to certain types of plans.

20 THE COURT: Yes. I'll accept it to the extent  
21 that that's his speculation as to what happens in these  
22 types of things. And Mr. Ryan you're totally free to  
23 present witnesses to make the same, and I assume you will  
24 be, to make the same type of speculation as to what goes on  
25 or doesn't go on and what could go on.

1 Q. You're anticipating more opposition to the industrial,  
2 obviously?

3 A. I would have anticipated much opposition to the  
4 industrial. Again, industrial zoning allows for a building  
5 height of 60 feet or 4 stories, allows for a 35 percent FAR as  
6 opposed to a 25 percent FAR. There's a tremendous amount of  
7 parking associated with those types of uses. The trip  
8 generation could be significantly greater for any of the variety  
9 of industrial uses than the residential development, even a  
10 moderate density residential development. And I would have  
11 absolutely anticipated more opposition to the industrial than  
12 the residential development.

13 Q. And that's based on what, your 24-years experience?

14 A. It's 22 years of experience.

15 Q. Okay.

16 A. And again, handling hundreds of zoning applications  
17 before a variety of town boards.

18 Q. Now --

19 THE COURT: Can I just ask you quick before -- in  
20 discussing what you use as a broad-based politics, I assume  
21 that's with a small "p" and includes community opposition  
22 or support to the extent that then influences small "p"  
23 politics.

24 THE WITNESS: Absolutely.

25 THE COURT: Is that what you were talking about?

1 THE WITNESS: Absolutely, Your Honor. It's  
2 non-discriminatory when it comes to party affiliation.

3 THE COURT: Thank you.

4 Q. And how familiar are you with the politics of the  
5 board of the Town of Brookhaven for November 2005?

6 A. Again, I served as the commissioner of the department  
7 for three years. I sat in on virtually every work session twice  
8 a month, discussing land use matters with the board and policy  
9 matters with the board during that time period. I appeared  
10 before every single Town Board hearing that roughly three-year  
11 period. I think I might have missed a portion of one Town Board  
12 hearing during that tenure.

13 I worked extensively with the board on a series of  
14 code amendments during that time period, sitting on numerous  
15 sessions, conducting public hearings to again to develop, I  
16 think, a pretty decent familiarity with their concerns and  
17 issues associated with land development applications.

18 Q. Now how about the Town of Smithtown -- some  
19 familiarity with how they were operating?

20 A. Again, I've worked as a professional planner again for  
21 22 years. I know the Smithtown planning director. I'm familiar  
22 with the development patterns in the town, having been a Town of  
23 Islip resident just south of the board with the Town of  
24 Smithtown. They are a mature, suburban community. They are  
25 fairly predictable in their land use patterns in terms of trying

1 to maintain an existing quality of life. So I would say I'm  
2 somewhat familiar with their decisions and their policies also.

3 Q. Now ultimately, in your report you come up with a  
4 conclusion on the issue of a reasonable probability of rezoning,  
5 right?

6 A. That's correct.

7 Q. Okay. First, let's deal with your conclusion  
8 regarding the density, okay. What was the density you  
9 recommended?

10 A. Again, I recommended that the most reasonable  
11 probability of density would be between three and six units to  
12 the acre.

13 Q. And again, you're saying it's going to be rezoned as  
14 residential, right?

15 A. That's correct.

16 Q. PDD?

17 A. That's correct.

18 Q. Okay. Now how did you come with a three to six units  
19 per acre determination?

20 A. Well, a couple different ways. Number one, we looked  
21 at the actual zoning code and we looked at the densities that  
22 were permitted under the zoning code. A planned development  
23 district can apply any density that's permitted under any of the  
24 other zoning district within the town code. So I analyzed the  
25 multiple family residences zoning district, the planned

1 retirement community residences zoning district and the planned  
2 retirement congregate housing community residences district.  
3 All three of those districts I actually drafted while I was  
4 employed as the commissioner of the town. So I'm somewhat  
5 familiar with the densities that are permitted and the  
6 requirements associated with them. Densities for planned  
7 retirement communities and multiple-family housing communities  
8 range any place from 8 to 12 units per acre for primary  
9 locations, between 4 to 6 units per acre for secondary locations  
10 and tertiary locations are 2 to 4 units per acre. Again,  
11 primary -- just to take a step back. I apologize. But the town  
12 looks at multiple family housing and planned retirement  
13 community locations as a series of levels in terms of the  
14 appropriateness of those locations. Primary locations of those  
15 locations with direct access or within 500-foot access of  
16 traditional downtowns; but it also importantly considers  
17 underutilized commercial properties and industrial properties.  
18 So in that case I would consider this as an underdeveloped or  
19 underutilized industrial property as potentially a primary  
20 location for multiple family housing or planned retirement  
21 community?

22 Q. And again, as a primary what's the density that's  
23 permitted?

24 A. Up to 12 units per acre. And again, in addition to  
25 the looking at the actual zoning districts, I also looked at the

1 history of zonings and the typical densities that were  
2 considered by the board over the last roughly five to seven or  
3 five to ten years. Again, those densities range from a high of  
4 11.4 units per acre for, I believe, it was Harriet Square, 582  
5 units with a density of 11.4 or 11.7 units to the acres to a  
6 level of about three units per acre. And again, we felt,  
7 conservatively speaking, that three to six units was well within  
8 the range when it, again, considered other applications that are  
9 referenced in the report, such as Earth Road at East Moriches,  
10 which was the light industrial zoning designation on a fur-line  
11 road and the Hamlet of East Moriches on the north side of the  
12 roadway. That was rezoned from light industrial development to  
13 Planned Retirement Community, PRC, at a density of seven units  
14 to the acre. I think 324 total units based again -- there was  
15 litigation involved in that site; and the litigation stemmed  
16 from the fact that the existing industrial use was not wanted by  
17 the community and they were trying to get rid of it. So one of  
18 the incentives to get rid of that industrial district was it was  
19 deemed incompatible with surrounding residential development,  
20 was to allow for its redevelopment as a planned retirement  
21 community at a density of seven units to the acre.

22 Q. So you ultimately conclude three sets and that's for the  
23 reasons you said; and that's on the conservative side.

24 A. And also one of the other criteria -- again, in fact

1 it's strongly, in terms of the likelihood of that density and  
2 the likelihood of the rezoning was the fact that this probably  
3 was not only consistent with the general principles within the  
4 comprehensive plan, those four or five criteria that we looked  
5 at in terms of spot zoning, underdeveloped, poor access and  
6 surrounded by residential development; but also by the fact that  
7 this comprehensive plan, I think, fairly uniquely specifically  
8 called out this property to be rezoned to planned development  
9 district based upon the map that's shown in the courtroom today.

10 Q. Now you also came up with the probabilities of  
11 rezoning -- a percentage, right?

12 A. Correct.

13 Q. What was your percentage for Brookhaven?

14 A. We said 90 to 95 percent.

15 Q. Okay, that's pretty high. Why did you come up with  
16 such a high percent at Brookhaven?

17 A. Based upon all those factors we were talking about --  
18 again, zoning is required under state laws and I understand to  
19 be in accordance with a comprehensive plan. In this case we not  
20 only have a comprehensive plan that again is fairly generic in  
21 terms of identifying types of industrial properties that ought  
22 to be rezoned to planned development district, but specifically

1 identifies this property as one that should be rezoned to  
2 planned development district, based upon the map. Again,  
3 looking at that and also looking at the pattern of rezoning over  
4 the year -- over the last -- you know, the recent years leading  
5 up to this action, lead me to believe there were 90, 95 percent  
6 certainty, based upon the code provisions, the densities  
7 permitted, based upon the comprehensive plan and based up on the  
8 history of rezoning, with 90 to 95 percent, ultimately this  
9 would have been rezoned to a Planned development district with  
10 that type of a density.

11 Q. Now what was the percentage you came up with  
12 Smithtown?

13 A. Smithtown I said it was a lower percentage, 70-75  
14 percent

15 Q. Why?

16 A. Because again, it didn't have the strength of the  
17 comprehensive plan behind it. The comprehensive plan was dated.  
18 It didn't have specific policy addressing this property within  
19 the comprehensive plan or any generic policy that really would  
20 have called this property out. It's also -- I don't think  
21 Smithtown has quite the history in terms of rezoning for these  
22 types of developments that Brookhaven has had in the last ten  
23 years or so. So based upon that, we lowered the reasonable



1 probability.

2 Q. What you've just identified was two, in fact. One was  
3 the existence of a comprehensive plan and the history of  
4 rezoning as being somewhat different in Smithtown?

5 A. Correct.

6 Q. How about the application of the other factors? Was  
7 that different in Smithtown or the same?

8 A. Again, in terms of the other factors, and particularly  
9 the balancing test that most boards would normally apply. Are  
10 we better off with the existing development versus the proposed  
11 development under the new zoning, I think is very consistent  
12 with the Town of Brookhaven. And that, generally speaking, a  
13 light industrial development would have looked at as more  
14 intense, more potentially impacting to the surrounding  
15 residential development than the proposed moderate, residential  
16 development I think would have been supported for those reasons,  
17 both by the public as well as by the Town Board.

18 Q. Okay.

19 MR. CLASEN: Thank you very much, Your Honor. No  
20 further direct questions for this witness.

21 THE COURT: Thank you. Mr. Ryan, why don't we  
22 take a couple minutes for you to -- we'll adjourn to 11:15.  
23 Will that give you enough time, Mr. Ryan?

1 MR. RYAN: Very good. Thank you.

2 THE COURT: Fine. Thank you.

3 (Off the record.)

4 THE COURT: Mr. Ryan, are you ready to commence  
5 your cross-examination?

6 MR. RYAN: I am, Your Honor.

7 THE COURT: Then please do so.

8 MR. RYAN: Thank you.

9 CROSS-EXAMINATION

10 BY MR. RYAN:

11 Q. Mr. Gulizio, I believe your testimony, if I heard you  
12 right, and you'll have to forgive me, I don't hear well, was  
13 that in your professional opinion the likely change of zone for  
14 this property in the Town of Brookhaven, in any event, is to a  
15 PDD?

16 A. That's correct.

17 Q. Now you, in your report, which is Exhibit 1, quote  
18 what a PDD is, correct? And do you have your report before you?

19 A. Yes, I do.

20 Q. Where in the definition of a PDD do I find that it  
21 requires a residential construction or use?

22 A. A planned development district, by definition, allows  
23 for any of the underlying zoning categories to be considered.  
24 The two planned development districts that were referenced in  
25 the report both involved rezonings to allow for residential

1 zoning designations -- townhouses and single-family homes.

2 Q. You quoted, as I said, and I'll ask the question  
3 again, extensively from the town's PDD the definition of what it  
4 means by a PDD, correct? Where do I find in that definition the  
5 requirement that the development in a PDD be residential?

6 A. It doesn't require that a development be exclusively a  
7 residential under a Planned development district. Again, it  
8 allows for any of the permitted uses in any of the other zoning  
9 districts also.

10 Q. Okay. Does it require that some residential usage be  
11 in a PDD?

12 A. Not to my understanding.

13 Q. Can a PDD be all commercial and industrial?

14 A. Yes. A planned development district could be all  
15 commercial or industrial.

16 Q. Could it be all government service facilities?

17 A. A planned development district, again, could be any of  
18 the permitted uses under any of the other zoning categories  
19 under the town code.

20 Q. Okay, a school?

21 A. Yes, institutional uses also.

22 Q. So it isn't the potential change of the portion of  
23 this property in Brookhaven to PDD that makes it required to be  
24 developed or most like -- probably, in your view, developable as  
25 a residential parcel, correct?

1           A.    I think the planned development district is a vehicle  
2 that allows for the greatest flexibility of development.  And in  
3 this case I thought the most appropriate development pattern  
4 would be a residential zoning category.

5           Q.    Okay.  So it's not the zoning requirements of PDD, but  
6 your view in this case that residential development in a PDD  
7 process would be the most suitable?

8           A.    Again, I think based upon the fact that it was  
9 currently zoned for light industrial development, if an  
10 industrial development character was what the Town Board saw as  
11 most appropriate for the property, it wouldn't have been  
12 considered for a planned development district.  So yes --

13          Q.    All right.

14          A.    -- my professional judgment lead me to believe that a  
15 residential zoning category would be most appropriate.

16          Q.    Well, let's get to that then.  Mr. Gulizio, this  
17 property is zoned industrial, correct?

18          A.    L1 Light Industrial District --

19          Q.    Right.

20          A.    -- and light industrial in Smithtown also.

21          Q.    And when you considered, in comparing the various uses  
22 that could be made of the property, you considered the possible  
23 yield for an industrial build out of this property, correct?

24          A.    That's correct.

25          Q.    Now did you consider the maximum residential yield

1 that could be achieved on this property?

2 A. Under the industrial zoning or under the planned  
3 development --

4 Q. No, under the change of zone --

5 A. -- district?

6 Q. Under any of the categories?

7 A. Yes.

8 Q. Okay. And did you make a study of that?

9 A. I'm not sure if I understand the question. What I  
10 considered was the potential build out under the existing  
11 zoning, comparing that to what I felt was the most reasonable  
12 probability of rezoning or use of the property, which was  
13 moderate density to low density residential development.

14 Q. Okay. The industrial zoning under L1 was too dense,  
15 correct?

16 A. Relatively speaking, in comparison to a low to  
17 moderate density residential development, I felt it was more  
18 intense than that. I'm not sure what you mean by "too  
19 intensive." The zoning code permits a certain level of density.

20 Q. Under the zoning code?

21 A. Correct.

22 Q. But too dense for this site?

23 A. Based upon the surrounding nature and character of  
24 development of the property, the potential of the access to the  
25 property, the limited nature of the roadway access to the

1 property I felt that it would have been significant adverse  
2 impacts with development under the existing zoning. Yes.

3 Q. Now the limited nature of access and roadways around  
4 the property that's the same, both for industrial use or for  
5 residential use, correct?

6 A. The size of the roadways doesn't change, but if I  
7 could just --

8 Q. Right. But the infrastructure doesn't change. The  
9 same infrastructure affects this property whatever is used.

10 A. If I could just finish, though. What does change is  
11 the trip generation associated with the industrial development  
12 versus the residential development or the stress that it puts on  
13 those roadways.

14 Q. Okay. Where do I find in your report reference to the  
15 relative trip generation?

16 A. I don't believe it's referenced in the report. The  
17 trip generation I talk about the fact that industrial uses, in  
18 general, have a much higher trip generation characteristic than  
19 residential development. I base that upon, again, 22 years of  
20 looking at traffic studies, analyses under the Institute of  
21 Transportation Engineers Trip Generation Manual, which shows  
22 that, again, per acre of property typical trips associated with  
23 a single-family residential development can range between say  
24 any place from five to ten trips per day on average for a  
25 weekday trip versus a variety of industrial uses or office uses

1 it could be as high as 70 trips per day per thousand square foot  
2 or per acre.

3 Q. That's fine. But what is it actually you were  
4 comparing here? I mean a 20-story building with apartments in  
5 it versus a 10,000 square foot warehouse -- what is it you were  
6 comparing in this trip generation analysis you did?

7 A. Again, the Institute of Transportation Engineers Trip  
8 Generation Manual, which is the bible we use to estimate traffic  
9 associated with individual land use types, has done decades of  
10 research in terms of the expected number of trips, either per  
11 unit or per acre of property or per thousand square foot of  
12 property associated with virtually every development type.  
13 We've used that for 20 years and that's what I would base my  
14 estimates upon.

15 Q. Okay. Is there some planning rule that every  
16 industrial development will always produce more trips than any  
17 possible residential development?

18 A. There's no absolutes with trip generation. But what  
19 the ITE does it looks at a spectrum of uses over a period of  
20 time, analyzes thousands of cases in terms of what's the average  
21 trip generated for each land use type. And again, uses come and  
22 go, so what may be initially a very low intensity use in terms  
23 of trip generation could years from then be a very intense use  
24 in terms of trip generation, so that's why we use the average  
25 within the ITE.

1 Q. Mr. Gulizio, you're considering a particular property  
2 and considering trips on this property in residential or  
3 industrial use, correct?

4 A. Correct.

5 Q. The average for a 1500-unit residential use would that  
6 be the same as or higher or lower than the current industrial  
7 use of the property in 2005?

8 A. Again, I think that's the wrong comparison. What we  
9 would look at --

10 Q. Please, answer my question.

11 A. Well, I'm trying to answer your question, but the  
12 comparison that I would make as a professional planner is the  
13 potential build out under the existing zoning, not what the  
14 existing use of the property is. Because ultimately that use,  
15 as it has a varied application, could change. So it's not  
16 relevant in my analysis as a planner to look at just the  
17 existing development. If the property were vacant, it wouldn't  
18 generate a lot of traffic either. So we would look at it in  
19 terms of the likelihood of build out under the existing zoning,  
20 comparing that to the proposed rezoning, not the existing  
21 development.

22 Q. Now answer my question.

23 A. Could you repeat your question, please?

24 Q. Sure. My question is which would produce a higher  
25 trip generation, a 1500 unit residential use of this property or



1 the existing industrial use of this property as it existed in  
2 2005?

3 A. I can't answer that question without seeing a traffic  
4 impact study from what the existing use generates.

5 Q. All right. In answering that question for purposes of  
6 your analysis, did you use a traffic impact study?

7 A. No. Again, I looked at the ITE and its anticipated or  
8 estimated trip generated based upon a variety of uses --

9 Q. Okay.

10 A. -- that would be permitted.

11 Q. So you can't tell us that an 80-tenant residential use  
12 of this property in 2005 would generate less trips than 1500  
13 residential units --

14 A. No.

15 Q. -- because you need a traffic study in order to do  
16 that, correct?

17 A. I can't calculate what the -- without a traffic study,  
18 I couldn't tell you the number of trips that are coming from the  
19 existing use, so I couldn't compare them.

20 Q. I didn't ask you the number of trips. I asked you to  
21 make the comparison, which is greater and which is less. That's  
22 a simple seesaw equation.

23 A. I can't make a comparison when I don't know what the  
24 number of trips are.

25 Q. All right, what is the number of trips that you used,

1 and where do I find it stated in your report, for the potential  
2 residential use of this property?

3 A. Again, I didn't state specific trip generation numbers  
4 within the report. It's my understanding there's a separate  
5 traffic study to generate that. What I did was talk, generally  
6 speaking, in terms of trip generation associated with different  
7 types of land use category, which was supported by the ITE.

8 Q. Okay. All right. And similarly, you didn't look at  
9 any numbers for an industrial use of this property, correct?

10 A. Again, I looked at numbers under the ITE in terms of  
11 what trip generation would be for a variety of different uses  
12 were permitted as of right under a light industrial zoning  
13 district.

14 Q. Okay. A full build out the existing L1 zone is what  
15 you looked at?

16 A. I looked at the build out based upon the estimated  
17 growth that could potentially occur on the property, based on a  
18 variety of FARs, the maximum FAR down to the a 25 percent FAR.

19 Q. Only for industrial use?

20 A. I looked at a number of different land use categories  
21 under an industrial district. That could be anything from a  
22 warehouse use, which wouldn't generate a significant amount of  
23 traffic per thousand square feet versus an office use that could  
24 generate potentially a significant number.

25 Q. Okay. And what was the range of industrial

1 development that you considered? In speaking with Mr. Clasen,  
2 you talked about millions of square feet. How many millions of  
3 square feet was the maximum that you considered and what was the  
4 size of the minimum that you considered for this trip generating  
5 industrial use in the industrial zone?

6 A. I estimated an FAR of about 25 percent under the low  
7 end of the spectrum and 35 percent, which is the maximum  
8 permitted under the code, under the high end of the spectrum.

9 Q. All right, you've offered me percentages and I asked  
10 for square feet.

11 A. That would result in roughly a square foot range of  
12 between approximately 3 million square feet to 4 and 1/2 million  
13 square feet.

14 Q. Three million to two and a half?

15 A. Three million to four and a half.

16 Q. Four and a half? Okay.

17 A. Depending upon the amount of parking that they  
18 accommodated, the buffers and landscaping requirements.

19 Q. Okay. Now did you consider a less dense industrial  
20 development, say in a PDD development in an industrial use?

21 A. Again, I considered a range of densities going down to  
22 about an FAR of 25 percent, which is less dense than the maximum  
23 permitted at 35 percent.

24 Q. I understand that it's less than the maximum. What  
25 density would be permitted in a PDD?

1           A.     Again, the Town Board has the authority to vary the  
2 maximum permitted standards under a planned development district  
3 as part of the zoning application or to apply any of the  
4 underlying zoning requirements. So they could apply the 35  
5 percent FAR. They could apply a lower FAR. That's within their  
6 discretion as a legislative act.

7           Q.     Right. They could apply a 10 percent or a 5 percent.

8           A.     Assuming there's a rational basis to the application  
9 of the standard, they can place reasonable conditions on a  
10 rezoning. Yes.

11          Q.     Right. As you've indicated, the PDD zone is a  
12 procedural statute, correct? It allows for greater latitude in  
13 the use of a particular property. It could be used for anything  
14 allowed in the code so long as the town approved, correct?

15          A.     Okay, I wouldn't characterize it as a procedural  
16 zoning category. It's a separate zoning category that's  
17 permitted under the code, just like any other zoning category.  
18 I wouldn't, you know, characterize it as procedural. If any  
19 rezoning application, whether it's to a planned development  
20 district or to a residential district or a commercial district,  
21 there's a process associated with, but I don't know what you  
22 mean by a "procedural" zoning district.

23          Q.     If there were a change of Gyrodyne zoning in the Town  
24 of Brookhaven to a zone --

25                   MR. RYAN: One second.

1 Q. -- MF, would the town be able to -- Town Board, in  
2 granting that, be able to set a density requirement?

3 A. The Town Board, in connection with any rezoning, could  
4 set a reasonable condition if it has a rational basis to it. So  
5 yes, they could limit density in connection with a rezoning.

6 Q. Okay. So an MF in the Town of Brookhaven is a multi-  
7 family residential district, correct?

8 A. Correct.

9 Q. And you tell us that it allows a maximum density or  
10 between six and nine units per acre?

11 A. It actually allows up to a maximum of 12 units per  
12 acres if all the units are set aside as workforce or affordable  
13 housing units.

14 Q. If the Town Board had reason to, it could change the  
15 zone to MF, but impose two units per acre requirement?

16 A. If there was a rational basis to that limitation and  
17 they explained why it was inconsistent with the comprehensive  
18 plan, they could change it to a separate zoning category,  
19 theoretically.

20 Q. Well, but what do you mean by separate zoning  
21 category?

22 A. Other than what was recommended in the comprehensive  
23 plan, which was a planned development district.

24 Q. Okay. As a matter of fact, the Town Board in  
25 Brookhaven it was not bound to do this, correct, to change it to

1 a PDD?

2 A. They're bound to take actions that are consistent with  
3 the comprehensive plan or to update the comprehensive plan or  
4 explain why they're varying their policies from the  
5 comprehensive plan.

6 Q. Right. Then they need to explain why they're doing it  
7 differently, correct? But they can do it differently.

8 A. They can act inconsistent with a comprehensive plan?

9 Q. No. I didn't say anything about being inconsistent.  
10 I said different.

11 A. Yes. They have the ability to do something different  
12 than what a comprehensive plan recommends.

13 Q. Thank you.

14 A. So --

15 Q. Instead of --

16 MR. CLASEN: Wait until he's finished.

17 MR. RYAN: Oh, I'm sorry. I thought he had.

18 A. Again, subject to certain safeguards, they would be  
19 able to do that through a detailed public hearing process. So  
20 they'd need to explain why they're doing something inconsistent  
21 with the comprehensive plan. They would need to address whether  
22 or not it's consistent with the State Environmental Quality  
23 Review Act that was considered at the time of that comprehensive  
24 plan and they would have to have a rational basis for taking  
25 that action.

1 Q. I understand. But the compliance with the State  
2 Environmental Review Act, the public hearing -- having a  
3 rational basis for what you're doing is something the town is  
4 always required to do for a zoning change, correct? It can't  
5 irrationally change its zoning. It can't change its zoning  
6 without a public hearing. And it can't change its zoning  
7 without considering the environmental impact, isn't that so?

8 A. That's correct. But again that --

9 Q. So that would apply to any zoning change, regardless  
10 of whether it was in total agreement with the proposed  
11 comprehensive -- or the comprehensive plan and a proposed use of  
12 a property or varied from it?

13 A. Okay. I was just trying explain that they can't  
14 independently without any other safeguards, without any other  
15 precautions vary the comprehensive plan.

16 Q. Well, we're talking about a change of zoning, correct?

17 A. Correct.

18 Q. And a change of zoning is not -- or the zoning of a  
19 property is that determined by the comprehensive plan?

20 A. The comprehensive establishes policies for zoning  
21 actions --

22 Q. Right.

23 A. -- within the town.

24 Q. Right. Does the comprehensive plan itself identify  
25 the zoning of a particular location?

1 A. Typically, yes.

2 Q. All right. Well, the zoning of Gyrodyne's property as  
3 PDD that did not exist at any time, correct?

4 A. My understanding it was an Industrial 1 or Light  
5 Industrial prior to --

6 Q. Right.

7 A. -- up to the current time.

8 Q. Right. So this map is showing something that may  
9 occur --

10 A. It's showing --

11 Q. -- not something that did occur.

12 A. It's a recommended land use pattern. It's what they  
13 recommended for zoning action within the town.

14 Q. All right. So it's a recommendation, not an existing  
15 legal condition affecting the property?

16 A. I would characterize that again. I don't mean to be  
17 disrespectful, but the comprehensive plan is a document that  
18 establishes policy and guidelines to use as a framework on  
19 zoning actions. It's not just a recommendation. It's a policy.

20 Q. Okay. The policy of changing Gyrodyne's Brookhaven  
21 holdings to a PDD zone existed from when, 1996, I think is the  
22 date of that final or comprehensive land use plan until 2005?  
23 That policy existed --

24 A. Correct.

25 Q. -- during that entire time.



1 A. Correct.

2 Q. During that entire time, the board at any time could  
3 sua sponte make a change after examining the environmental  
4 impacts and after holding a public hearing and if it had a  
5 rational basis for the Gyrodyne property to a PDD, couldn't it?

6 A. I'm sorry. By sua sponte, you mean by the Town Board  
7 on motion?

8 Q. Correct.

9 A. On their own? Town boards can change zoning on their  
10 own motion or through an individual application.

11 Q. Right.

12 A. That's correct.

13 Q. So they had nine years to do that under the policy  
14 that was adopted in 1996, correct?

15 A. That's correct. Typically, I would tell you, though,  
16 that I would normally recommend to a town board --

17 Q. Please, I'm not asking anything beyond whether they  
18 could or could not, Mr. Gulizio. During that nine-year period,  
19 did the board at any time change zoning on its own motion?

20 A. Yes.

21 Q. As a matter of fact, it did so while you were tenured  
22 as the commissioner of zoning, correct?

23 A. The commissioner of planning, yes.

24 Q. Commissioner of planning. And it was your  
25 recommendation that it was done for a number of sites across the

1 town.

2 A. That's correct.

3 Q. It was not done for Gyrodyne, correct?

4 A. That's correct.

5 Q. And what year was it that that rezoning of -- what was  
6 it, commercial property I think in the Town of Brookhaven that  
7 you had formulated occurred?

8 A. The most significant number of rezones, I believe,  
9 occurred in 2004.

10 Q. And in 2004, you made no recommendation as to the  
11 change of this industrial -- this particular industrial parcel.

12 A. No. The districts that we were looking at in 2004  
13 involved all of the "J" business districts and the "L"  
14 industrial districts in terms of eliminating some of the "J"  
15 business districts and consolidating them into other categories.  
16 The rezones that occurred at that time were primarily taking  
17 properties where the zoning was being eliminated and putting  
18 them in some other alternative-zoning category.

19 Q. All right. Fine.

20 A. If the property zoning was not being eliminated at  
21 that time, it was not something that was typically rezoned.

22 Q. Well, you said you were looking at "L" industrial  
23 zoning, correct?

24 A. Right. We eliminated the L3 industrial park zoning  
25 designations and those properties needed to go into separate

1 zoning districts.

2 Q. Well, there were other zoning changes aside from L3  
3 industrial zoning that was initiated by the board's own motion,  
4 correct?

5 A. Yes. There were several hundred rezoning that were  
6 done during that phase of amending the code. Most of those  
7 predominately -- well, the vast majority of those were in the  
8 "J" business district categories.

9 Q. All right. So you looked at "J" business. You looked  
10 at Industrial 3 and you looked at other categories, too.

11 A. No. We looked at the "J" business district categories  
12 and the "L" industrial categories.

13 Q. But you knew during that entire time that your plan,  
14 the town's plan had specific recommendations that you've  
15 indicated applied to Gyrodyne's property regarding its need for  
16 a change?

17 A. Was I aware that the code -- the comprehensive plan at  
18 this time referred to the Gyrodyne property?

19 Q. This was your policy and your guidance in your  
20 planning for the Town of Brookhaven during your tenure as its  
21 planning director, correct?

22 A. Correct.

23 Q. And you were familiar with it?

24 A. That's correct.

25 Q. In fact, as planning director for Brookhaven back

1 in -- no, I'm sorry, commissioner back in 2002 to 2005, you knew  
2 that the need to or that the town's -- withdrawn. Back in 2002  
3 to 2005, Mr. Gulizio, you were aware of Gyrodyne's property and  
4 its unique -- fairly unique circumstances; is that correct?

5 A. I was aware that there was a pending application on  
6 it.

7 Q. And the pending application in 2002 and 2005 was for  
8 not a change of zoning to a PDD, correct?

9 A. I don't recall what the zoning designation they were  
10 seeking. I know they were seeking to develop a golf course  
11 community, a luxury golf course community.

12 Q. All right. Were you aware that Gyrodyne had applied  
13 for a zoning change to the town board in the Town of Brookhaven  
14 that would have affected ten acres of its parcel back in 2000?

15 A. No.

16 MR. RYAN: May I have a document marked? Oh, I'm  
17 sorry. It's in evidence. I'm sorry. Can I have  
18 Exhibit 13?

19 THE MONITOR: Show it to the witness?

20 MR. RYAN: Yes.

21 (Handing document to the witness.)

22 Q. Would you take a minute and look at that, Mr. Gulizio.

23 A. (No response.)

24 Q. Are you familiar with that document, Mr. Gulizio?

25 A. No. I haven't seen it before.

1 Q. What is it?

2 MR. CLASEN: Objection. He hasn't seen it  
3 before.

4 MR. RYAN: He's seeing it now, Your Honor. It's  
5 in evidence.

6 MR. CLASEN: It's a document --

7 THE COURT: If he can identify it, Mr. Clasen,  
8 we'll let him respond.

9 MR. CLASEN: Okay.

10 A. It's a letter from the then Town Clerk Stan Allen to  
11 Mr. Pitsiokos, attached with a resolution from the Town Board  
12 dating from February of 2000.

13 Q. Now when you say "Town Board" and "clerk," we're  
14 talking about the town of Brookhaven?

15 A. That's correct.

16 Q. All right. And does it relate to the Gyrodyne  
17 property?

18 A. It relates to the Gyrodyne property. And I'm not sure  
19 from the resolution how much of the property it relates to,  
20 whether it's the property in its entirety or just a portion of  
21 the property. There's no description of it.

22 Q. There's a condition -- and what's the nature of the  
23 resolution?

24 MR. CLASEN: Objection, Your Honor. All he's  
25 doing now is he's just reading to us something that's in

1 evidence. I don't see the purpose of this.

2 THE COURT: Mr. Ryan, it is in evidence. This  
3 wasn't a part of any direct testimony. Is there some place  
4 you're going with this? And it's a Claimant's exhibit. I  
5 assume we're going to get to it one way or another.

6 MR. RYAN: I hope we'll get somewhere with it,  
7 Judge.

8 THE COURT: Yes, but why with this witness? I  
9 mean this isn't any -- he said he'd never -- I don't mind  
10 him identifying it, but he said he'd never seen it before.  
11 I mean he was the planning commissioner of Brookhaven, so I  
12 allowed him to identify it because, obviously, it's a  
13 Brookhaven town document ==

14 MR. CLASEN: Right.

15 THE COURT: == but after that where do you really  
16 want to go with it? I mean he has not personal knowledge  
17 of it.

18 MR. RYAN: Your Honor, I'm not certain that's so,  
19 Your Honor, but I will change --

20 THE COURT: Well, except he's already testified  
21 he'd never seen it before.

22 MR. RYAN: That's been the testimony, Your Honor.  
23 May I see Exhibit 14?

24 (Handing document to Mr. Ryan.)

25 MR. RYAN: Thank you.

1 Q. Looking at Exhibit 14, Mr. Gulizio, what is that?

2 A. It's another letter from the town clerk, then Town  
3 Clerk Stan Allen to Mr. Pitisokos regarding the previous  
4 resolution involving a PRCHC on the Gyrodyne property.

5 Q. And that's the resolution that you identified as  
6 Exhibit 13, correct?

7 A. That's correct.

8 Q. Same resolution, correct?

9 A. Well, it's a resolution related to that resolution.  
10 It's not the same resolution.

11 Q. But the resolution being referred to by the town clerk  
12 is the same resolution that's attached to Exhibit 13 -- as part  
13 of Exhibit 13, correct?

14 A. Yes, it's a numerous --

15 Q. Thank you.

16 A. I'm sorry. It's a numerous --

17 Q. Mr. Gulizio, were you copied on Mr. Allen's letter?

18 A. Yes, I was.

19 Q. So you were town planning commissioner on November 13,  
20 2002, when a matter relating to that resolution came up and was  
21 before you, correct?

22 A. Yes. I was hired about five weeks prior to this  
23 resolution being issued.

24 Q. Please, Mr. Gulizio, I'm not interested in your  
25 employment history. Isn't it so that you were copied a letter

1 relating to your duties as the town planning commissioner in a  
2 zoning application and resolution of your town board in which  
3 you were professionally interested on November 13, 2002?

4 MR. CLASEN: Objection, Your Honor.

5 THE COURT: Mr. Clasen?

6 MR. CLASEN: It's been asked and answered  
7 already, okay. The document speaks for itself. He is cc'd  
8 on it. And number three, it's way beyond the scope of the  
9 direct as to any of this stuff, Your Honor. And quite  
10 frankly, we're going to have a witness, Mr. Pitisokos,  
11 who's going to talk about these documents. Right now, he  
12 seems to be asking him does this show that he may have seen  
13 the 2002 thing before. He didn't see the document --

14 MR. RYAN: Your Honor, if I could have a speaking  
15 objection. I'd ask the witness be excused.

16 MR. CLASEN: Your Honor, that the extent of my  
17 objection and I apologize to the Court. But my objection  
18 is relevance, okay, and beyond the scope of the direct,  
19 okay. And as for the specifics --

20 THE COURT: I'll agree to the extent that it is  
21 beyond the scope of the direct, unless you want to somehow  
22 incorporate it into his direct testimony.

23 MR. RYAN: I'm sorry, Your Honor. Is the Court's  
24 ruling that my cross-examination of an adverse witness is  
25 limited to the direct when we're talking -- my question



1 relates to the particular zoning of the property that he  
2 has studied?

3 THE COURT: Well, to the extent that you're  
4 getting into Exhibit 14, which wasn't covered by the direct  
5 -- what -- here are you trying to go, Mr. Ryan because I  
6 haven't figured out yet where you're trying to go?

7 MR. RYAN: Your Honor, I'll ask that the witness  
8 be excused.

9 THE COURT: Mr. Gulizio, would you step down,  
10 please? Why don't you wait in my chambers?

11 (Witness leaves the courtroom.)

12 MR. RYAN: Certainly, Your Honor, the board  
13 resolution attached as a part of Exhibit 13 grants the  
14 application of Gyrodyne to rezone a 10-acre section of its  
15 308 acres, but imposes a condition. The condition is that  
16 any further application to the town must include an  
17 application for a change to a PDD, rather than do that that  
18 condition was not met. The application was withdrawn.

19 THE COURT: All right.

20 MR. CLASEN: Your Honor, if the -- first of all,  
21 the documents do say what they say. But the last statement  
22 "rather than do this, they withdrew the application," I  
23 know of o factual support for that, okay. And that's not  
24 what happened when we hear from another witness,  
25 Mr. Pitsiokos. But if this witness knows -- if he can say

1 what Gyrodyne said when they withdrew it, if he knows,  
2 otherwise, he'd be speculating just as everybody else,  
3 other than the person who actually did it.

4 THE COURT: What are you trying to do with this  
5 witness, Mr. Ryan? I mean all I've heard is that he was  
6 employed five weeks before this letter went out, the second  
7 -- excuse me, Exhibit 14 went out, which was two years  
8 after the resolution containing what you say the stip was  
9 dispatched when he was not an employee.

10 Are you trying to establish that in the five-week  
11 period he was employed by the town prior to the November  
12 13, 2002 letter set forth in Exhibit 14 that he had some  
13 personal involvement which generated that letter? If so,  
14 I'll be glad to bring him in and ask him?

15 MR. RYAN: Oh no, Your Honor. I have no factual  
16 basis for assuming that. This is an expert witness who has  
17 testified that in 2005 --

18 THE COURT: Yes.

19 MR. RYAN: -- the likely change for this property  
20 would be to a BCC zone district -- PDD zone district.

21 THE COURT: PDD, yes.

22 MR. RYAN: And here we have an opportunity for  
23 the town to have done that back in 2002 and 2001 and 2000  
24 when it's own policy proposed it and they did not --

25 THE COURT: Okay.

1 MR. RYAN: == except as would be agreeable to the  
2 owner of the property.

3 THE COURT: And I'm still not following where  
4 you're going.

5 MR. RYAN: Well, Your Honor.

6 THE COURT: Excuse my being...

7 MR. RYAN: It certainly goes to the affect of the  
8 comprehensive plan on the actions taken by the planning  
9 board and whether it was that urgent a matter that they  
10 would only consider a change for this property to a PDD.

11 THE COURT: And what would you like to ask the  
12 witness? I mean I hear your conclusion with it, but what  
13 do you want to ask the witness? I mean so far the only  
14 place you've gone is that you're trying to point out he was  
15 an employee at the time that Exhibit 14 was sent. And I  
16 understand he was an employee for five weeks. Now are you  
17 finished with that? If you want to ask him in his expert  
18 testimony --

19 MR. RYAN: Your Honor, I just pointed that out  
20 for the fact that he said that he had absolutely no  
21 awareness of it. And he may have no current recollection  
22 of it, but he was certainly aware of it back at the time  
23 then.

24 MR. CLASEN: Your Honor, that's not what he said.  
25 He asked him did you see Exhibit 13. He said no.

1 THE COURT: You asked if he'd known about  
2 Exhibit 13.

3 MR. CLASEN: Right.

4 THE COURT: I don't want to get into a long --  
5 Mr. Ryan, you did ask him if he knew about 13.

6 MR. RYAN: Right.

7 THE COURT: You then trying to prove to me for  
8 some reason, I would assume, that he knew about 13 because  
9 he was copied on 14.

10 MR. RYAN: Yes.

11 THE COURT: Well, I understand. Now I will  
12 accept that he was copied on a letter in 2002, five weeks  
13 after he began work at Brookhaven for something that  
14 happened two years before and he worked in Brookhaven and  
15 that he had no current memory of it. I don't know what  
16 conclusion you want to draw from that, but it's noted.

17 Now if you want to ask him now as an expert what  
18 he makes of all this in terms of action or inaction as the  
19 case might be with respect to Brookhaven, sure, I'll let  
20 you ask him that, if that's where you're going.

21 MR. RYAN: I intended -- you know --

22 THE COURT: Okay.

23 COURT CLERK: == was that an opportunity for them  
24 to do that. Right.

25 THE COURT: Yes, but I also note the innuendo of

1           how come you couldn't possibly remember some letter in 2002  
2           just after you started to work about an action that took  
3           place two years before he worked there.

4                       MR. RYAN: Your Honor, I'm not saying that. This  
5           was being done to refresh his recollection to ask if it  
6           did.

7                       THE COURT: Well, I hope you never question me  
8           under oath about refreshing my recollection like that, but  
9           that notwithstanding.

10                      MR. CLASEN: Your Honor --

11                      THE COURT: Why don't you bring the witness --  
12           I'm sorry. Go on.

13                      MR. CLASEN: My objection is really here, Your  
14           Honor, that the facts that counsel just said, right, this  
15           witness can't say them. And I object because they're not  
16           true. But what I'm saying is here is what are we having  
17           this witness -- if he's going to show this witness the two  
18           letters and say, after having read them, does this change  
19           your opinion or do you have an opinion on such and such and  
20           such, an expert opinion on it, I can he can say that. I  
21           don't know where that gets us.

22                      THE COURT: I'm assuming that's what he wants to  
23           ask.

24                      MR. CLASEN: I don't know where that gets us in  
25           life, okay. But he going to --

1 THE COURT: And Mr. Clasen, as to where something  
2 gets Mr. Ryan isn't your business either. I mean if he  
3 wants to ask the question he can ask the question.  
4 Whatever its probative value is up to me, but he can ask  
5 the question. I don't object to Mr. Ryan asking the  
6 question.

7 MR. CLASEN: I agree, Your Honor. But if he's  
8 going to say that Gyrodyne withdrew it for these reasons,  
9 right?

10 THE COURT: Ah, well, that's something else. I  
11 understand.

12 MR. RYAN: I haven't said that.

13 MR. CLASEN: He's got to say -- he's going to  
14 say hypothetically.

15 THE COURT: I will entertain your objection if --

16 MR. RYAN: If I --

17 THE COURT: Yes, if you get there, Mr. Ryan. And  
18 if he doesn't get there, there will be no objection.

19 MR. CLASEN: 'Cause he already -- in his  
20 discussion of the relevance of this document, he said they  
21 withdrew it because they didn't want to do this.

22 THE COURT: Yes.

23 MR. CLASEN: And that's the reason why I'm making  
24 it now.

25 THE COURT: And if there had been a jury sitting

1 here, you'd be climbing all over the table and you'd be  
2 absolutely correct.

3 MR. CLASEN: Right. But that's why I'm making it  
4 here, Your Honor.

5 THE COURT: But suffice it to say I've ignored  
6 it. And we'll put that on the record that I've ignored it,  
7 if you'd like.

8 MR. RYAN: Your Honor, I believe my indication  
9 was that the condition imposed was not met and the  
10 application was withdrawn. I did not indicate causation.

11 THE COURT: Mr. Ryan, whatever. You know the  
12 boundaries that you want to ask the witness as an expert.  
13 Let's get him back in and go from there.

14 (Witness returns to courtroom.)

15 CONT'D CROSS-EXAMINATION

16 BY MR. RYAN:

17 Q. Mr. Gulizio, the town had a proposed change of this  
18 site to a PDD development zone, correct, in 2000 and 2002,  
19 correct?

20 A. I'm sorry.

21 Q. The town had a proposed -- a plan to change this site  
22 to a PDD zone in 2000 and 2002, correct?

23 A. Again, I don't remember the zoning district it was  
24 proposed to be changed to. I remember it was a luxury golf  
25 course community.

1 Q. All right, please listen to my question. The town had  
2 a plan, this plan to change the zoning for this site to PDD in  
3 2000 and 2002?

4 A. Yes. The 1996 land use plan recommended the zone be  
5 rezoned to a Planned development district. Sorry.

6 Q. And in 2000 and 2002, the town had an opportunity to  
7 do that, not on its own motion, but as a condition to the  
8 application brought to it, correct?

9 MR. CLASEN: Objection, Your Honor. That's a  
10 fact question, so he know what the application was for in  
11 2000. Did they draw it for the whole property or something  
12 else, okay? And then the question wouldn't apply to the  
13 2002.

14 MR. RYAN: Your Honor, if we could have a  
15 speaking objection.

16 THE COURT: Yes. Mr. Clasen, the witness can  
17 answer the question to the extent he knows the answer or if  
18 he does know the answer. If he doesn't, he won't.

19 MR. CLASEN: My objection was foundation.

20 THE COURT: I understand.

21 MR. CLASEN: He didn't lay a foundation at all.

22 THE COURT: To the extent that the question's  
23 been asked with the type of foundation it's been asked  
24 with, the witness can answer under the boundaries that the  
25 question was asked, if you're following me.



1 THE WITNESS: I think so.

2 A. I wasn't familiar with the resolution that you  
3 presented to me earlier I guess as Exhibit 13 in terms of the  
4 nature of that application. I don't know if it was for a  
5 portion of the property. I can assume based upon the density  
6 that was permitted, that it was only for a portion of the  
7 property, but I don't know that.

8 Q. Okay. Mr. Gulizio, how many acres of Gyrodyne's  
9 property is in the Town of Brookhaven?

10 A. I think it's about a 182 acres are in the Town of  
11 Brookhaven.

12 Q. And how much of it is in the Town of Smithtown?

13 A. Approximately 63 acres are in the Town of Smithtown.  
14 Again, not including -- I think there's a small strip of  
15 residential that's also in the Town of Smithtown that doesn't go  
16 into that figure.

17 Q. Now let's refer to your report, Mr. Gulizio, page 4.  
18 Let me ask you again, how much of this property was in the town  
19 of Smithtown?

20 A. I apologize. I thought we were talking about just  
21 that portion that was the subject of this application. There  
22 is, according to the report, there's 308 total acres. There are  
23 approximately 182 acres in the Town of Brookhaven and  
24 approximately 126 acres -- no, excuse me.

25 MR. RYAN: Your Honor, can we have a direction to

1 the witness --

2 A. -- a hundred and twenty.

3 MR. RYAN: -- to answer my question rather than  
4 giving more information than it calls for.

5 THE COURT: I don't understand --

6 MR. RYAN: Sure.

7 THE COURT: -- what he's not answering?

8 MR. RYAN: All right.

9 Q. Did I ask you, Mr. Gulizio, how many total acres there  
10 were?

11 A. A hundred and twenty-six acres.

12 Q. Did I ask you that?

13 A. No.

14 MR. CLASEN: Objection, Your Honor.

15 Q. Thank you.

16 THE COURT: Mr. Ryan, I thought you asked that.  
17 I don't know what question you are asking him.

18 MR. RYAN: I asked a simple question. How many  
19 acres were in the town of Smithtown?

20 THE COURT: Well, do you mean the acres subject  
21 to the appropriation by the State of New York or do you  
22 mean the total acreage of the Gyrodyne property? Let me  
23 try it because I'm having the same failure to understand.  
24 Which set of acreage are we talking about?

25 MR. RYAN: To clarify for the Court and

1 Mr. Gulizio --

2 THE COURT: Thank you.

3 MR. RYAN: -- I am talking about the Gyrodyne  
4 property, 308 acres.

5 THE COURT: The entire Gyrodyne property? Yes.  
6 How much of the Gyrodyne property is in the town of  
7 Smithtown?

8 THE WITNESS: One hundred and twenty six acres.

9 MR. RYAN: Thank you.

10 THE COURT: Thank you.

11 Q. Now does Smithtown have a PDD?

12 A. I'm not certain.

13 Q. Well, to develop -- when you analyzed the planning of  
14 this -- or the reasonable probability of use of this property,  
15 you evaluated both the lands in Brookhaven and the lands in  
16 Smithtown, correct?

17 A. That's correct.

18 Q. And you say the lands in Brookhaven have a reasonable  
19 probability of being changed to a PDD?

20 A. That's correct.

21 Q. What is the reasonable probability of the lands in  
22 Smithtown?

23 A. I looked at a series of residential zoning categories  
24 in the Town of Smithtown, the R6 townhouse district, the RGA  
25 garden apartment district in terms of considering potential

1 density and rezonings within the Town of Smithtown.

2 Q. Well, okay, you looked at those and you don't know  
3 whether the Town of Smithtown also has a PDD?

4 A. No. Again, I'm not certain is what I said. I believe  
5 that the four residential districts that I analyzed are the  
6 limitations and that there's not a PDD. But again, I'd be happy  
7 to review their code again and confirm that. I apologize.

8 Q. Well, refresh yourself with your report. I mean you  
9 are doing a reasonable probability of use for 120 -- of the  
10 property that includes 126 acres in Smithtown?

11 A. Right.

12 Q. When you consider what could be used or what use could  
13 be made of the acreage in Smithtown, you reviewed all of  
14 Smithtown's available zoning, did you not?

15 A. That's correct.

16 Q. Or did you limit that review to particular zones?

17 A. I looked at the entire zoning district. And again, I  
18 considered -- I believe it was four residential zoning district  
19 -- the R6 townhouse district, the RC retirement community  
20 district and the RM garden apartment district.

21 Q. All right. Those are the ones you mention in your  
22 report. Were there others -- I mean there is an L1 district in  
23 Brookhaven, correct -- I mean in Smithtown, correct?

24 A. Uh-huh.

25 Q. Is there an industrial park district in Smithtown?

1           A.    I looked at the light industrial district in  
2 Smithtown, based on the existing zoning.

3           Q.    Okay. Well, I'll ask my question again. Mr. Gulizio,  
4 is there an industrial park zoning in Smithtown?

5           A.    I'm not certain.

6           Q.    So your review was limited to what or your recitation  
7 in your report is limited to those districts that you felt were  
8 most appropriate after eliminating others that you don't  
9 discuss, correct?

10          A.    Correct. I didn't discuss every zoning district in  
11 each of the towns.

12          Q.    Right. And you didn't discuss the available  
13 industrial districts?

14          A.    No. Actually, I looked at the yield for each of the  
15 industrial districts in terms of the basic area qualifications  
16 of lot area and lot length.

17          Q.    My question was discussed. If you can listen to the  
18 question put to you, Mr. Gulizio, and answer that. Do you  
19 discuss the other industrial districts in you report?

20          A.    No. I discuss the existing industrial district.

21          Q.    Right. But you say, nonetheless, you considered those  
22 other industrial zones?

23          A.    I looked at the use that I thought that was the most  
24 reasonable probability of a rezoning and considered those zoning  
25 districts in connection with the analysis. I didn't look at the

1 other industrial districts because I didn't think of them as  
2 being reasonable probable in terms of a rezoning.

3 Q. Now Mr. Gulizio, the purpose of this report is to  
4 analyze what the most probable rezoning would be, correct?

5 A. That's correct.

6 Q. Not to justify a conclusion that you reached as to  
7 what is the most probably; isn't that so?

8 A. Yes.

9 Q. Okay. So first comes the analysis, then comes the  
10 conclusion; isn't that the way a professional planner would  
11 work?

12 A. Yes.

13 Q. All right. What you've just indicated is that you  
14 only discuss in your report those aspects of your analysis that  
15 support your conclusion?

16 A. No. I think as a planner, again, I looked at the  
17 nature and character of developments surrounding the property,  
18 the existing spectrum of permitted uses under the existing  
19 zoning district, the limitations of the site, the constraints in  
20 terms of traffic, the references within the comprehensive plan,  
21 and the history of rezoning within the town and coming to the  
22 conclusion that the most reasonable probability of development  
23 would be for a residential use.

24 Q. Okay. Now for this property, Gyrodyne's entire  
25 308-acre property, to be developed as a PDD -- or could it be

1 developed, all 308 acres as a PDD?

2 A. I don't believe a PDD existed in the Town of  
3 Smithtown, so it would have been a separate zoning in the Town  
4 of Smithtown. But certainly, that portion in the Town of  
5 Brookhaven could have been, in its entirety, a planned  
6 development district.

7 Q. Okay. Now a planned development district, as I  
8 understand the statute you cite and the code provisions you  
9 cite, requires the approval of a master plan, correct?

10 A. That's correct.

11 Q. Now do you have in your report anywhere the master  
12 plan for this PDD?

13 A. No.

14 Q. All right. Now this master plan would it relate only  
15 to 182 acres in the Town of Brookhaven or would it necessarily  
16 show what's being developed on the 126 acres in the Town of  
17 Smithtown.

18 A. I would assume that the plan would show the entirety  
19 of the development. There's a number of options about how that  
20 could be accomplished. The towns could do separate SEQR as co-  
21 lead agencies. They could also form what's called an inter-  
22 municipal agency to consider the zoning action in a combined  
23 format with representatives of both towns being subject to the  
24 overall review of the project. There's a number of options on  
25 how it could be accomplished.

1 Q. Okay. But your zoning -- you have to make zoning  
2 applications to each town, correct?

3 A. The start of the process would begin with an  
4 individual zoning application in each town, if the development  
5 were to occur in each town.

6 Q. Okay. And in 2005, the zoning application by Gyrodyne  
7 with which you're familiar there was an application to the town  
8 board while you were planner, correct, for the development of  
9 this property?

10 A. To which town board?

11 Q. The Town Board for town in which you were planner?

12 A. Yes. There was an application pending in the Town of  
13 Brookhaven.

14 Q. All right. And that was for development of just 182  
15 acres or 308 acres?

16 A. Again, it represented that portion of the property  
17 that was in the Town of Brookhaven. But it was my understanding  
18 there was also a pending application for the remainder of the  
19 property in the Town of Smithtown.

20 Q. In 2005?

21 A. During my tenure between 2002 and 2005 with the Town  
22 of Brookhaven.

23 Q. Do you recall when the application was submitted?

24 A. No, not offhand.

25 Q. Did you look at that application in relation to your



1 consideration of what the highest or highest probability of use  
2 of this property was?

3 A. I didn't pull the existing file. No.

4 Q. As part of your duties as Town of Brookhaven planner,  
5 did you review that application?

6 A. Again, during my tenure as the commissioner of  
7 planning, I did sit in on a number of meetings on the Gyrodyne  
8 property.

9 Q. Did you look at the plan?

10 A. Yes.

11 Q. Did you review the plan?

12 A. I had staff members that reviewed the plan in terms of  
13 the staff review. I wasn't, as the commissioner, responsible  
14 for the day-to-day review of the plans. Again, I was  
15 responsible for preparing the applications and consulting with  
16 staff; but did not complete review of the plans myself.

17 Q. Okay. Did you advise the board on the plan?

18 A. I did speak with the Town Board on at least one  
19 occasion regarding the status of the application.

20 Q. Did you forward the plan to the county commissioner of  
21 planning?

22 A. I don't recall if it was referred to the county. It's  
23 something a staff member would have done. Typically, we  
24 wouldn't refer it to the County Planning Commission until we  
25 were ready to make a decision on it.

1 Q. Now in your report, Mr. Gulizio, in addition to the  
2 comprehensive plan, you consider various zoning actions by the  
3 Town of Brookhaven, correct?

4 A. That's correct.

5 Q. And one is Silver Corporate Park?

6 A. That's correct.

7 Q. And when was that application made to the town?

8 A. I don't recall when it was submitted. It was pending  
9 during my tenure with the town between 2002 and 2005.

10 Q. And that is still pending today? It's in litigation I  
11 think you indicated.

12 A. I believe it's in litigation right now. Again, I'm  
13 not sure of the status of the litigation.

14 Q. And that was from an industrial to a PRCHC. And  
15 that's basically a health care facility, correct, or assisted  
16 living?

17 A. It's an adult care facility I believe is how the term  
18 is licensed by New York State.

19 Q. Okay. It refers to 620 housing units. Are we talking  
20 about housing units or beds?

21 A. I believe it's 620 units is what's included in the  
22 resolution, not beds.

23 Q. Are these independent residences in the PRCHC?

24 A. An adult care facility as licensed by New York State  
25 can have individual units. I believe it's defined by the state

1 as residents that need some assistance with their daily care.

2 Q. I'm sorry. I didn't hear you, Mr. Gulizio.

3 A. An adult care facility that is licensed and defined by  
4 New York State my understanding is that it's residents that can  
5 live what somewhat independently who need assistance in their  
6 daily care of living. That can be a spectrum of residents. I  
7 don't believe there's also an age requirement that you need to  
8 be a minimum age in order to reside within an adult care  
9 facility.

10 Q. Okay. But is it always beds -- I mean is it always  
11 units or could it be beds?

12 A. Again, under the town code it's related based upon  
13 either the density in terms of the number of units, which is, I  
14 believe ten units -- eight units to the acre or the number of  
15 beds, which is, I believe, eight.

16 Q. Okay. And this one was it units or beds, do you know?

17 A. I believe that the 620 refer to the number of units.

18 Q. And do you have a copy of that report so we can know?

19 A. I don't have the resolution with me. No.

20 Q. You reference it, though, in your bibliography --  
21 item 3 on page 18?

22 A. Yes.

23 Q. Your reference sheet, though, although it lists the  
24 resolution, doesn't give a date, doesn't attach the resolution  
25 to let us know what it says, correct?

1 A. No.

2 Q. And it could be either beds or units?

3 A. Okay, my recollection is that it's units.

4 Q. But under the PRCHC zoning it could be either. It's  
5 not limited to units?

6 MR. CLASEN: Objection. That's been asked and  
7 answered twice.

8 THE COURT: Sustained.

9 Q. Now this was a -- Yaphank is well east of here,  
10 correct?

11 A. (No response.)

12 Q. It's near the east land of the town.

13 A. I'd call it the central section of the town.

14 Q. Okay. And this change of zone was from L1 to the  
15 PRCHC, not to a PDD.

16 A. The Silver Corporate Park?

17 Q. Yes.

18 A. That's correct.

19 Q. Now is it your belief, Mr. Gulizio, that Gyrodyne's  
20 308 acres are suitable for a PRCHC district?

21 A. I believe what the report reflects is that the most  
22 reasonable probability of the land use category would a planned  
23 development district with low to moderate density development,  
24 three to six units per acre. I don't think the report states  
25 that it's viable as the PRCHC.

1 Q. Is the answer to my question then no?

2 A. Could you repeat your question again?

3 Q. Sure. Is it your view that PRCHC district is  
4 appropriate for the Gyrodyne 308-acre parcel situated where it  
5 is?

6 A. My view, again, is that the most appropriate zoning  
7 category is a planned development district, which could include  
8 components of either the MF, Multiple Family district, PRC,  
9 Planned Retirement Community or the PRCHC, Planned Retirement  
10 Congregate Housing Community zoning districts.

11 MR. RYAN: Your Honor, can we have a direction  
12 that the witness answer the question put to him. I'm not  
13 asking him what his view is. I'm asking him whether what I  
14 stated was his view. It's a simple yes or no.

15 THE COURT: He answered it. He said that it is  
16 part of his view. I mean it's included in what would be --  
17 are you trying to ask him is that the only thing it could  
18 be? I'll ask him that. Is that the only thing it could  
19 be?

20 THE WITNESS: No.

21 MR. RYAN: Okay.

22 Q. And a PRC district for Miles Development -- well,  
23 going to Heritage Square, when was Heritage Square adopted?  
24 When was that resolution adopted?

25 A. Again, I'm not sure the exact date. I believe

1 Heritage Square was sometime in the 1990s. Just to add to that,  
2 there was an application pending to seek modifications of that  
3 approval that was done, considered during my tenure with the  
4 town between 2002 and 2005. That involved, in effect, removing  
5 what previously included as a nursing home facility as a  
6 component of that approval and increasing the number of units of  
7 the PRCHC development and eliminating the nursing home facility.

8 MR. RYAN: Your Honor, move to strike everything  
9 that was not responsive to my question. My question  
10 related to when.

11 THE COURT: All right, everything that doesn't  
12 relate to when is stricken.

13 MR. RYAN: Thank you.

14 THE COURT: You're welcome.

15 Q. Do you know when Heritage Square was constructed or if  
16 it was constructed?

17 A. No. I don't believe it's under construction yet.

18 Q. From the 1990s to 2008 it hasn't been constructed?

19 A. As I indicated earlier, there was an application to  
20 modify the prior approval sometime between 2002 and 2005. But  
21 since that time, it's my understanding it hasn't been  
22 constructed.

23 Q. But for this project it has not -- and Silver  
24 Corporate Park that hasn't been built either, correct?

25 A. Not to my understanding.

1 Q. And the date when that was constructed was when?

2 A. Again, it hasn't been constructed.

3 Q. I mean when it was proposed?

4 A. Sometime between 2002 and 2005. I believe it was  
5 approved sometime shortly after my tenure with the town ended.

6 Q. 2002, early 2003?

7 A. No. Sometime in 2005, early 2006.

8 Q. Okay. And you indicated on your direct examination  
9 that, although this zone change had been granted by one board,  
10 it was rescinded by a subsequent board?

11 A. That's correct.

12 Q. Do we have reference in your report, Mr. Gulizio, to  
13 the rescission of the Silver Corporate Park approval?

14 A. No. I don't believe there's a reference in there.  
15 Again, that revocation it was my understanding is still the  
16 subject of the litigation.

17 Q. Well, regardless of what your understanding about the  
18 status of litigation, an action by the Town Board is what you  
19 are citing the Silver Corporate Park for, correct?

20 A. That's correct.

21 Q. And the revocation is an action by the town board,  
22 correct?

23 A. That's correct.

24 Q. And it's a subsequent action affecting the one  
25 you cite.

1 A. That's correct.

2 Q. But you don't reference it in your report?

3 A. That's correct.

4 Q. Now you cite the board action regarding Silver  
5 Corporate Park for the purpose of showing what the town's  
6 attitude and easy acceptance of a residential change from a  
7 light industrial property would be, correct?

8 A. That's correct. My understanding of a litigation --

9 Q. Mr. Gulizio, there's no question. If it's correct,  
10 then it's not. Is it not correct?

11 A. I don't know --

12 Q. Okay.

13 A. Can I explain?

14 Q. You cite in your references in item 3 at page 18 that  
15 an order adopting that PRCHC district, correct?

16 A. That's correct.

17 Q. Now the revocation of the prior board action and  
18 resolution that's indicative of the board's temper and tenor, is  
19 it not?

20 A. Yes. But that revocation, as I understand it, is  
21 related specifically to the previous board's action of  
22 increasing the density without the benefit of a public hearing  
23 on the original approval after it was first approved. And then  
24 the second board revoked that prior approval, also without the  
25 benefit of the public hearing, which resulted in the pending



1 litigation. It wasn't on the merit of the rezoning itself.  
2 It's my understanding the litigation is directly related to  
3 density.

4 Q. Well, those facts are nowhere detailed here so anyone  
5 else can evaluate the suitability of your selection of Silver  
6 Corporate Park as an appropriate indicator of the temper of Town  
7 Board, is it -- are they, Mr. Gulizio?

8 A. Could you just repeat the question?

9 Q. Sure. Those facts that you've just now recited are  
10 nowhere indicated in your report so that someone reading it  
11 would have some appreciation of the need to qualify and perhaps  
12 analyze your selection of Silver Corporate Park as an exemplar  
13 of the temper of the Town Board.

14 A. That's correct that it doesn't include the additional  
15 revocation resolution.

16 Q. And there's nowhere in your report that it indicates  
17 that Heritage Square, despite it's approval in the 1990s, was  
18 never constructed for whatever reason.

19 A. No. The report doesn't detail the developments which  
20 have been constructed or not constructed to date.

21 Q. Mr. Gulizio, the Silver Corporate Park was adjacent to  
22 the Long Island Expressway. Heritage Square was on the  
23 Moriches, wasn't it?

24 A. Moriches Bypass?

25 Q. Where in Moriches was it?

1           A.     It was in the north central portion of Moriches. I  
2 don't recall the exact street frontage.

3           Q.     All right. You don't give that identifying  
4 information as to Heritage Square, correct -- where it's  
5 located?

6           A.     No. I didn't go into detail on any of the individual  
7 cases cited the exact location and give a detailed analysis.

8           Q.     Now one of the factors that affect each of these board  
9 actions are the physical conditions impacting the development of  
10 the property, correct? It's ease of access, for example?

11          A.     All of the factors that I referenced earlier in terms  
12 of the nature and character of development, the site  
13 constraints, the history the zoning applications, the  
14 comprehensive plan would be considered, I would hope, during the  
15 review of any of those individual applications by the board.

16          Q.     All right. And to know whether any of these cited  
17 instances of -- well, first of all, these were not all of the  
18 zoning applications that were submitted to the Town of  
19 Brookhaven, correct?

20          A.     No, certainly not.

21          Q.     These are ones that you selected?

22          A.     Yes.

23          Q.     Were there others that were denied?

24          A.     During what time period?

25          Q.     Well, during the --

1 A. During any time period? Yes.

2 Q. Well, we don't know what time period is covered here,  
3 correct?

4 A. There was --

5 Q. We don't have a date for any of these actions; isn't  
6 that so?

7 A. That's correct.

8 Q. So all we have is your recollection that they occurred  
9 sometime in the 2002, 2005, 1990 timeframe. So we're talking 20  
10 years, maybe.

11 MR. CLASEN: Objection, Your Honor. That's math.  
12 From 1990 to 2005 can't be 20 years, even assuming we  
13 started at 1900 -- 1990, which no one has said.

14 THE COURT: Noted. Continue, Mr. Ryan.

15 MR. RYAN: Okay.

16 Q. So are we dealing with ten years of a time span?

17 A. I didn't look for a particular year. I looked for  
18 cases that are reasonably current and I looked for cases that  
19 were reasonably similar that I felt was the most appropriate  
20 potential consideration for a land use category.

21 Q. You looked for reasonably current. And you tell us  
22 that these are reasonably current. But you provide and can give  
23 us no dates for any of them. And you're indicating one occurred  
24 in the 1990s, at least five years before the time that you were  
25 concerned with, correct?

1           A.     Okay.  I can give ranges on the dates to the  
2 resolutions --

3           Q.     I'm not asking for your guesses.  I'm just asking  
4 for...

5           A.     I'm just trying to answer the question.  Again, can I  
6 give you a specific year and month and date of each of the  
7 resolutions?  No.  Absolutely not.  Do I know the range about  
8 the times when they were approved?  Yes.

9           Q.     Well, your references refer to each of these town  
10 resolutions.  You looked at these town resolutions, correct?

11          A.     That's correct.

12          Q.     So you had the exact date.  You could give us a date  
13 in time, couldn't you?

14          A.     Yes.  If I'd included that information in the report,  
15 you would have that date and time.

16          Q.     And these are all Brookhaven town records, correct?

17          A.     That's correct.

18          Q.     You go to Brookhaven and go through its zoning  
19 resolutions of the Town Board for a period of years?

20          A.     No.  I spoke with staff members and asked them to pull  
21 the resolutions and provide me with the information in terms of  
22 the units and the density.

23          Q.     And did you ask for particular approvals?

24          A.     I asked for applications which I was familiar with  
25 from the time during my service with the Town of Brookhaven.

1 Q. That's what I'm asking. Did you ask for the approval  
2 -- you go into the Town Board or town planning department and  
3 ask for the information from the Town Board resolution relating  
4 to Silver Corporate Park?

5 A. Yes.

6 Q. Did you go into the planning department and ask for  
7 the information from the Town Board resolution regarding  
8 Heritage Square?

9 A. Again, most of my conversations were by phone, just to  
10 be clear. And I would ask for copies of the resolution or the  
11 information from the resolution relative to density, lot area,  
12 and zoning.

13 Q. So you called them up, spoke to them about particular  
14 approvals that you were aware of?

15 A. That's correct.

16 Q. You didn't go in and review the files to see what  
17 others may have been denied?

18 A. Again, I used my best judgment based upon my  
19 experience the town to consider individual application. Did I  
20 look at every single action that has been submitted during a  
21 certain period of time? No, I did not.

22 Q. Did you ask the town to analyze or the people you were  
23 in contact at town planning department to analyze which ones  
24 were denied and what their density was and their location?

25 A. I asked for a specific variety of applications that I

1 was familiar with, most of which were approvals.

2 Q. Well, you don't cite any denial, correct?

3 A. That's correct.

4 Q. You were familiar with denials?

5 A. Yes. I'm familiar with denials.

6 Q. And you spoke to the town about those?

7 A. I focused on those applications that would reflect the  
8 policy of the board relative to the potential range of uses that  
9 would be considered. I focused more on approvals than denials,  
10 admittedly.

11 Q. Did you speak to the town about the denials?

12 A. I was familiar with the denials that occurred during  
13 my tenure there and there were not a lot of denials. The board  
14 was very reluctant --

15 Q. Mr. Gulizio --

16 A. I'm sorry. If I could just --

17 MR. CLASEN: Wait. Your Honor, he should --

18 Q. -- my question is simple. Did you --

19 THE COURT: Wait a minute. Mr. Clasen?

20 MR. CLASEN: He wasn't finished answering his  
21 question. Let him answer it and if he wants to strike it,  
22 fine, but I think it's responsive.

23 THE COURT: He was answering the question.

24 Mr. Ryan, let him continue.

25 A. The Town Board, in general, was very reluctant to

1 actually issue denials. They weren't even aware during my --  
2 prior to my tenure there that they could deny a rezoning  
3 application without the benefit of a public hearing. Most of  
4 the applications that were not considered tended to linger as  
5 opposed to being denied by the board.

6 MR. RYAN: Move to strike as not being  
7 responsive, Your Honor.

8 THE COURT: No. He was totally within the  
9 question you asked.

10 Q. My question was did you discuss with the members of  
11 the planning department of the Town of Brookhaven that you  
12 contact with the denials and ask them for information. That was  
13 my question, Mr. Gulizio. Please answer my question.

14 A. I spoke with staff primarily on the resolutions that  
15 were for approvals. I'm not aware of very many denials during  
16 my tenure there that were relevant to this application.

17 Q. Mr. Gulizio, I'm asking you what you did in preparing  
18 this report?

19 A. I went through the litany of applications that were  
20 pending during my tenure --

21 Q. Mr. Gulizio, there is not a pending question before  
22 you. My question --

23 THE COURT: Mr. Ryan?

24 MR. CLASEN: He just asked a question.

25 THE COURT: Mr. Ryan, move on. We've settled

1 this area.

2 MR. RYAN: Your Honor, I don't -- may I then ask  
3 the witness be directed to answer the question put to him.

4 THE COURT: He's answered the question, Mr. Ryan.

5 MR. RYAN: Okay.

6 Q. Do you recall any of the specific conversations you  
7 had with the Town of Brookhaven regarding any of these  
8 applications?

9 A. I recall having the conversations. I recall taking  
10 notes from the conversation so I could keep track of what  
11 actually occurred with those individual applications.

12 Q. And do you recall the conversations?

13 A. Specific conversations? No.

14 Q. Okay. Do you recall where you were when you talked to  
15 the Town of Brookhaven about these?

16 A. Most of my conversations were from home.

17 Q. Did you ever go into the town?

18 A. I don't believe so.

19 Q. You ever call the town from your office?

20 A. I tried not to call the town from my office in  
21 connection with this because --

22 Q. Excuse me?

23 A. I tried not to call the town from my office because I  
24 always tried to do this work on my own time.

25 Q. So you worked on this on your days off?



1 A. My lunch hours, my days off, yes.

2 Q. Your consideration of what went on in Smithtown is  
3 limited to two approvals?

4 A. That's correct.

5 Q. Now the Hamlet Estates was that built?

6 A. Yes. I don't know if it's fully built out, but it is  
7 partially built.

8 Q. And when was that approval given?

9 A. Again, I don't recall the exact date of the approval.

10 Q. Excuse me?

11 A. I don't recall the exact date of the approval.

12 Q. I didn't ask you -- I said when was that given or do  
13 you have a year? Do you have a decade?

14 A. I would say it's under construction now. It's  
15 partially built that it was sometime around 2000.

16 Q. Do you know?

17 A. No. I've answered that. I don't know the exact date.

18 Q. Well, do you know whether it was in 2000?

19 A. No. I said it was around 2000.

20 Q. Right. Could it have been 1999?

21 A. Yes.

22 Q. Could it have been 1998?

23 A. Possibly.

24 Q. Could it have been 1997?

25 A. No. I don't believe was prior to '97.

1 Q. And it's just under construction now?

2 A. It's been -- there are units that are built and  
3 occupied. My understanding is they've had trouble with economy  
4 and the housing market and they've had difficulty selling their  
5 remaining units.

6 Q. And do you know when that change was first proposed --

7 A. No.

8 Q. -- let alone granted?

9 A. No, I don't.

10 Q. On any of these do you know when the change was first  
11 proposed?

12 A. Again, I don't know the exact dates of any of them.

13 Q. Galleria in Smithtown it's an Avalon Commons  
14 development or Avalon Commons is the name of it, correct?

15 A. I believe that's the name of it.

16 Q. Now that approval was granted in the 1980s, wasn't it?

17 A. I'm not sure of the exact date.

18 Q. Do you have any idea --

19 A. Again, that sounds about right.

20 Q. -- what decade it was?

21 A. Late 1980s, early 1990s is about right.

22 Q. Is that recent to 2005 in your view?

23 A. Well, in view of the fact that there's not many zoning  
24 applications that occur in the Town of Smithtown because it's a  
25 more mature suburb, I considered it a relevant consideration.

1 Q. What does an approval in 1989 tell you about the  
2 temper of the Town Board of the Town of Smithtown in 2005?

3 A. Again, in looking at the application, I would consider  
4 all the factors associated with that site -- it's location, the  
5 nature and character of developments surrounding it, the  
6 density. It was considered as one of the few examples of a  
7 modified zoning district to townhouse development or a senior  
8 citizen development that could be considered within a relevant  
9 timeframe.

10 Q. Okay. You cite the Galleria Development as a 14.8  
11 units per acre, correct?

12 A. I think it's 14.7, but yes.

13 Q. I'm looking at page 15. It looks like 14.8 from what  
14 I'm --

15 A. I apologize.

16 Q. -- looking at.

17 A. Okay.

18 Q. Am I correct? Does it say 14.8 at page 15?

19 A. Yes, it does. I apologize.

20 Q. How many acres?

21 A. Again, I don't recall the exact acreage. It's  
22 information that I had in my notes. I was looking mostly at  
23 density in terms of communicating information through the  
24 report.

25 Q. Did you go into the town to look at the application?

1 A. No. I spoke to a staff member over the phone.

2 Q. Okay. Did you -- were you advised that Galleria  
3 Avalon Common was a 82-acre site?

4 A. Again, I don't recall the exact acreage.

5 Q. And that the site included a hotel, included luxury  
6 single-family homes and apartments?

7 A. I recall it had the apartments and the townhouses.  
8 Quite honestly, I don't recall the hotel.

9 Q. There's no note of the supplemental development and  
10 that 1989 approval was for the whole 82 acres. It was a master  
11 plan, all right.

12 A. Okay.

13 Q. And you're referring to a piece of it.

14 A. I think I'm referring to the overall density of the  
15 townhouses and the apartments, not just a piece of it.

16 Q. Well, you don't reference any single-family homes,  
17 correct?

18 A. I reference that I went to an R6 townhouse development  
19 and an RMGA garden apartment complex. So it involved  
20 townhouses, which is form of single-family home, either attached  
21 or semi-attached, then the garden apartments.

22 Q. Okay. Do you know what the relative numbers were --  
23 how many apartments, how many townhouses, how many single-family  
24 homes?

25 A. I don't recall the numbers.

1 Q. Did you get those?

2 A. I would have gotten the numbers because I couldn't  
3 have generated the density without the lot area and the total  
4 number of units.

5 Q. Well, you don't even consider single-family homes for  
6 Gyrodyne, correct?

7 A. MF development, PRC development allow for single-  
8 family homes, either attached or semi-attached as part of the  
9 zoning district. I didn't specify the type of dwelling unit  
10 that could be constructed.

11 Q. Well, you used this density of townhouse and rental  
12 apartments, though, without reference to single-family homes.

13 A. Again, I would consider a townhouse to be a form of  
14 single-family homeownership.

15 Q. Well, there are also independent single-family homes  
16 other than townhouses --

17 A. Well, there can be --

18 Q. -- freestanding, single-family homes?

19 A. There are multiple forms of residential ownerships,  
20 some attached, some semi-attached.

21 Q. Okay. And you never investigated the entire plan for  
22 this entire 82 acres?

23 A. I looked at the overall density of the site, based  
24 upon the lot area and the total number of units, combining the  
25 mixture of unit types.

1 Q. But you don't tell us what the lot area is.

2 A. Again, the lot area is not cited in the report. The  
3 density is cited in the report and the total number of units.

4 Q. Well, where do we see the total number of units?

5 A. I apologize. It's the density cited on the Smithtown  
6 case.

7 Q. Right. If we had the total number of units and we had  
8 your density calculation, we would know what areas you're  
9 talking about, correct?

10 A. That's correct.

11 Q. But without one or the other, we can't know unless you  
12 tell us outside the report.

13 A. No, other than what the report references, which is  
14 the overall density.

15 Q. You selected a density for this property, correct,  
16 Mr. Gulizio?

17 A. That's correct.

18 Q. And you based that on a consideration of the  
19 particular aspects of the Gyrodyne parcel?

20 A. I based it on what I found to be relevant zoning types  
21 with the Gyrodyne application, admitting that there aren't a lot  
22 of recent rezoning applications of the Town Smithtown which to  
23 draw from. There were more in the Town of Brookhaven, quite  
24 honestly.

25 Q. Did you consider the density in relation to this --

1 Gyrodyne's property, what it -- not what a plan would be, but  
2 what it could accommodate?

3 A. I didn't know what the density was until I looked at  
4 this item and again, discussed with the staff what the density  
5 of the project was. I didn't know what the density was and then  
6 select the site.

7 Q. That's of the ones you've cited, correct?

8 A. Correct.

9 Q. All right, we're talking about -- you opine that  
10 Gyrodyne's property could be developed with a density of three  
11 to six units per acre; isn't that part of your opinion?

12 A. Yes.

13 Q. Okay. Now that selection of the three to six units  
14 per acre has to be based on the particular conditions of the  
15 Gyrodyne property, correct --

16 A. It was based upon --

17 Q. -- in part?

18 A. It was based upon the factors that I discussed before  
19 -- the existing zoning of the site, the nature and character of  
20 development in the area, the comprehensive plan recommendations  
21 for the property, individual site constraints, and the policies  
22 of the town board in terms of how they represented or considered  
23 individual or similarly situated properties and what those  
24 densities were. It was all of those factors that went into  
25 the recommendation.

1 Q. How does the existing zoning on the site bear on the  
2 density of development in residences of the Gyrodyne property?

3 A. Because one of the things that would be a  
4 consideration of a town board and consideration of the community  
5 is that if it's going from a single-family residential  
6 category --

7 Q. No. No. We're talking about Gyrodyne's property.

8 A. So I'm trying to answer the question. The town --

9 Q. We're not going from residence to residence. We're  
10 talking about an L1, largely vacant property, correct?

11 MR. CLASEN: Your Honor?

12 THE COURT: Mr. Clasen?

13 MR. CLASEN: He's not letting the witness answer  
14 the question. Let him answer the question. If he wants to  
15 move to strike as unresponsive, he can. The witness  
16 started to explain his answer and then he cut him off.

17 THE COURT: Well, let's start again, Mr. Ryan and  
18 ask him a question and wait for an answer.

19 MR. RYAN: All right.

20 Q. Mr. Gulizio, how does the L1 industrial zoning of  
21 Gyrodyne's 308-acre site affect the eventual density of its  
22 development in a residential use?

23 A. The existing zoning district is one of the factors  
24 that the town board would consider in weighing the benefits of  
25 the rezoning. If it were going from a low intensive district,



1 such as a single-family zoning district, there would be less  
2 tolerance for the idea of increased density on the property as a  
3 multiple family residence, planned development district or  
4 planned retirement community. Moving from a more intensive  
5 district, such as an L1 district to a multiple family residence  
6 or a planned development district, there would be more tolerance  
7 for density. It would be one of the considerations by the board  
8 and by the community. They would look at the existing zoning  
9 and evaluate the impacts under that existing zoning and compare  
10 that to the proposed rezoning.

11 Q. All right. So in your view the existing zoning  
12 results in a greater acceptance by the Town of Brookhaven for  
13 density on Brookhaven's property -- I'm sorry, on Gyrodyne's  
14 property?

15 A. I think that's one of the factors that would be  
16 evaluated in consideration of the application.

17 Q. Now you arrive at a prediction of a 90 to 95 percent  
18 certainty that the Town of Brookhaven would approve a PDD  
19 residential development of Gyrodyne's property with -- between  
20 three and six acres per unit -- per acre, correct?

21 A. That's correct.

22 Q. How is it you arrived at your percentage?

23 A. Again, I looked at all of the factors that I'd  
24 previously mentioned -- the nature and character of developments  
25 surrounding the property, the existing zoning for the property,

1 potential constraints on site, potential constraints in terms of  
2 traffic limitations, the comprehensive plan and previous zoning  
3 polices to determine what would be the most likely outcome of  
4 the development of the property. When you have a comprehensive  
5 plan that not only has general policies that recommends rezoning  
6 of industrial properties such as this to planned development  
7 districts alternative zoning categories, and then you have  
8 specifically within that comprehensive plan, this property  
9 identified as a candidate for rezoning to planned development  
10 district together with those recent policies of the board in  
11 terms of similar rezonings, and all the limitations and  
12 potential opposition that would come from build out under the  
13 existing industrial zoning, I think it's highly likely to the  
14 degree of 90 to 95 percent that this would ultimately be rezoned  
15 to a planned development district with that density. That's how  
16 I came to the conclusion.

17 Q. Okay. But why 90 to 95 percent? Why not 94 percent?

18 A. Well, again --

19 Q. Why not 92 percent? Why 89? Why not any percentage?

20 A. Well, it's not a science. Am I certain that it's 90  
21 to 95 as opposed to 89 to 96, probably not? But I have a very  
22 high degree of certainty, based upon my 22 years of experience  
23 of handling hundreds of zoning applications --

24 Q. All right.

25 A. -- along with the specific facts of this case that

1 ultimately it was going to get rezoned.

2 Q. So what we're talking about is your degree of  
3 confidence in your analysis?

4 A. My professional opinion --

5 Q. Right.

6 A. -- based upon my 22 years of experience and my  
7 education. Yes.

8 Q. And the 5 percent is because of uncertainty -- 10 to 5  
9 percent uncertainty is because you don't know what the future  
10 will bring, correct?

11 A. As I've told hundreds of applicants, whether I  
12 consider it to be the best application or the worst application,  
13 I don't vote on it. I provide recommendations and guidance to  
14 the board and I can't guarantee any particular outcome. But I  
15 think this particular circumstance, particularly within the Town  
16 of Brookhaven comes as close as you come based upon the facts of  
17 the case and the comprehensive plan documents that are relative  
18 to this property.

19 Q. It requires a future legislative vote that you've got  
20 no control over, correct?

21 A. Any rezoning is a legislative act. I don't vote on  
22 legislative acts, only the town board does. That's correct.

23 Q. All you can do is assess it and give your opinion as  
24 to what the likelihood of it is.

25 A. Right.

1 Q. Right.

2 A. After evaluating similar decision from the town board  
3 relative to other properties.

4 Q. Okay. And 70 to 75 percent accuracy as to the Town  
5 Board of Smithtown -- the Town of Smithtown, correct?

6 A. That's correct.

7 Q. And that 70 to 75 percent accuracy is based on your  
8 inability to find additional examples and the exact same factors  
9 affect the property, correct?

10 A. I think the Town of Smithtown has less of a history of  
11 rezoning these low to moderate density developments. There's  
12 fewer of those projects actually built. And considering the  
13 town of Smithtown, I think there wasn't a comprehensive plan  
14 document specifically referenced to the level that it did in  
15 Brookhaven this particular property.

16 Q. But of all of the factors that you were considering  
17 and that contribute to your method for arriving at this degree  
18 of certainty, as you've expressed, the only difference between  
19 the Town of Smithtown and the Town of Brookhaven was the master  
20 plan, correct -- the comprehensive plan?

21 A. I wouldn't say that was the only difference.

22 Q. I haven't finished yet. That was one. And the  
23 document or the examples available of rezoning that you could  
24 recall in Brookhaven and that you found in Smithtown?

25 A. Again, based upon my 22 years of working in the Town

1 of Brookhaven and in the Town of Islip, familiar with actions of  
2 rezoning, individual zoning applications, generally speaking in  
3 Suffolk County, certainly in Islip and Brookhaven, I don't  
4 recall the same history of rezonings in the Town of Smithtown,  
5 so I wouldn't give it the same high degree of probability.  
6 There have been fewer applications, quite frankly. And again,  
7 that together with, as you mentioned, the comprehensive plan  
8 encouraged me to lower the probability of the potential  
9 rezoning. Just to --

10 Q. But --

11 A. I'm sorry, just to finish my statement. The other  
12 thing that I would add, though, is that I still gave it a high  
13 degree of probability because we're still going from a more  
14 intensive zoning district, a light industrial district, to a  
15 less intensive residential district, even if it's low to  
16 moderate density.

17 Q. Understood. Now you've come up with different  
18 percentages between the Town of Smithtown and the Town of  
19 Brookhaven. And the only facts that you considered in your -- I  
20 mean your experience is the same when analyzing the degree of  
21 certainty for Smithtown's action and the degree of certainty you  
22 would apply to Brookhaven action, correct?

23 A. Correct.

24 Q. It's the same experience. The physical circumstances  
25 affecting the property -- its location, its traffic, it's

1 potential use, and industrial is the same in both towns, light  
2 industrial use?

3 A. I would say that thee factors are identical, but  
4 they're certainly similar.

5 Q. So the factors that are changes are the factors  
6 relating to the examples that you found and each town's  
7 comprehensive plan or lack of one in Smithtown or the lack of  
8 some portion of one that you can cite to and the examples of  
9 prior rezoning applications.

10 THE COURT: Mr. Clasen?

11 MR. CLASEN: Your Honor, he's asked and answered  
12 this one three times.

13 THE COURT: Yes, we have. And I think that's why  
14 Mr. Ryan you're going to move on. But first we're going to  
15 have some lunch and then you can come back suitably  
16 replenished to continue. Fair enough?

17 MR. RYAN: Thank you, Judge.

18 THE COURT: Why don't we adjourn to 2 o'clock?

19 (Lunch recess at 12:59 p.m.)

20 THE COURT: You may proceed, Mr. Ryan.

21 MR. RYAN: Thank you, Your Honor. It's my only  
22 copy, Your Honor. I wanted counsel to be aware of what I  
23 was handing up.

24 THE COURT: Would you like us to have a copy  
25 made? Mr. Clasen, did I anticipate what --

1 MR. CLASEN: Or at least provide a minute to read  
2 it, so I know what it is. It's the first time I'm seeing  
3 it.

4 THE COURT: Why don't we just have a copy made  
5 and that way...

6 MR. RYAN: Thank you, Your Honor.

7 THE COURT: Is it something I need to see? Do we  
8 need to copies?

9 MR. RYAN: I've seen it, Judge.

10 THE COURT: Oh, have you. Off the record.

11 (Off the record.)

12 THE COURT: Mark that document as State's "C" for  
13 identification, is that were we are?

14 MR. RYAN: "C."

15 THE MONITOR: "C."

16 THE COURT: "C."

17 (Whereupon, Defendant's Exhibit C was marked for  
18 I.D. purposes only.)

19 THE COURT: Okay, Mr. Ryan.

20 CONT'D CROSS-EXAMINATION

21 BY MR. RYAN:

22 Q. Mr. Gulizio, I show you what's been marked as State's  
23 Exhibit C for identification; would you please take a look at  
24 that?

25 A. (No response.)

1 Q. Mr. Gulizio, do you recognize what that document is?

2 A. It's a -- it looks like a petition to the Town Board  
3 for a rezoning a portion of the Gyrodyne property within the  
4 Town of Brookhaven.

5 Q. And this was an application that was submitted while  
6 you were the zoning commissioner for the Town of Brookhaven?

7 A. That's correct. Well, I'm sorry. Let me check the  
8 date. It was submitted -- I started I believe in October of  
9 2002. So the date of this document is October 30th, so this  
10 document was submitted certainly during that time period.

11 Q. This is the application that was before your town  
12 board at the time you were commissioner, right?

13 A. Yes.

14 MR. RYAN: I would offer it, Your Honor.

15 THE COURT: Mr. Clasen?

16 MR. CLASEN: Your Honor, the only objection I  
17 have is we understood you had directed the parties to  
18 exchange exhibits --

19 THE COURT: I'm sorry. What?

20 MR. CLASEN: We understood that you had  
21 instructed us before the trial to exchange exhibits and  
22 have everything marked ahead of time. We sent all 17 of  
23 our exhibits to them a week ago, okay. And we were told  
24 from the other side the only exhibits they thought they  
25 were going to have was the reports and that they didn't



1 have any additional exhibits. Okay, this morning's  
2 exhibits were just the legal documents, so I didn't have  
3 any objection to them.

4 But I mean if something comes up unexpectedly, I  
5 can see either side having to do it, but I don't see that  
6 this fits within it, certainly. So we followed what we  
7 thought the rules were. And if that's not the rules, then  
8 I have no objection, but I thought that that was the  
9 understanding that we had.

10 THE COURT: I think more or less that is the  
11 understanding. But can I --

12 MR. CLASEN: Otherwise, I have no objection to  
13 it.

14 THE COURT: I understand.

15 MR. CLASEN: And it is what he said and it is  
16 relevant. There's no doubt it.

17 THE COURT: Yes. And it's not a private letter.  
18 It's an application that went before a government agency.

19 MR. CLASEN: Right.

20 THE COURT: So I'm going to take it in for, you  
21 know, again whatever probative value it establishes. So  
22 Defendant's "C" for identification is in evidence as "C" in  
23 evidence.

24 (Whereupon, Defendant's Exhibit C was admitted in  
25 evidence.)

1 MR. CLASEN: I understand, Your Honor. My real  
2 point was --

3 THE COURT: I understand your point. I  
4 understand your point in advance in case Mr. Ryan has more  
5 pockets in his suit in which he wants to clean out more  
6 lint.

7 MR. RYAN: I always do, Judge.

8 THE COURT: What?

9 MR. RYAN: I always do. I will try to empty them  
10 out tonight.

11 THE COURT: Your pockets are very well known,  
12 Mr. Ryan. Continue.

13 Q. Mr. Gulizio, Exhibit "C" is an application by the  
14 Gyrodyne Company of America, Inc. for a change of its zoning for  
15 the lands in Brookhaven from L1 Industrial to D1 Residential,  
16 right?

17 A. That's correct.

18 Q. Is D1 Residential considered, in your evaluation of  
19 reasonably and probable zoning for this property?

20 A. No, it was not. D1 Residence, I believe, was  
21 eliminated during the period of 2002 to 2005 when I was  
22 commissioner of the department. It was one of the zoning  
23 categories that was actually deleted from the town code, if I'm  
24 not mistaken.

25 Q. This application was made --

1 THE COURT: Could you repeat again what was D1  
2 when it existed?

3 THE WITNESS: When it existed, it was a  
4 residential zoning category that I believe it allowed for  
5 something other than just single-family residential  
6 districts. And I apologize for not knowing the specific  
7 content of it, but it's my recollection that that was one  
8 of the several zoning districts that was eliminated from  
9 the code sometime around 2003 or 2004.

10 THE COURT: Thank you.

11 MR. RYAN: Okay.

12 Q. But it existed at the time of this application,  
13 correct?

14 A. In 2002 it did exist. Yes.

15 Q. And do you know what the requirements for them were?  
16 I mean it provided by way of density or mixed use or use of the  
17 properties?

18 A. I don't recall.

19 Q. So you have no opinion whether or not that any plan  
20 proposed for a D1 residence was likely or not, correct?

21 A. Well, no. Again, it was pending at the time of my  
22 tenure between 2002 and 2005. It was never considered by the  
23 Town Board during that time period and then during my time  
24 period with the town between, again, roughly 2003, 2004 it was  
25 eliminated from the code.

1 Q. So you never analyzed it for your purposes here.

2 A. It was my understanding that the period of the  
3 analysis was in 2005. At that time this code was no longer in  
4 effect.

5 Q. Okay.

6 A. So no, I didn't consider it.

7 Q. In your analysis, Mr. Gulizio, do you discuss anywhere  
8 the impact on -- or what school districts the Gyrodyne property  
9 was located?

10 A. I didn't analyze the potential impacts to the school  
11 districts as part of my analysis.

12 Q. All right. Where do I find that in your report?

13 A. As I indicated, I didn't go into an evaluation of  
14 potential impacts to the school district as part of the  
15 analysis.

16 Q. I'm sorry. You did not?

17 A. I did not.

18 Q. A residential use has an impact on the school  
19 district, does it not?

20 A. Depending upon the nature of the residential use. A  
21 senior citizen residential use would typically not have an  
22 impact. My understanding is also that moderate density  
23 residential districts, including multiple-family districts tend  
24 to have a positive impact on the school district relative to  
25 single-family districts and sometimes exceeding the potential

1 impact benefit associated with commercial development.

2 Q. But you've made no analysis of it here.

3 A. There's no analysis included in the report. Again, as  
4 I stated, though, my understanding from 22 years of experience  
5 is that a multiple family zoning district and certainly a  
6 planned retirement community zoning district have a net positive  
7 impact on the school district relative to single-family and at  
8 times will also exceed the benefit associated with light  
9 industrial development or commercial development.

10 Q. And that's your opinion. I understand that.

11 A. Yes. That's my professional opinion.

12 Q. Do you know what the population of the school  
13 district? Do you know the identity of the school districts this  
14 property is in?

15 A. Again, I didn't analyze potential impacts to the  
16 school district in this case. No.

17 Q. Mr. Gulizio, is your answer to my question no?

18 A. No.

19 THE COURT: His answer is no.

20 MR. RYAN: All right.

21 Q. Do you know what facilities are available to either  
22 school district?

23 A. I'm not aware of what schools -- what do you mean by  
24 "facilities"?

25 Q. Available seats in schools?

1           A.    I'm not aware of any statistics that the seats in  
2 schools.

3           Q.    Is impact of a proposed development on schools a  
4 planning consideration?

5           A.    Yes.

6           Q.    And does an industrial development have an impact on  
7 schools?

8           A.    Yes.

9           Q.    And what is the impact of an industrial development on  
10 schools?

11          A.    Well, on a positive side I would assume it contributes  
12 tax ratables to the school district without the impact of  
13 additional school children. On the negative side there can be  
14 costs associated with the industrial development, such as  
15 increased road maintenance that is a cost borne by the local  
16 municipality. Again, it, I think, helps to increase the  
17 potential costs of just accommodating the development. I'm not  
18 sure if that has a direct impact on the school district, but  
19 those are the costs that I would typically look at.

20          Q.    Well, I mean in your 22 years of experience as a  
21 planner, Mr. Gulizio, have you ever run across a school district  
22 whose budget included the maintenance of public roadways?

23          A.    No. That's correct.

24          Q.    So those impacts of an industrial development are all  
25 positive. They contribute ratables to the school, correct?

1           A.    They do certainly contribute tax ratables to the  
2 school district without the impact of school children.

3           Q.    All right.  A residential development what impact does  
4 it have on the schools?

5           A.    It depends again on the nature of the residential  
6 development.  Some residential development may have a  
7 significant impact on the school district in terms of the  
8 negative, such as detached single-family houses were there's not  
9 adequate tax base to accommodate that type of development.  My  
10 understanding, again, based upon discussions with previous town  
11 assessors and my experience just studying these issues also that  
12 on multiple family developments and in particular, planned  
13 retirement communities there can be a net positive benefit to  
14 the school districts through the development because they  
15 generally contribute more in taxes and they cost in services to  
16 the school district.

17          Q.    All right.  Well, your opinion as to the highest and  
18 best use of this property or the probable use of this property  
19 was not just a planned retirement community, correct?

20          A.    No.  Again, what I indicated was it would be a  
21 residential development between three to six units to the acres  
22 under a planned development district.

23          Q.    And that needn't be age limited or restricted at all,  
24 correct?

25          A.    It could be age restricted by the town board.  It's

1 not required to be age restricted by the town board. Typically,  
2 I will tell, based upon my experience, that boards were much  
3 more quick to restrict it to an age senior citizen community as  
4 opposed to a non-age restricted community for some of those  
5 considerations associated with the school districts.

6 Q. Are you are aware of any other 308-acre planned  
7 retirement community that's actually been constructed?

8 A. No. I think the report includes retirement  
9 communities that had been approved. Constructed -- if I could  
10 take a quick look at the report?

11 Q. Sure.

12 A. Setauket Meadows and Hamlet of Setauket is a 150-unit  
13 senior citizen housing development on 50 acres, which is three  
14 units per acre.

15 Q. Mr. Gulizio, my question was 300 acres?

16 A. Oh.

17 Q. Please try to focus on the question.

18 A. I apologize. I'm not aware of many 300-acre change on  
19 applications that pending in Suffolk County.

20 Q. All right.

21 A. So I would say that generally, no. I'm not familiar  
22 off the top of my head --

23 Q. Mr. Gulizio?

24 A. I'm trying to answer the question.

25 Q. Please, my question -- apparently, you misunderstood.



1 My question is a retirement community -- a 300-acre retirement  
2 community can you think of another example of one of those on  
3 Long Island?

4 A. I can't think of one off the top of my head in Suffolk  
5 County. I'm not aware of Nassau County as well.

6 Q. Okay. Now what we're talking about is with Setauket  
7 Meadows 50 acres, correct?

8 A. That's correct.

9 Q. What we're talking about with Earth Grow (phonetic)  
10 and East Moriches is 50 acres, correct?

11 A. That's correct, approximately.

12 Q. Eastport Senior Living is 74 acres?

13 A. That's correct.

14 Q. Less than a third of the size of this property,  
15 correct?

16 A. That's correct.

17 Q. Now Parchar (phonetic) is not age restricted, correct?

18 A. (No response.)

19 Q. Laurel Hill is not age restricted, correct?

20 A. I don't believe Parchar is age restricted. Laurel  
21 Hill is a series of communities, not just one community. I'm  
22 not certain if one of the individual developments is senior or  
23 not.

24 Q. Okay.

25 A. I couldn't state it.

1 Q. Some may be age restricted?

2 A. Well, it's not one development. So there was a  
3 nursing home component to it, which has not been constructed.  
4 I'm not sure if any of the individual developments were planned  
5 retirement community or age restricted.

6 Q. Now Miles Development that was in Massack. That's on  
7 128 acres, right?

8 A. That's correct.

9 Q. That's adjacent to Sunrise Highway, you say?

10 A. That's correct.

11 Q. Is access important to a planned retirement community?

12 A. Depending upon the size and the scale of it, yes.

13 Q. The larger it is the better the access need be,  
14 correct?

15 A. The higher the density I would assume so.

16 Q. Well, we're talking about getting into it, right?

17 A. Well, again, the access issue would be, I think, more  
18 relevant to density than it would just be property size. It  
19 could be a thousand acres, but if it was only a hundred units  
20 it's not going to have an issue in terms of access.

21 Q. Right. But if you only have three --

22 A. So I think it's density.

23 Q. -- ways in or out whether you -- if you have a  
24 thousand homes on 300 acres or a thousand homes on 50 acres,  
25 it's the same impact, correct?

1           A.    No.  I would say that the property would be relevant  
2 to the potential impacts.  And if you're following all that  
3 access out through a very small piece of property, it's going to  
4 have more site-specific impacts and you have opportunity for  
5 multiple curve cuts and points of ingress and egress.

6           Q.    Heritage Square that's only 50 acres, correct?

7           A.    (No response.)

8           Q.    Silver Corporate Park, that's 117 acres?

9           A.    It's 117 acres and Heritage Square was 51 acres.

10          Q.    Right.

11          A.    That's correct.

12          Q.    You had no experience in your 22 years with a  
13 300-acre, age-restricted development.

14                   MR. CLASEN:  I think he's aged a little bit.

15                   THE COURT:  I'm sorry?

16                   MR. CLASEN:  Was it 40 -- did he say 22 years?

17                   THE COURT:  No.  He said 22 years.

18                   MR. CLASEN:  Oh, I think he said 42.  I said, oh  
19 my God, I must have missed 20 years.  It's been a long --  
20 sorry about that.

21          A.    I'm aware of a 300-acre development that was exclusive  
22 for senior citizen housing during my tenure.  I'm aware of other  
23 300-acre planned development districts, such as the former  
24 redevelopment of the Central Islip Psychiatric Center that had  
25 an age component to it.  But I'm not aware of one single

1 property of 300 acres that's developed exclusively for senior  
2 citizen housing.

3 Q. Okay.

4 A. This is best as I can recollect right now.

5 Q. So your reasonably probable use here would likely have  
6 an impact on the schools, right?

7 A. That's not what I indicated. It could have a positive  
8 impact on schools. Again, potentially --

9 Q. All I said was an impact.

10 MR. CLASEN: I don't think he was finished.

11 THE COURT: Okay, gentleman. He acknowledged the  
12 impact. Go ahead, Mr. Ryan.

13 MR. RYAN: All right.

14 Q. And you did not analyze what that impact would be, did  
15 you?

16 A. Depending upon the nature of the residential use, it  
17 could have a variety of impacts. I didn't look at specifically  
18 school district impacts as a part of the detailed analysis.  
19 Again as I stated earlier, if it was a PRC or even some  
20 multiple-family residential developments, they could have a  
21 positive impact on the school district as they generate more in  
22 taxes and the costs in school services. So it's difficult to  
23 quantify without knowing the specific mix of units.

24 Q. You appreciate that the proposed use that you find  
25 probable will have some impact, but did not analyze it. Yes or

1 no?

2 A. It's going to have an impact. Yes. I'm sure if that  
3 would be a positive impact or a negative impact on the school  
4 district.

5 Q. Would that have any effect on the reaction of the  
6 community to a proposed use?

7 A. Would what have an impact?

8 Q. The potential impact on the schools?

9 A. Potential impacts to the school districts is one of  
10 the issues that would be typically be discussed during the  
11 public hearing process. Yes.

12 Q. Right. And the public hearing process before the town  
13 board.

14 A. Yes, or before the planning board.

15 Q. Or before the planning board -- but for a change of  
16 zone before the town board, correct?

17 A. Yes. But again, some towns require the Planning Board  
18 hold a public hearing also. Brookhaven previously did it. It  
19 doesn't any longer. Islip still does.

20 Q. All right. How about the Town of Brookhaven?

21 A. Again, they previously did. I don't believe that's  
22 their policy anymore. As I indicated, it's now exclusively  
23 within the Town Board.

24 Q. So you would have a public hearing in the town board  
25 and the citizens would comment on what affect they feel would

1 arise from a proposed development of Gyrodyne, right?

2 A. Again, I'm not sure what they would specifically  
3 comment on, but I would anticipate there would be public comment  
4 on the application.

5 Q. And the town would respond to those comments?

6 A. The town is -- during the public hearing process would  
7 typically respond either at the staff level or during the public  
8 hearing process to questions that were raised.

9 Q. Now your 90 to 95 percent approval by the Town of  
10 Brookhaven that considered no particular school involvement,  
11 you've indicated.

12 A. Again, I didn't analyze potential impacts for the  
13 school district to include it as part of the analysis, but part  
14 of the nature and character of developments surrounding the  
15 property, part of the review of the comprehensive plan, part of  
16 the site constraints, along with whatever issues might develop  
17 in connection with the development of property is something that  
18 I would consider as part of that analysis. I didn't do a  
19 detailed analysis of the school district impacts, though.

20 Q. But the Town Board, when it votes up or down on the  
21 zoning changes, is considering those impacts?

22 A. If they're raised as part of the application process,  
23 I assume they would be addressed during that public hearing  
24 process.

25 Q. Well, there's an impact, an environmental impact

1 requirement. Traffic impacts on schools. Those are required to  
2 assessed, correct?

3 A. There are a variety of issues that are required under  
4 the State Environmental Quality Review Act.

5 Q. Including the impacts on the schools.

6 A. That depends on the scope of the EIS. I would  
7 typically assume that on a project of this scale that it would  
8 be one of the impacts that would be discussed and analyzed.

9 Q. Right. Mr. Gulizio, please keep your voice up. I'm a  
10 little hard of hearing. All right?

11 A. I'll try my best.

12 Q. Okay. You would assume that before the town voted on  
13 an approval or a disapproval of a zone change it would consider  
14 the impacts on the schools by the proposed change?

15 A. I would assume that staff would look at it. I  
16 wouldn't necessarily guarantee that it's something the Town  
17 Board would consider during the public hearing process.

18 Q. Well, why is staff's looking at it?

19 A. Staff would look at it in terms of all the potential  
20 impacts associated with the application.

21 Q. Right.

22 A. If there were a significant negative impact associated  
23 with the application, it's something that would be discussed  
24 during the public hearing process, analyzed through that public  
25 hearing process, and addressed during that public hearing

1 process. If during the staff review there was a determination  
2 made that this would not have an adverse impact on the school  
3 district, it's not something that may be detailed in terms of  
4 the discussion at the public hearing process.

5 Q. Okay. But it's not mentioned in your report that this  
6 impact would be discussed and reviewed and considered by the  
7 town, correct?

8 A. No. I did go into detail in terms of the range of  
9 potential environmental impacts associated with the application.  
10 It's not something the report includes.

11 Q. Well, your 90 to 95 percent had to include all of the  
12 effects that the change of zone would result in, correct?

13 A. Yes.

14 Q. And one of those is schools. Yes or no?

15 A. I would look at all of the potential impacts; and  
16 again, comparing it to the existing zoning, comparing it to the  
17 range of potential uses under the application and try to  
18 evaluate that.

19 MR. RYAN: Your Honor, I asked a yes or no  
20 question. I specifically --

21 THE COURT: Please answer him yes or no,  
22 Mr. Gulizio.

23 THE WITNESS: Could you repeat the question?

24 Q. Your 90 to 95 percent probability you say considered  
25 all impacts from the zoning change. You are of an opinion in



1 your professional evaluation, as a planner, that based on all of  
2 those factors this town board would have issued this zoning  
3 change to a 90 to 95 percent certainty. That's your opinion,  
4 correct?

5 A. Yes.

6 Q. One of the factors that the town would be considering,  
7 and that you have indicated, would be of concern to the town in  
8 that vote is the impact on the schools. But you have not  
9 considered it in your evaluation or in your estimate of the  
10 probability of approval. Yes or no?

11 A. No. I did not think that that particular issue would  
12 have been something that would've modified my recommendation in  
13 connection with what the ultimate and most reasonable  
14 probability of the development was. It's a factor. But it  
15 wouldn't have been a determining factor that I would have  
16 changed my opinion on the recommendation.

17 Q. In your years as Town of Brookhaven Commissioner of  
18 Planning, did you ever have vocal, local opposition to a  
19 development because of the impact on schools?

20 A. I had opposition to -- based upon a variety of  
21 concerns, whether or not one was specifically related to schools  
22 I can't recall.

23 Q. You can't recall? You can't recall any voiced concern  
24 relating to school in regard to any planned zoning change or  
25 requested zoning change that you were involved with over a

1 number of years as town commissioner?

2 A. There were not a significant number of rezoning  
3 applications that I can recall off the top of my head that  
4 involved rezonings that went to the actual step of getting a  
5 public hearing in front of the Town Board. The overwhelming  
6 majority of my three years there was spent going a through a  
7 public hearing process to modify the code amendments. The  
8 analysis of individual applications, quite honestly, the board  
9 did not process a significant number of rezoning during my three  
10 years there.

11 Q. Okay. So let's expand it beyond your three years at  
12 the Town of Brookhaven.

13 A. Uh-huh.

14 Q. In your 22 years as a planner have you ever become  
15 aware of a zoning change application that generated vocal  
16 opposition due the impact that the change will have on schools?

17 A. I'm certain during -- at some point during my 22 years  
18 there was an application where somebody raised concerns over  
19 impact of the school district. Yes.

20 Q. Okay. During your 22 years as a planner have you ever  
21 experienced a situation where a proposed zoning change generated  
22 vocal opposition as a result of its impact on traffic?

23 A. Yes.

24 Q. Is traffic a significant concern?

25 A. Yes. Depending upon the nature of the application, it

1 can be.

2 Q. Certainly. And just as schools can be a significant  
3 concern, depending on the nature of the application.

4 A. That's correct.

5 Q. And in any of the situations that you're familiar  
6 with, have concerns over the impacts on schools resulted in  
7 denial of a zone change application?

8 A. I can't say that there's one application that jumps to  
9 mind that was specifically limited to just that narrow a topic.  
10 I would say most of my rezoning applications that --

11 Q. Thank you. All right. Withdrawn. I'll ask it  
12 another way.

13 MR. CLASEN: I don't think he was finished.

14 THE COURT: He's withdrawing the question.

15 MR. RYAN: Yes.

16 MR. CLASEN: Okay.

17 Q. Is there any matter in your 22 years that you can  
18 recall in which the opposition to the impact on schools was a  
19 significant factor in the denial of the application?

20 A. I can't think of it as a significant factor in the  
21 denial of an application. I can say it's been a significant  
22 comment at a variety of public hearings. Sometimes based upon  
23 good information. Sometimes, again, based upon misinformation  
24 or bad information.

25 Q. Have you ever, in your 22 years of experience,

1 Mr. Gulizio, come across a situation where vocal opposition to  
2 the impacts on traffic was a significant factor in the denial of  
3 a change of zoning?

4 A. Yes.

5 Q. Now your impact -- your review of the impacts of  
6 zoning here was referenced to the ITE trip generation schedules?

7 A. Manual. Yes.

8 Q. And those manuals provide the likely number of trips  
9 to be generated in various uses, correct?

10 A. That's my understanding.

11 Q. Industrial or various types of residential use.

12 A. That's correct.

13 Q. Are there types of industrial uses which can generate  
14 fewer trips than residential uses?

15 A. I don't know if it's industrial use. It depends on  
16 the size of the industrial property on a per acre basis. I'm  
17 not sure how to do the analysis, quite honestly.

18 Q. Three and eight acres, are there uses for that 308  
19 acres -- industrial uses that would generate less traffic than  
20 residential use of the same acreage?

21 MR. CLASEN: Objection, Your Honor.

22 THE COURT: Sustained.

23 MR. CLASEN: We did this this morning when he  
24 asked this very same questions and we dealt with different  
25 types of buildings. We had a warehouse. This question

1 that he just asked he asked this morning, okay.

2 THE COURT: It has been asked and answered,  
3 Mr. Ryan. You did go into it this morning.

4 (Cross-talk.)

5 THE COURT: This afternoon before lunch. Why  
6 don't we try it that way?

7 MR. RYAN: If the Court remembers the answer, I'm  
8 happy with that. I didn't remember asking the question.

9 Q. Now Mr. Gulizio, the probabilities that you -- or the  
10 analysis that you did was for the entire 308 acres, correct?

11 A. I commented on the remainder also. Yes.

12 Q. Right. But it was the remaining 62 acres and -- but  
13 before the appropriation the entire 300 acres.

14 A. Right. I looked at it in two phrases. I looked at  
15 the 245 acres that was considered or obtained by the State  
16 through the use of eminent domain. And I also commented, I  
17 believe, at the end of the report on the remainder to the  
18 property, the remaining 60 somewhat acres.

19 Q. Now as to the entire property, two towns are involved  
20 and you've arrived at different percentages potential for each  
21 of them, right?

22 A. That's correct.

23 Q. But your opinion relates to the entire parcel, right?

24 A. In terms of the range of development density?

25 Q. Well, in order to develop all 308 parcels, both towns

1 have to be in agreement, don't they?

2 A. Not necessarily.

3 Q. Well, to develop the 308 acres would they need  
4 Smithtown's approval?

5 A. To develop that portion of the property in the Town of  
6 Smithtown, they would need Smithtown's approval.

7 Q. All right. And would Brookhaven be impacted by that  
8 development?

9 A. Well, that's something they would certainly  
10 participate in as part of the SEQR process and comment on those  
11 potential impacts.

12 Q. And to develop the 181 acres in Brookhaven, would  
13 Smithtown be impacted by that?

14 A. There are potential impacts to the town. And it's  
15 something that I guess would be considered during that review  
16 process.

17 Q. And a single plan encompassing all 308 acres in order  
18 be approved must be approved by both towns.

19 A. That's correct. There's also an opportunity for both  
20 towns to get together and to form what's called an  
21 inter-municipal agency to consider the application as one whole.  
22 I don't think that's something that would have been done under  
23 these circumstances, but it is permitted under state law.

24 Q. Now each town would independently consider the merits  
25 of an application relating to the whole property under the terms

1 of its zoning, right?

2 A. I think they would look at the specific impacts. If  
3 they were going to review it individually, they would analyze  
4 the potential impacts of development with their town and look at  
5 separately as part as this same review, but separate, the  
6 potential impacts of the pending application of the adjoining  
7 town.

8 Q. You appreciated that Gyrodyne's property, its 308  
9 acres, the 181 acres in Brookhaven and the 126 acres in  
10 Smithtown communicated by way of interior roadways, correct?

11 A. I would assume there would be some coordination with  
12 access. Yes.

13 Q. So that people occupied on the 101 acres, if they  
14 wanted to, could exit on the Smithtown side.

15 A. Again, depending upon how those particular impacts  
16 would be mitigated would determine how the access was going to  
17 be accomplished.

18 Q. Right. But the approvals of both towns would have to  
19 be coordinated.

20 A. They would be coordinated through SEQR. Yes.

21 Q. And the approvals in both towns would have to concur  
22 for a single development.

23 A. I'm not sure if that's absolutely the case. What do  
24 you mean by "concur?" The would have to determine the same --  
25 I'm not sure what you mean by "concur."

1 Q. Well, for this to have residential use of three to six  
2 acres -- for all 308 acres to have that you have to have the  
3 approval of both Brookhaven and Smithtown for that particular  
4 use.

5 A. Again, that could be a degree of density in one town  
6 as opposed to the other. Upon balance, if you average it, I  
7 think three to six is the number that I was most comfortable  
8 with.

9 Q. Well, what if Smithtown only said one per acre or one  
10 per five acres?

11 A. Again, if one of the towns issued a decision that was  
12 lower than the density that I estimated, there would either be  
13 less density or that density would be accommodated in the other  
14 town.

15 Q. Right. Well, if the additional density is to be  
16 accommodated in the other town -- if Smithtown says only one  
17 unit per five acres Brookhaven would have to pick up the slack.

18 A. Brookhaven would make an independent determination as  
19 to what was the most appropriate density within that portion in  
20 the Town of Brookhaven.

21 Q. Well, what is -- you've indicated that there's a 90 to  
22 95 percent certainty that Brookhaven would approve three to six  
23 units, selecting four, I believe, is your measure applied.  
24 Would it approve more if Smithhaven (stet) approved less?

25 A. What I've indicated in the report is that, on balance,



1 between the two towns the average density would be some place  
2 between to three to six units per acre. I have a certain degree  
3 of certainty with that in Town of Brookhaven with 90 to 95  
4 percent based upon those factors that I considered. And because  
5 of the less significance of the comprehensive plan and the other  
6 factors that I mentioned, I think there's less of a probability  
7 for that, somewhat less in the Town of Smithtown.

8 Q. They're agreeing to a single development plan here,  
9 aren't they?

10 A. Who's agreeing to a single development plan?

11 Q. The two towns.

12 A. Again, I don't mean to be difficult. I'm not sure if  
13 I understand the question.

14 Q. All right. Well, when you were involved in the  
15 application by Gyrodyne in 2002, do you recall it being referred  
16 to the Planning Commission?

17 A. No. Again, I'm not certain. It might have done  
18 through the staff, but I don't recall it getting to that level.

19 Q. Do you recall the Planning Commission rejecting it  
20 until such time as an application for the same development was  
21 also submitted to Smithtown?

22 A. Again, I don't recall the specifics of the referral  
23 process at that time.

24 Q. Would the actual process of the development on this  
25 property, historically, have any bearing on your consideration

1 of the reasonable probability of its development?

2 A. What had bearing in terms of my concern with respect  
3 to reasonable probability were the factors that I listed -- the  
4 nature and character of development in the area, the existing  
5 zoning for the property, the comprehensive plan, potential  
6 impacts at the site level, and the history of rezoning  
7 applications within the respective towns.

8 Q. Right.

9 A. Those are the factors that I considered.

10 Q. Sure. And the history of a zoning application would  
11 include, I assume, the history of this property, would it not?  
12 Wouldn't that be the most relevant?

13 A. I'm not sure if it's the most relevant. It would  
14 depend on the nature of the previous applications. It's one of  
15 the factors that would be looked at.

16 Q. Well, did you investigate the history of this  
17 development proposal by Gyrodyne in 2000 and 2002?

18 A. Well, I was at the town, again, in 2002. I discussed  
19 the nature of the pending application with the Town Board at  
20 executive session during that time and I was aware of what the  
21 town's disposition was at that time.

22 Q. It's not mentioned in your report, is it, Mr. Gulizio?

23 A. No.

24 Q. You mentioned the approvals given by the town to other  
25 parcels, correct?

1 A. Correct.

2 Q. Do you mention anywhere the fact that there was an  
3 application relating to this specific property --

4 A. No. Again --

5 Q. -- before the town --

6 A. That --

7 A. -- the town took some procedural actions on.

8 A. The town accepted the application. It never scheduled  
9 it for a public hearing as far as I understand. And when I  
10 discussed it with the Town Board at executive session, they  
11 weren't inclined to consider it at a public hearing. So I  
12 didn't give a lot of weight to the nature of that pending  
13 application.

14 Q. Did you, as part of you phone conversation and  
15 investigation with the planning people in the Town of  
16 Brookhaven, ask for them to review the details of that to  
17 refresh your recollection?

18 A. My recollection of it was that it was a luxury golf  
19 community that wasn't of interest to be considered by the Town  
20 Board. And during my tenure the university stepped and took  
21 title to the property, so beyond that I didn't consider it to be  
22 relevant.

23 MR. RYAN: Your Honor, can we have a direction to  
24 the witness to answer my question. Whether he did.

25 THE COURT: I thought he did answer the question.

1 MR. RYAN: Perhaps I'm obtuse, Your Honor. It  
2 seemed to evade me.

3 Q. Did you or did you not?

4 A. Did I or did I not what?

5 Q. Seek to refresh your recollection through your  
6 contacts with the Town of Brookhaven regarding the particular  
7 application that was made by Gyrodyne for the development of  
8 this entire property?

9 A. No. I recall the status of the application that it  
10 was a luxury golf community, that it was never processed for a  
11 public hearing to the Town Board, that during the pendency of  
12 that application the state took title the property and I didn't  
13 go beyond that.

14 Q. The answer is no?

15 THE COURT: The answer to what?

16 MR. RYAN: Did or did he not?

17 THE COURT: What?

18 MR. RYAN: My question was did he or did he not.

19 THE COURT: Do what?

20 MR. RYAN: Speak about this with the --

21 THE COURT: He's answered that now --

22 MR. RYAN: Withdrawn, Your Honor.

23 THE COURT: -- four times.

24 MR. RYAN: Withdrawn.

25 Q. Mr. Gulizio, I've been informed that you're appearing

1 here without compensation, is that true?

2 A. Yes.

3 Q. You expect no remuneration from anyone as a result of  
4 your preparation of a 19-page written report dated October 17,  
5 2007?

6 A. That's correct.

7 Q. And you are testifying here solely out of your  
8 interest in planning?

9 A. No. I entered into a contract to prepare work,  
10 provide services prior to my employment with the County of  
11 Suffolk. When I commenced my employment with the County of  
12 Suffolk, it was clear to me that I could no longer provide  
13 consulting services for cost, at least that's the way I looked  
14 at it. I know now that there's an exception to that and I'm not  
15 interested in exercising my options under that exception. I  
16 made a commitment to do the work. I've started the work and  
17 felt it was appropriate to finish the work. I'm not being  
18 compensated in any way for that work. In fact, I've taken  
19 plenty of vacation time to prepare the work, to appear here  
20 today. It's probably cost me more than I've made in my career  
21 in terms of consulting services or outside work.

22 Q. Did your contract call for compensation?

23 A. Yes, it did.

24 Q. And what compensation did it call for?

25 A. It was an hourly fee. I don't recall the exact fee.

1 Q. And how many hours have you put into this?

2 A. I haven't kept track of my hours. I would say it's  
3 some place around 120 to 150 hours.

4 Q. And approximately what was your fee?

5 A. Again, I don't recall the exact amount in the retainer  
6 agreement.

7 Q. And you've waived any compensation at all. You've  
8 never received any of that sum?

9 A. I've never received any of that sum, and I don't  
10 intend on collecting it.

11 Q. And your indication that you don't want to collect the  
12 money is because of what?

13 A. I didn't want to give the appearance of a potential  
14 conflict. I made the commitment to do the work. I didn't want  
15 to have the hassle of having to go to the Ethics Committee and  
16 try to explain what the nature of the process was. But since  
17 I'd already agreed and we'd already started the process, I felt  
18 it was appropriate to finish it.

19 Q. Did you go to the Ethics Committee and asked them  
20 whether they thought it was appropriate that you finish it?

21 THE COURT: Yes, Mr. Clasen?

22 MR. CLASEN: Objection, Your Honor. What's the  
23 relevance of this, this one time? The question whether he  
24 was paid or not certainly goes -- he said he wasn't being  
25 paid.

1 THE COURT: Yes. I think Mr. Ryan this question  
2 was just ended.

3 MR. RYAN: That is true, Your Honor. Thank you.  
4 Nothing further.

5 THE COURT: Redirect, Mr. Clasen? Would you like  
6 some time?

7 MR. CLASEN: No. I don't have very much.

8 THE COURT: Take the microphone.

9 REDIRECT EXAMINATION

10 BY MR. CLASEN:

11 Q. There was some discussion a few moments ago about the  
12 impact of schools on your analysis; do you remember that,  
13 Mr. Gulizio?

14 A. Yes, I do.

15 Q. What, if anything, did you consider; and why did you  
16 consider or not consider it with respect to the impact of  
17 schools?

18 A. I didn't think the potential to the school district,  
19 as a multiple-family development or a planned retirement  
20 community, were so significant that they would have altered my  
21 recommendation on the application. I thought the overarching  
22 consideration was, again, the rezoning the property from an  
23 intensive or potentially intensive light industrial district  
24 consistent with the comprehensive plan to a lower intensive  
25 residential district. I felt the overall benefits of that type

1 of a development plan far outweighed any potential impacts to  
2 the school district. And again, stating clearly that impacts to  
3 the school district could be positive as opposed to negative,  
4 depending up the nature of the residential development.

5 Q. The second thing is you weren't contemplating that  
6 this was going to be a retirement community in its entirety,  
7 were you?

8 A. No.

9 Q. So the questions about you know of another 308-acre  
10 retirement community that's not what you were contemplating  
11 anyway, right?

12 A. I didn't break it down into the nature of potential  
13 use of the units. It could be non-age restricted or age  
14 restricted or a combination of the two.

15 Q. Now there was some discussion as to the golf proposal  
16 that was submitted, remember that?

17 A. Yes, I do.

18 Q. Okay. And that was something that you were aware of?

19 A. I was aware of that pending application. Yes.

20 Q. Okay. And you said that wasn't even scheduled for a  
21 hearing; is that correct?

22 A. No. I, in fact, discussed it with the Town Board in  
23 an executive session and they declined to consider that a public  
24 hearing process.

25 Q. Do you know why?



1           A.    Yes.  They indicated that it was currently under  
2 consideration by the university for acquisition and they'd best  
3 just leave it alone at that time and not interfere with that  
4 ongoing process.

5           Q.    And were you aware of any meetings that occurred  
6 between the town representatives and the school?

7           A.    Yes.  I attended at least one, and I believe two  
8 meetings with the university and the school back in 2004 where  
9 they expressed their interest in developing the property as a  
10 wireless technology center.  I believe that was in April of 2004  
11 and I met at that time with the supervisor, the chief of staff  
12 George Hoffman, Shirley Strump (phonetic) Kenny the president of  
13 the university and Reed Cooperman (phonetic), one of their  
14 planning consultants and two other administrators.  I believe a  
15 Richard Mann and I can't remember -- Mr. Foberdy (phonetic).  I  
16 met with them back in April of 2004.

17                   MR. CLASEN:  Thank you very much, Your Honor.

18                   THE COURT:  Re-cross?

19                   MR. RYAN:  Nothing further, Judge.

20                   THE COURT:  Thank you, sir.  You may be excused.

21                   THE WITNESS:  Thank you.

22                           (Witness excused.)

23                   THE COURT:  Would you like a couple of minutes?

24                   MR. CLASEN:  If I could have a short break  
25           between the witnesses, Your Honor --

1 THE COURT: Sure.

2 MR. CLASEN: -- because I have to change the  
3 screens.

4 THE COURT: Fifteen minutes?

5 MR. CLASEN: That's more than enough.

6 THE COURT: Okay, about 5 or 10 minutes after 3.  
7 We stand adjourned.

8 (Off the record.)

9 THE COURT: Mr. Clasen?

10 MR. CLASEN: Yes, Your Honor. I'd like to call  
11 my next witness, Alan King.

12 THE COURT: Thank you.

13 THE MONITOR: Please raise your right hand.

14 (The party complies.)

15 THE MONITOR: Do you solemnly swear that the  
16 testimony you're about to give is the truth, the whole  
17 truth, and nothing but the truth, so help you God?

18 MR. KING: Yes, I do.

19 THE MONITOR: Okay, please be seated. For the  
20 record in a loud, clear voice please say and spell your  
21 name and also state your business address.

22 MR. KING: Alan J. King, Jr., a licensed  
23 professional engineer with the firm of Cameron Engineering.

24 THE MONITOR: Would you just spell your last  
25 name?

1 MR. KING: K-I-N-G.

2 THE COURT: And that's not amplified, Mr. King,  
3 so you're going to have to speak up.

4 MR. KING: Sure.

5 THE COURT: Mr. Clasen?

6 MR. CLASEN: Thank you, Your Honor.

7 A L A N K I N G , was called for examination as a witness  
8 herein after first being duly sworn and testified  
9 as follows:

10 DIRECT EXAMINATION

11 BY MR. CLASEN:

12 Q. Good afternoon, Mr. King.

13 A. Good afternoon.

14 Q. Could you tell me a little bit about yourself?

15 A. Sure. I'm a licensed professional engineer for the  
16 State of New York, State of Pennsylvania. I received an  
17 Associates in Engineering & Science degree from Nassau Community  
18 College. I received a Bachelor's of Science degree in Civil  
19 Engineering from Poly Tech University, Farmingdale, New York.

20 Q. And when you graduated, did you get a job?

21 A. Yes, I did.

22 Q. Tell me about the -- that's good. I'm encouraging my  
23 kids (inaudible).

24 A. Yes.

25 Q. What did you? Could you tell me your job

1 experience --

2 A. Absolutely.

3 Q. -- from your graduation to the present.

4 A. In 1987, I graduated from Poly Tech University and I  
5 went to work for a consulting engineering firm doing traffic and  
6 transportation work in Farmingdale, New York, where I was for  
7 two years. And then I went to a firm in Melville, New York for  
8 a couple of years. And then I was in Pennsylvania for nine  
9 years doing traffic, transportation, highway engineering work  
10 for large-scale industrial and residential developments. Then I  
11 proceeded to come back in 1999 to the same firm in Melville, New  
12 York where I was then for five years. And for the last five  
13 years I've been with firm of Cameron Engineering.

14 Q. What's your position at Cameron Engineering?

15 A. I'm a partner in charge of transportation -- traffic  
16 and transportation engineering for the firm.

17 Q. Could you tell me about your experience doing traffic  
18 impact studies in Suffolk?

19 A. I started doing traffic impact studies actually in my  
20 -- as an intern in 1986 for the firm in Freeport, New York. And  
21 then, I proceeded to do the traffic engineering analysis,  
22 traffic impact studies for various private and municipal  
23 clients, including the State of New York, where I did high  
24 accident studies, to New York City Department of Transportation  
25 to all of the counties -- Nassau County, Suffolk County -- in

1 almost every town I have done some work on Long Island in  
2 traffic or transportation engineering services.

3 Q. Okay. What is actually a traffic impact study for?

4 A. A traffic impact study is when a client, whether  
5 municipal or a private client, has a concern about a particular  
6 location. We would be asked to go in and evaluate it as to how  
7 it operates today and how it may operate in the future or even  
8 in the past.

9 Q. Did you perform --

10 MR. RYAN: Excuse me. May I move, Judge, so I  
11 can have a better shot of hearing this?

12 THE COURT: By all means. Bring your chair with  
13 you. Well, your chair is still there.

14 MR. RYAN: It's still there, Judge.

15 THE COURT: Oh, okay.

16 MR. RYAN: Thank you.

17 Q. Did you prepare a traffic impact study in connection  
18 with the Gyrodyne property?

19 A. Yes, I did.

20 Q. Now I'll show you what's been marked as Exhibit 4.

21 (Handing document to the witness.)

22 THE WITNESS: Thank you.

23 THE MONITOR: You're welcome.

24 Q. Is that the traffic impact study that you did for me  
25 in connection with the Gyrodyne property?

1 A. Yes, it is.

2 Q. Okay. Now what'd like you to do is walk through how  
3 you did this and what you did. But before we go specifically,  
4 just tell me generally what were you trying to do here?

5 A. In this particular case we were asked to evaluate what  
6 the traffic conditions would be in November of 2005 under  
7 various scenarios.

8 Q. What scenarios?

9 A. The "no build" scenario -- what traffic engineers  
10 typically call the "no build" scenario, which is if nothing at  
11 all were to occur and the scenarios of a residential development  
12 on the entire property and then the remainder, after the  
13 acquisition and the industrial/commercial development of the  
14 entire property and the remainder also. So there was four  
15 scenarios that we looked at.

16 Q. After you decided the "no build."

17 A. That's correct.

18 Q. Okay. So what's the first step you do, "no build"?

19 A. The first step we do is we go out and we evaluate the  
20 intersections to determine what intersections should be studied,  
21 what kind of data is available and we also obtain the geometric  
22 conditions, all of the various input elements that go into the  
23 actual model for the scientific model that we prepare for each  
24 location.

25 Q. Okay. What did you do in this case?

1           A.     In this particular case, we had a unique situation  
2 where we actually had to go backwards in the traffic conditions.  
3 Because, typically, what happens is we go out and we collect  
4 traffic counts at a particular location and then at that time we  
5 would factor in adjustments for seasonal rates and for growth  
6 rates to develop a future year. In this particular case, we had  
7 to actually go backwards because we had to freeze the analysis  
8 at November of 2005.

9           Q.     And how did you go backwards?

10          A.     In order to do that, we obtained two sets of traffic  
11 count data. One was from our own data that we had from 2006,  
12 which was obtained by my firm in September of 2006. That data  
13 was for most of the intersections that we determined of the 13  
14 intersections we studied with the data for most of those.

15          Q.     Why did you do that in 2006?

16          A.     We went to 2006 because we were trying to freeze the  
17 traffic --

18          Q.     No. I meant why in 2006 were you doing that study?

19          A.     We had prepared a traffic study on behalf of the  
20 Gyrodyne Corporation for an impact study for the remaining  
21 property.

22          Q.     Okay. But since the property -- it was still pretty  
23 much the same way at that point in time.

24          A.     Well, more importantly, it wasn't the property that  
25 was the same way. It was the intersections that were the same.

1 Q. Okay.

2 A. The intersections that we have looked at have not  
3 significantly changed. And if they have we've made those  
4 adjustments accordingly.

5 Q. So your firm actually made the traffic counts in 2006  
6 for many of these intersections?

7 A. That's correct.

8 Q. Okay, but not all the intersections?

9 A. Not all of them.

10 Q. So what did you do with respect to the remaining ones?

11 A. The remaining ones that we did not have we utilized  
12 the DGEIS, the Draft Generic Environmental Impact Study that was  
13 prepared on behalf of SUNY for the research park and we utilized  
14 those remaining traffic counts for the intersections that we did  
15 not have. They were obtained by a consulting firm in February  
16 of 2004. And what we did then is we had to equalize everything  
17 out to 2000 -- November of 2005. So what we did was we had --  
18 New York State publishes seasonal and annual adjustment factors.  
19 As it relates the seasonal factors, we adjusted the February  
20 counts from 2004 we adjusted them to November by using the  
21 seasonal adjustment. We did the same thing for our September  
22 counts to November, which was a minor adjustment, but there was  
23 an adjustment made there. September happens to be one of the  
24 higher months.

25 We then looked at the state factors for adjusting



1 traffic counts in an annual basis. And what happens is the New  
2 York State Department of Transportation has monitoring stations  
3 throughout the state where they actually collect traffic count  
4 information. They then publish that traffic count information  
5 for traffic engineers like myself to utilize in predicting  
6 future traffic conditions. In this unique situation where we  
7 were in 2008 and we had to go backwards to 2005, we actually had  
8 very accurate data beyond what we would typically utilize  
9 because we were using traffic counts that the state had  
10 published in 2005. So the state actually published the exact  
11 data during the time that we had, and we were looking for.

12           So we adjusted the '04 traffic counts up by one year  
13 and we adjusted the 2006 counts down by one year and normalized  
14 the entire network at November of 2005.

15           Q.    Okay. Now at this point of time, what have we got?

16           A.    What we have at this time is what us traffic engineers  
17 consider as the "no build" condition. That's the condition  
18 where the traffic would be -- if you were at one of these  
19 intersections in November of 2005 what would happen -- what you  
20 would see at that location.

21           Q.    As if nothing happened? And indeed, nothing had  
22 happened as of November 2005.

23           A.    That's correct.

24           Q.    So the "no build" situation is showing what the  
25 existing -- really did look like in November 2005?

1 A. That's correct.

2 Q. Okay. Where's that in your report -- the construction  
3 of the "no build"?

4 A. It's spelled out in detail I mean throughout the  
5 report, but the construction of the "no build" is in Section 3  
6 of my report.

7 Q. Okay. Now after you constructed the "no build" base,  
8 for want of a better term, right?

9 A. Uh-huh.

10 Q. Okay. And that is your base number, right?

11 A. That is the base condition that we have set the  
12 scientific model to. At that time then we would test it with  
13 the various scenarios.

14 Q. Okay. Now when you say a "scientific model," is this  
15 science or is this guessitimates?

16 A. This is extremely detailed science. We build a  
17 scientific model that all of the various factors go into, such  
18 as -- it ranges from the lane widths to the type of  
19 signalization, the type of operation of the signal, how much  
20 time the signal has in yellow, red, and green phase, if there's  
21 pedestrian push buttons, if there's bus stops. All of the  
22 geometric features are built into the model and then the traffic  
23 volumes are also built into the model. So it's a scientific  
24 model of the traffic conditions at that time.

25 Q. How do you know the geometric conditions going into

1 the traffic signals?

2 A. I measure them. I measure them and observe --

3 Q. You went there?

4 A. I observed the traffic conditions and the geometric  
5 conditions at the locations.

6 Q. You went to all the locations we're talking about?

7 A. I've been to all the locations in this study numerous  
8 times.

9 Q. Okay. Now once we did the base and you had to look at  
10 one of the scenarios, which was the first scenario you looked  
11 at?

12 A. We looked a numerous scenarios. The first scenario  
13 was the build scenario -- and I'd refresh my memory. I believe  
14 the build with the remainder. Yes. The build with the  
15 remainder was Scenario 1 in my document.

16 Q. And then you do the build of the entirety?

17 A. The build of the entirety. That's correct.

18 Q. Okay. Now we're talking build as what?

19 A. In that particular case, the build for both the  
20 remainder and the entirety for Scenario 1 and Scenario 2 were  
21 industrial "as of right" developments.

22 Q. Okay. So this next scenario, which was split into two  
23 pieces is if it was developed "as of right"; is that correct?

24 A. That's correct.

25 Q. Okay. So how do you do this development of this

1 model?

2           A.     Once we have our base condition, which we have  
3 identified as the -- the terminology would be the "no build"  
4 condition.  Then we reference the Institute of Transportation  
5 Engineers, known as the ITE, Trip Generation Manual.  That is a  
6 traffic engineer's manual that is nationally accepted,  
7 internationally utilized for predicting traffic that would be  
8 generated by various types of land uses.  The document is on its  
9 8th edition.  It has been around and accepted for many years.  
10 And what happens is it's a compilation of published reports of  
11 various types of land uses.  So you open it up to the particular  
12 land use, you go into the -- equations are typically what's  
13 utilized and you calculate the traffic generated for a different  
14 type of land use.

15           Q.     Is that what you did in this case?

16           A.     Absolutely.

17           Q.     Okay.  Now that gives you the number of trips, right?

18           A.     That's correct.

19           Q.     Now how do you figure out where these trips are going?

20           A.     What we utilize is the existing background traffic.  
21 We look at how the traffic patterns are today, where people are  
22 going today through different of uses at the different  
23 locations.  And we also have -- because of my local background  
24 of 22 years of doing traffic engineering in this region, I'm  
25 very familiar with how people travel on the different road

1 networks, where the work centers, where the residential centers,  
2 depending on the type of land use. So we apply those factors  
3 based on the existing traffic patterns and the local knowledge  
4 and we apply it -- and the access locations for the various  
5 developments and we apply that to the roadway network.

6 Q. Okay. Now the "as built" industrial you basically did  
7 it two ways. You did as just the remainder after the taking of  
8 Gyrodyne, right?

9 A. That's correct.

10 Q. And then you did it as if the entire 308 acres had  
11 been done?

12 A. That's correct.

13 Q. Okay. And that build up of those two scenarios of 1A  
14 and 1B is where in your report?

15 A. The build up of those scenarios is Section 4 -- I'm  
16 sorry. I apologize. It starts in Section 4 in universal and  
17 then Section 5 and 6 in my report.

18 Q. Now after you built up the scenario of -- it was  
19 developed and zoned for industrial. Did you look at a different  
20 scenario?

21 A. Yes, we did.

22 Q. What scenario was that?

23 A. We looked at residential development of the property.

24 Q. Okay.

25 A. Both the remainder and the entirety.

1 Q. The same thing you did -- the remaining piece and then  
2 you did the whole thing, including the remaining piece?

3 A. That's correct.

4 Q. Okay. Now the "as built" for residential what numbers  
5 were you using to determine the density?

6 A. We relied on the Rogers & Taylor reports, which had  
7 the densities laid out within them.

8 Q. Okay.

9 MR. RYAN: I'm sorry. What report was this?

10 THE WITNESS: Rogers & Taylor.

11 Q. So once you got those densities from the appraiser,  
12 what did you do next?

13 A. We applied the Institute Engineers Trip Generation  
14 Manual and we developed the actual number of vehicles that would  
15 be coming in and out of the site.

16 Q. Okay. Now the manual you were talking about that just  
17 tells you the number of trips coming in?

18 A. It tells us the number of vehicles coming -- entering  
19 and exiting the property.

20 Q. You still have to figure out where they're going,  
21 right?

22 A. Correct.

23 Q. And you do that by using?

24 A. By utilizing the existing travel patterns within the  
25 area, local knowledge of where the employment -- in case where

1 appointment centers are. And at that point we apply those  
2 percentages throughout the network, in this case 13  
3 intersections.

4 Q. Okay. And where's the build up that you did for the  
5 residential in your report?

6 A. That's contained within Section 7 of the document.

7 Q. I'd like to direct your attention to Section 8 of your  
8 report. Near the back it's -- the pages are not numbered, so I  
9 guess you have to find the section. It's titled "Summary of  
10 Intersections Requiring Mitigation"

11 A. Correct.

12 MR. CLASEN: Do you need time, Your Honor?

13 THE COURT: I have it.

14 MR. CLASEN: You have it? Okay.

15 THE COURT: Page 8-1?

16 MR. CLASEN: It's page 8-1.

17 THE WITNESS: Correct.

18 Q. Can you tell us what does this section affect?

19 A. As I have stated, when we developed what the traffic  
20 conditions would be in the various alternatives, then what we do  
21 is utilize the Highway Capacity Manual's standard calculations,  
22 which is for capacity analysis. Capacity analysis of an  
23 intersection is a mathematical model that is developed, which is  
24 all the input that we have collected and enveloped we put into  
25 the model. And what happens is we run a computer program, which

1 is accepted by New York State Department of Transportation,  
2 along with most national transportation agencies. We utilize a  
3 computer software to determine what the levels of service are at  
4 the various study intersections. Level of service vary.  
5 They're ranked from an "A," which is essentially uncongested,  
6 free-flow traffic conditions to an "F," which is congested to  
7 the point where most likely it's heading to an intersection  
8 breakdown, where the intersection is failing to operate. It  
9 cannot handle the demand at that location.

10 Q. Now this Section "A," right, you call it "A Summary of  
11 Intersections Requiring Mitigation."

12 A. Correct.

13 Q. This is a list of intersections that were impacted; I  
14 take it, by one of the two scenarios?

15 A. Once we have run the models for all the various  
16 scenarios, what we determined was where there were significant  
17 adverse impacts at the various intersections and we utilized  
18 those to determine this list. This list is a summary of the  
19 locations that would require some form of mitigation in order to  
20 allow the intersection to handle the future traffic from those  
21 different scenarios.

22 Q. These are the intersections, though, that are  
23 negatively impacted significantly as a result of the scenario  
24 you were talking about?

25 A. That's correct.



1 Q. So if an intersection was already a "C" and you  
2 developed it for residential, it stayed a "C." It wouldn't be  
3 on this list?

4 A. It is not on this list.

5 Q. Okay. And if it was an "E" before any development and  
6 after any development under either scenario, it wouldn't be on  
7 your list, right?

8 A. Based on my experience, if there was a significant  
9 impact, it would be on this list.

10 Q. Right.

11 A. So if there was not a significant change in  
12 operation --

13 Q. Negative?

14 A. Negative impact, then it would require -- if there was  
15 a negative impact, it would require mitigation and therefore it  
16 would be on this list.

17 Q. Now the first scenario is "as of right," right? And  
18 that's just having you do the remainder after the taking, right?

19 A. That's correct.

20 Q. So is the scenario where Gyrodyne loses its property,  
21 except for the remaining, but they develop that "as of right."

22 A. That's correct.

23 Q. And you list -- I believe it's eight intersections  
24 here which have a negative impact as a result of that?

25 A. That is correct.

1 Q. Now the next, 8.2, that's the scenario, which if it  
2 had been the entire property had been developed as of light  
3 industrial, right?

4 A. That's correct. In that scenario, 12 of the 13 study  
5 locations would require mitigation.

6 Q. Okay. Back, if we can to 8.1, 8.1 is just the  
7 remainder of to be developed, right?

8 A. 8.1 would be the remainder of the 62 acres remaining.

9 Q. That's like 20 some odd percent of the entire  
10 property.

11 A. That's correct. And that would require -- eight  
12 intersections would require mitigation.

13 Q. If only 20 percent of the entire 308 were being  
14 developed, right?

15 A. That is correct.

16 Q. Now if just the remainder was to be developed for  
17 residential, would the densities that you were given, three to  
18 six, right?

19 A. That's correct.

20 Q. Okay. What's the impact?

21 A. Zero.

22 Q. Zero negative impact?

23 A. There would be zero negative impact.

24 Q. Okay. Was there any positive impact for some of  
25 these?

1 A. There is actually a positive impact at one location.  
2 Yes.

3 Q. And the negative impact -- if the entire property was  
4 developed --

5 A. Uh-huh.

6 Q. -- as residential, it would be how many intersections?

7 A. There would be one intersection that would require  
8 mitigation.

9 Q. What intersection is that?

10 A. That would be Route 25A at Link Avenue right across  
11 from the firehouse.

12 Q. Okay. And what's the problem here?

13 A. The problem at that location is that it's in an  
14 intersection that's very difficult to find gaps in the through  
15 traffic on 25A. So drivers tend to be come frustrated and  
16 cannot make the turn onto 25A. So in this particular scenario  
17 that location would be impacted. My suggestion would be,  
18 although mitigation -- actual determining mitigation was not  
19 part of our analysis, I believe that could be easily handled  
20 with a traffic signal installation.

21 Q. Now earlier on in your report at -- I think it's in  
22 your executive summary and it's Roman number "IV" you had a  
23 chart, which we've blown up part of it here.

24 A. That's correct.

25 Q. Okay. This stuff that's blown up here that comes from

1 the "IV" chart, right?

2 A. That's correct. The information contained in there is  
3 identical.

4 Q. Okay. And if you would just tell me, what are we  
5 looking at here? The blue, the dark blue that's on the left  
6 side of the chart, that 4,224, what's that?

7 A. That is the number of vehicles in a one-hour period  
8 that would enter and exit this site if it was developed as an  
9 "as of right" industrial/commercial development. That's 4,224  
10 vehicles in a one-hour period.

11 Q. In the morning, right? This is the morning.

12 A. In the morning. That is the A.M. peak condition, so  
13 that's during the busiest A.M. hour in the morning. That would  
14 be the number of vehicles that would be added if the "as of  
15 right" for 308 acres was developed.

16 Q. Now instead of being developed "as of right," right,  
17 if it was developed as residential with the density of three to  
18 six that you looked at here, right?

19 A. Correct.

20 Q. What's the peak traffic that we're expecting in the  
21 morning?

22 A. Three hundred and twenty-three vehicles over a one-  
23 hour period.

24 Q. And that's the peak hour, right?

25 A. That is the peak condition in the morning.

1 Q. As is this is the peak?

2 A. That's the peak in the morning also.

3 Q. Now similarly, in the afternoon the 4,804 on that big  
4 blue line, what does that represent?

5 A. That would be over a one-hour period how many cars  
6 would come into and out of the industrial development if it was  
7 an "as of right" for the 308 acres over a one-hour period.

8 Q. The peak hour?

9 A. The peak one-hour period.

10 Q. This is the P.M. rush hour?

11 A. That's the P.M. rush hour. That's correct.

12 Q. Okay. And the 343, what's that?

13 A. That would be the number of vehicles over that same  
14 one-hour peak condition if it was developed as a residential  
15 development.

16 Q. Okay.

17 MR. CLASEN: This board, by the way, Your Honor,  
18 that's been marked as Exhibit 6 is a blow-up I, you know,  
19 xeroxed it.

20 THE COURT: Understood.

21 Q. Now you prepared a video, is that true?

22 A. That is correct. We prepared a video and that video  
23 is a graphical representation of the exact calculations, the  
24 models that went into this study. We have -- the software  
25 allows us to utilize a video representation of exactly the

1 traffic conditions, as you would see in November 2005 during  
2 various scenarios that we built. We built these models using  
3 the computer simulation or the computer software that is  
4 accepted by New York State Department of Transportation. And  
5 part of that software package is a visual simulation or a visual  
6 representation of exactly the traffic conditions that are out  
7 there. Typically, when we utilize this in public forums, the  
8 residents often turn to us and say "That's exactly what I see  
9 out there." It is a very accepted and realistic representation  
10 of traffic conditions.

11 THE COURT: That's Exhibit 5, I assume.

12 MR. CLASEN: Yes. With your permission, I  
13 could...

14 THE COURT: You may.

15 (Video shown.)

16 Q. Now Mr. King if you could -- it's going to start  
17 playing in just a second.

18 A. Sure.

19 Q. If you could just walk us through what we're seeing.

20 A. What we're going to see -- the first thing is a map  
21 here, which is the same map that is contained within the -- and  
22 my laser pointer is not working. I apologize. Now it is. This  
23 map is contained within the traffic study and it shows the  
24 various locations that were analyzed. The yellow as the first  
25 intersection we will see, which is the intersection during the

1 A.M. peak hour of Route 25A, Lake Avenue and Moriches. That is  
2 the three intersections that come together right at the Village  
3 Hall, right at the firehouse. That particular location will be  
4 represented by a side-by-side analysis. The first side on the  
5 left will be the "as of right" industrial use and on the right  
6 will be the residential use.

7           They are running at a two times, real time scenario.  
8 So in other words, for every minute there's actually two minutes  
9 of real time speeded up slightly. And this representation will  
10 show you -- as I said, the industrial "as of right" is on this  
11 side. The residential is on this side. The software is so  
12 accurate that it will show conditions that anybody that utilizes  
13 this intersection would understand. Right now, on the  
14 residential right there that is a backup because that driver  
15 wants to make a left turn at that location and he's blocking all  
16 the traffic. Once he gets ability to go, the traffic will start  
17 to flow.

18           On this particular side, what you will notice is that  
19 the traffic is heavy on 25A and there's a significant backup on  
20 Lake Avenue. Lake Avenue actually will back up around a  
21 thousand feet under the industrial "as of right" scenario in the  
22 morning.

23           THE COURT: And you're doing that because you're  
24 taking that as a feeder road from the south going north?

25           THE WITNESS: That's correct. That is one of the

1 ways to come from the south to get to the site, as is  
2 Richards Roads, Stony Brook Road. But what you will see is  
3 that this will backup -- this backup here will not go away  
4 because it will continue to be fed by the heavy traffic  
5 volume trying to get to the industrial development. Where  
6 once this individual here was able to make that left, that  
7 cleared out, pretty common for that type of a situation.

8 Another thing is that this will backup, and what  
9 happens is in an industrial development there is vehicles  
10 that leave in the morning, whether it's somebody being  
11 dropped off or it's somebody working a later shift or  
12 something like that; and you'll see that this will get  
13 heavier and this continues. This will never clear out.

14 Q. I was going to say, when do these people get to work?  
15 Never?

16 A. They eventually get to work. There are no skeletons  
17 there. So they do eventually get there, but it takes a lot of  
18 time. And in the residential you will not see that at all --  
19 that kind of a scenario. The next location, again, the same map  
20 that's in the report will be Moriches Road at Mills Pond Road.  
21 This location, under the A.M. peak scenario, will have the exact  
22 same industrial on the left. It'll have the residential on the  
23 right. And the only thing I want to point out on this one is  
24 that because of the limitation of the simulating software the  
25 intersection will be shown off skew a little bit and I'll point



1 that out.

2           What happens is it's just -- it has no affect on the  
3 analysis whatsoever that's contained within the document. But  
4 this is the roadbed here from Moriches Road. If we had rotated  
5 this around in the modeling over to here, the software would  
6 think that we had two through conditions. So because of the odd  
7 geometry of this location, we had to rotate around it. It does  
8 not in any way affect the analysis whatsoever. It's a true  
9 representation of what you would see out here. And this is an  
10 all-way stop; therefore you have the four red dots on the  
11 corners. Those are representative of stop signs. In the  
12 Moriches, and in this particular intersection, in the  
13 residential you will se there is very little traffic. It's  
14 actually very similar to what's out there today.

15           However, in the industrial "as of right," again,  
16 another southerly feeder into the property and a significant  
17 one, this traffic will back up well over a thousand feet going  
18 down Moriches Road.

19           Q. Can't you stop this by just putting a light here?

20           A. This particular location is operating as an all-way  
21 stop today. So an all-way stop is very comparable to a  
22 short-cycled intersection under traffic signal control. In  
23 other words, it essentially operates that way already. It would  
24 have to meet the warrants and maybe eventually there would be a  
25 need for a traffic light at that location. But that is in the

1 middle of a residential area and it's not highly desirable.

2 Q. And if you put a light there, what would the affect be  
3 on the other streets?

4 A. All the other streets would then share the pain. They  
5 would all have delay. Because what happens is, as you can see,  
6 the people coming off of the side streets beyond this queue here  
7 do not have any real wait at all. But they would all be  
8 impacted by the traffic signal being red.

9 Q. How far back on Moriches Road do these people back up?

10 A. This one backs up significantly. Because it's an  
11 all-way stop, you can't actually calculate the distance. We  
12 know it does not go as far as Woodlawn Road, but it's hundreds  
13 of feet.

14 The next location we're going to be looking at is  
15 Mills Pond right at 25A. This is on the northwest corner of the  
16 property. And at this location we have installed in all five  
17 scenarios a traffic signal and a miter left turn lane on 25A.  
18 We did that in all five scenarios. That's the "no build" and  
19 the build conditions because of discussions that we had with New  
20 York State Department of Transportation where they have  
21 authorized it. They've agreed that it meets the federal  
22 warrants for a traffic light at this location. So we have done  
23 it in all of the balance scenarios.

24 We had discussions with Frank Durubos (phonetic) over  
25 at the Town of Smithtown. He also was in favor of a traffic

**A SWIFT SCRIPT**

1 light at this location.

2 MR. RYAN: Objection, Your Honor.

3 THE COURT: As to Mr. Durubos's statement?

4 MR. RYAN: Durubos and the Department of  
5 Transportation.

6 THE COURT: Well, certainly as to Mr. Durubos,  
7 whether he's in favor or not. I won't strike the comments  
8 to that -- I'll strike the reaction of the Department of  
9 Transportation, but I'll leave in the fact that the witness  
10 had discussions with the Department of Transportation since  
11 those were his discussions.

12 MR. RYAN: If I may, Your Honor? The witness has  
13 indicated that the Department gave authorization.

14 THE COURT: That's what I said. I'll strike the  
15 reaction of the Department.

16 MR. RYAN: Okay.

17 THE COURT: I will leave in that he had  
18 discussion with the Department since participated in the  
19 discussions.

20 MR. RYAN: Understood.

21 THE COURT: Fair enough?

22 Q. So tell us what's happening here?

23 A. So at this location again we have in all five  
24 scenarios, the "no build" and all of the industrial and the  
25 residential we have a traffic light here. What you can see is

1 the significant backup on 25A in both directions. This is  
2 thousands of feet in both directions because of the industrial  
3 "as of right" additional traffic, where you don't see that at  
4 all in the proposed residential development. There is no  
5 backups at this location; yet, there is significant backups here  
6 in both directions. And as I've stated, those are in the  
7 thousands of feet.

8 Q. And you put a light here, so there's nothing else you  
9 can do, right?

10 A. There is a traffic light there with a left turn lane  
11 for the westbound turning traffic and there's significant  
12 pavement there for that to occur.

13 Q. Okay. Now that's 25A coming down. That's really just  
14 a one-lane road, right?

15 A. This is essentially one lane in both directions, 25A.  
16 That's correct, with turn lanes at selected locations.

17 Q. As a practical matter, you're not going to be able to  
18 widen that road, am I correct?

19 A. As a practical matter, it would not be looked upon  
20 favorably to widen that road to accommodate the industrial  
21 development.

22 THE COURT: Do you have a P.M. video on that,  
23 too, as well, I assume?

24 THE WITNESS: Yes, we do.

25 THE COURT: And I assume that shows the increased

1 traffic on the left turn lane?

2 THE WITNESS: Yes. It would show increased  
3 traffic here --

4 THE COURT: Yes.

5 THE WITNESS: -- as it does on Mills Pond itself,  
6 too. That's correct.

7 Q. You actually -- we're going to see some locations just  
8 in the A.M. and some just in the P.M. and some both, right?

9 A. That's correct.

10 Q. And why is that?

11 A. That's correct. Because what we tried to do is show a  
12 representation in this particular location -- the next one will  
13 be Stony Brook Road at 25A. What we tried to do is show a  
14 representation of the intersections that would be affected along  
15 25A near the property. We did not show the heavy traffic  
16 locations down on 347 because if you looked at the intersections  
17 on 347 where there is also, under the industrial scenario  
18 significant impacts, you would see the entire screen filled with  
19 cars in both directions. So it's very difficult to notice that  
20 affect. But if I were to show it to you, you would see --  
21 especially at the location of CR97 and 347 under the industrial  
22 "as of right" development there is a doubling of the traffic  
23 delay.

24 THE COURT: Of County Road 97?

25 THE WITNESS: Of both 97 and 347 there's a

1 doubling of the delay there. So it goes up to 228 seconds  
2 per vehicle.

3 Q. Now what's the next intersection we look at here?

4 A. Stony Brook Road at 25A, which is on the northeast  
5 corner, essentially, of the property. This particular one we're  
6 going to show the P.M. peak hour of 25A at Stony Brook Road.  
7 And what you really will see significant here is the backing up,  
8 the queuing that occurs on Stony Brook Road.

9 THE COURT: To make the turn?

10 THE WITNESS: To make the left turn onto 25A.

11 A. This particular location, when you look at the overall  
12 intersection it does not operate bad because it's a stopped  
13 condition for only Stony Brook Road here. So all the traffic on  
14 25A, essentially, continues to flow. But under the industrial  
15 "as of right" there is so much more traffic that the queuing  
16 that occurs down Stony Brook Road just gets greater. And it's  
17 approaching over a thousand feet that it actually backs up.

18 And the other thing you see is a backing up of traffic  
19 here of people trying to get down here. The reason this backs  
20 up is because the industrial is exiting from the property and  
21 it's eliminating any -- the few precious gaps that are there  
22 that allow you to make a left turn onto Stony Brook Road are  
23 essentially eliminated under this scenario because of the  
24 traffic increase on 25A from the industrial development. And  
25 this queuing just continues to go further and further because

1 there is no longer any gaps available at this location.

2 Q. How about the queuing up on 25A?

3 A. As I said, this queuing -- the left turn queuing here  
4 has actually stopped. The westbound through traffic has  
5 actually been stopped because the people making a left turn  
6 cannot make that left turn onto Stony Brook Road because there's  
7 no gaps. There's no opening in the traffic at this point.

8 THE COURT: Did you measure intersections further  
9 to the east if they try to avoid Stony Brook Road or to  
10 continue on 25A up to Nichols Road?

11 THE WITNESS: We did. In our analysis we also  
12 looked at Main Street at 25A and we looked at 25A at  
13 Nichols Road. We looked at both those within the study.

14 A. And we didn't show all of those. If we had looked at  
15 them, we would see similar situations with traffic backing up,  
16 the queuing going on because of the increase in industrial  
17 traffic.

18 THE WITNESS: We're back at Mills Pond Road in  
19 the P.M. peak, which is the one you asked about, Your  
20 Honor.

21 THE COURT: Uh-huh.

22 A. And in this particular case, again, which is  
23 throughout all the scenarios, we have included a traffic light  
24 and we included a left turn lane. If we didn't have them, the  
25 industrial would just be that much worse. Residential would

1 have some backing up, but the existing it actually backs up.

2           So we're going to see at that location the similar  
3 situation where there is queuing that is going on. This is  
4 constant. You're going to see a constant flow whenever this is  
5 green through here of vehicles trying to come into and out of  
6 the industrial park. Mills Pond Road, even though it's  
7 signalized, will actually back up now under this scenario.  
8 Under the residential scenario, it will not have any or very  
9 minor backup at that location, a couple of vehicles during the  
10 traffic light.

11           But you can see this distance it just keeps getting  
12 longer and longer. And I want to point out that this simulation  
13 is running two times real time, but it's running exactly the  
14 same timeframe for both residential and industrial. So if this  
15 is running right now at 5:10, it's at 5:10 for the other one.  
16 They are the same side-by-side times, so they're running exactly  
17 synchronized, if you will, to each other so that you can get a  
18 true representation of how the two of them would be.

19           Q.    And this on the right side we're looking at all those  
20 units being built on the property that were anticipate by Gary  
21 Keller (phonetic), right?

22           A.    This is the entirety. Of the 308 acres, this is all  
23 the residential development. That's right.

24           Q.    All being full built out and this is what it's  
25 generating, right?



1           A.    That's correct.  That's correct.  Which is, as you  
2 remember from this chart here, is only 300 vehicles over a  
3 60-minute period.  So in the overall scheme of things that's not  
4 that many vehicles as opposed to the industrial, which has  
5 almost 5,000.  So you can see this queue on Mills Pond Road is  
6 just getting longer and longer because there's on service demand  
7 coming out of -- even with a traffic light, you just cannot get  
8 enough vehicles out of that and the Mills Pond Road certainly  
9 would never widen to accommodate this kind of a traffic volume.

10          Q.    And what about Mills Ponds Road?  What type of road is  
11 that again?

12          A.    It's a town road -- two-lane town road.

13          Q.    It's kind of winding with all the residences in the  
14 area?

15          A.    Somewhat.  Yes.

16          Q.    Yes.

17          A.    It is somewhat.  It has its straight section.  This is  
18 -- we're going back to the intersection of Moriches Road at  
19 Mills Pond, which is the all-way stop condition.  This  
20 particular one you will see the inverse of what we saw in the  
21 A.M. peak where we had all the traffic coming from the south,  
22 working its way up to the industrial development and it was  
23 queued up way down Moriches Road.  You're going to see the  
24 opposite now where traffic is actually backed up on Mills Pond  
25 Road trying to make the left turn to get down to Moriches Road,

1 down to the Smithhaven Mall and further beyond at that point.

2           Again, this is running at two times the speed,  
3 industrial on the left, residential on the right. And you can  
4 see under the residential scenario this is very similar to the  
5 intersection that it is today. There are a couple of cars that  
6 come through, you know, ever once in a while. In this  
7 particular case, this is backing up almost 1600 feet with the  
8 inability to actually make this turn, even under the "all way"  
9 scenario.

10           And as I have stated previously, if we were to go and  
11 look at every scenario for every intersection, we would see  
12 comparable conditions. We just haven't shown each and every one  
13 of them in the interest of time. But everything that is shown  
14 on this screen is documented within the report and is modeled  
15 with the traffic study itself. Those analyses are what create  
16 this model.

17           Q.    What's the yellow "F" for the intersection on  
18 industrial, as it were?

19           A.    This intersection is failing versus -- I believe it's  
20 a "B" in the residential.

21           Q.    So the industrial is an "F" --

22           A.    Yes.

23           Q.    And the residential is a "B"?

24           A.    That's correct.

25           THE COURT: Now you've shown everything as the

1 movement of cars, whether it's the industrial "as of right"  
2 or residential. Is there any differentiation if mixed in,  
3 and particularly, in the industrial "as of right" there  
4 were trucks as well as cars? Does that factor in to the  
5 analysis at all?

6 THE WITNESS: What happens is that the software  
7 allows, the modeling allows us to put in a percentage of  
8 truck traffic. We have not -- in this scenario we have not  
9 increased that percentage based on the existing. In the  
10 industrial it would increase, but we haven't done that.  
11 You will see some trucks. You're seeing them right now.  
12 Here, coming down, there's a couple of trucks. What  
13 happens is if there was a 2 percent -- let's say when we  
14 did the traffic counts at this location and there was 2  
15 percent truck traffic, we held that percentage. We didn't  
16 increase it. But in reality in the industrial scenario,  
17 there would be more trucks.

18 THE COURT: In other words, what's in evidence is  
19 based upon what you saw at the time that you made the  
20 original analysis, no consideration given to any change as  
21 a result of could have been built, would have been built or  
22 through change in the zoning.

23 THE WITNESS: As it relates to the trucks?

24 THE COURT: As it relates to the type of vehicle?

25 THE WITNESS: That's correct. We have not

1 increased the truck percentages.

2 THE COURT: Okay. Thank you.

3 Q. Which you would in industrial assume that the trucks  
4 would belong, right?

5 A. We could. We should, but we hadn't because we're just  
6 being more conservative. If we did the queues would be that  
7 much longer, traffic conditions would be slower.

8 Q. Okay. That's it?

9 A. That's it.

10 Q. I'm sorry.

11 A. Uh-huh.

12 Q. Okay. What we've been seeing here is really just a  
13 video depiction of the result of this blow up that we here,  
14 right?

15 A. Absolutely. When we were first asked to look at this  
16 -- normally, as a traffic engineer doing this for 22 years, when  
17 I see that kind of a discrepancy, I'm done. I don't need to do  
18 any further analysis because there is no reason to. You look at  
19 -- traffic condition is between 5,000 to 300 during an hour  
20 period it's significant, unless this industrial were to have --  
21 and I've worked on projects in Pennsylvania where we were  
22 looking at 700-acre industrial developments where we were  
23 building new highways to get to them. Unless we were doing  
24 that, which in this scenario we're not, this industrial "as of  
25 right" makes no sense at 5,000 vehicles per hour.

1 Q. And if you could go back to Section 8 of your report.

2 A. Sure.

3 Q. Even if we knocked this down to really only 20 some  
4 odd percent being developed as industrial "as of right," it's  
5 still a nightmare for eight intersections, right?

6 A. There are still eight intersections that have adverse  
7 impacts.

8 Q. Do any of those intersections go down to an "F"?

9 A. I'm sorry.

10 Q. Do any of the intersections that would go down -- if  
11 just the remainder was developed, do any of them go down to a  
12 level "F" or "E"?

13 A. Yes. But I would like to consult the chart.

14 Q. Now all that's detailed in your report, right?

15 A. All of it's spelled out within the report. Yes.

16 Q. But some of them go down to "E's" and "F's" here,  
17 right?

18 A. Oh, absolutely. Absolutely. Yes. Yes.

19 Q. And "F" is just a failure situation, right?

20 A. "F" is if the intersection is at the point where it is  
21 unable to service the demand of vehicles to the location. And  
22 typically, at that point the level of service that you are  
23 waiting two, three cycles of red, yellow, green to get through  
24 the intersection.

25 MR. CLASEN: I don't have any further questions,

1 Your Honor.

2 THE COURT: Mr. Ryan, would you like a couple of  
3 minutes to consult with your...

4 MR. RYAN: I would, Your Honor.

5 THE COURT: Fifteen?

6 MR. RYAN: Thank you.

7 THE COURT: We will adjourn to ten after four.

8 (Off the record.)

9 THE COURT: Mr. Ryan, your cross-examination.

10 MR. RYAN: Thank you, Your Honor.

11 CROSS-EXAMINATION

12 BY MR. RYAN:

13 Q. Mr. King, as I read your report and as I understand  
14 your testimony, you did four different scenarios?

15 A. Five.

16 Q. Five? I'm sorry. There was the "no build" for the  
17 entire property, a full build out for the entire property  
18 industrial, a build out of the remainder property industrial, a  
19 full build out of the entire property residential and a build  
20 out of the remainder property residential, correct?

21 A. That's correct.

22 Q. Okay. And you developed this build out from -- the  
23 industrial build out I'll focus on that first, from what?

24 A. Which industrial build out?

25 Q. The full.

1 A. The entirety?

2 Q. Let's talk about the full property.

3 A. Okay. Now are you asking me how I developed the model  
4 itself?

5 Q. Yes. Well, you indicated that you developed the trips  
6 generated from a full industrial build out of this property,  
7 using the ITE schedules, correct -- tables?

8 A. That's correct.

9 Q. You envisioned at the time you did that some  
10 particular use and area of development of this property?

11 A. I utilized what was reported to me in the various  
12 studies -- the appraisal and the planning studies.

13 Q. Can you show me, in your report, the reference to what  
14 you were using? I want to understand it.

15 A. Yes. It's actually shown on the first page, first  
16 paragraph of the executive summary.

17 Q. All right, so the entirety is -- industrial build out  
18 is what you indicate is item "B", correct?

19 A. Correct.

20 Q. And that shows an "as of right" construction of  
21 1,710,00 square feet of office space and 2,230,000 square feet  
22 of industrial space, correct?

23 A. That's correct.

24 Q. All right. And where did you draw those numbers from?

25 A. From the planning studies that were done.

1 Q. Now that's Mr. Gulizio's study.

2 A. Mr. Gulizio's study and Mr. Fisher's study.

3 Q. Okay. Using Mr. Gulizio's study, correct? Mr. Fisher  
4 used Mr. Gulizio's numbers, correct?

5 A. I don't know that.

6 Q. Well, the numbers were the same, weren't they?

7 A. I don't know if Mr. Gulizio's were the same as  
8 Mr. Fisher's.

9 Q. All right. Is that all you used?

10 A. That's correct.

11 Q. All right. And your understanding is that these  
12 numbers are the maximum space that could be utilized in the  
13 existing zoning?

14 A. They were the square footages of development that were  
15 reported to me in the planning studies. That's correct.

16 Q. So you just accepted them.

17 A. That's correct.

18 Q. You didn't inquire at all whether that amount of  
19 office space or that amount of other industrial space could  
20 actually be built?

21 A. That was not part of my engineering exercise.

22 Q. Right. You just took it for granted, right?

23 A. I relied on the expertise of the consultants.

24 Q. Right. And you used that approximately 4 million  
25 square feet of industrial space as the baseline or one of the



1 baselines for your scientific model?

2 A. For the entirety "as of right" development. That's  
3 correct.

4 Q. Right. Now a scientific model depends on the  
5 assumptions that go into it, doesn't it?

6 A. In traffic engineering when you do a scientific model,  
7 you build it for the "no build" condition and then you test it  
8 for the different scenarios, which is actually what we did here.  
9 We used the same conditions, the same inputs, the same entries  
10 into the database in order test the four scenarios presented.

11 Q. Sure. But you know the statement "garbage in/garbage  
12 out," don't you? And you know what that refers to.

13 A. I think I have to take exception to what you're  
14 referring to here. If you're referring to that my document in  
15 any way is garbage in or garbage out, I take exception to that.  
16 I've done --

17 Q. Are you familiar with the term?

18 A. I've been preparing traffic studies for 22 years.

19 Q. Good.

20 A. I have done them for all types of large-scale  
21 industrial and residential developments. I have utilized all of  
22 the standards accepted by the New York State Department of  
23 Transportation as well as almost every national standard and  
24 I've applied those in my engineering judgment here.

25 Q. Now answer my question, Mr. King. Are you familiar

1 with the term?

2 A. Yes.

3 Q. Okay. Do you know what it means?

4 A. I know what it infers.

5 Q. Okay. You went to the ITE schedules for 1,710,000  
6 square feet of office space, correct?

7 A. As part of the entirety development.

8 Q. We're talking about "B", right?

9 A. Correct.

10 Q. And you drew from those schedules the trip generation  
11 for office space.

12 A. That's correct.

13 Q. And that was all based on advice to you that that's  
14 what would be built here or that's the analysis you should do.

15 A. I relied on the expertise of the consultants that  
16 prepared the planning studies for this property.

17 Q. Okay. Well, you used the term, and Mr. Clasen used it  
18 time and again in asking you question zoning "as of right." Now  
19 you've been involved in the building of many projects, have you  
20 not, Mr. King?

21 A. Absolutely. Does maximizing or the maximum density of  
22 a parcel under its existing zoning, is that a right?

23 A. Again, I was not charged with preparing the  
24 development scenarios. I was asked to analysis, by traffic  
25 engineering expertise, what the conditions would be represented.

1 Q. Mr. King, drawing on your 22 years of traffic  
2 experience analyzing developments, large developments, as you  
3 said, with their own feeder roads and analyzing this issue,  
4 zoning "as of right," -- and the questions that were asked to  
5 you, zoning "as of right," does it give a property owner, any  
6 property owner the right to build to the maximum density  
7 allowed?

8 A. My expertise is in traffic and transportation  
9 engineering. It is not in planning.

10 Q. In your experience, Mr. King.

11 A. In my experience what?

12 Q. Does the development that occurs is it the maximum  
13 that's allowed under the zoning?

14 A. There is oftentimes when it is. Yes.

15 Q. All right. Now office space has one traffic  
16 generation in the ITE, correct?

17 A. Are you referring to the land use category?

18 Q. Sure. "As of right" of the entirety 1,710,000 square  
19 feet of office space. The ITE trip generation schedules show an  
20 office space category, do they not -- use category?

21 A. There is a general office category.

22 Q. Right. Is that the one you used?

23 A. That is correct.

24 Q. Okay. And you accepted that there would be a  
25 split -- why didn't you use 4 million?

1           A.     Again, the numbers that I utilized were reported to me  
2 within the planning studies.

3           Q.     Okay. Industrial space, does that have a different  
4 ITE trip generation?

5           A.     Yes.

6           Q.     And you used the number that was given to you for that  
7 as a multiplier?

8           A.     We used the Institute of Transportation's Engineers  
9 Trip Generation Manual to determine the trips.

10          Q.     Okay, for industrial space?

11          A.     For both.

12          Q.     Okay. And you took the trip generation numbers and  
13 just multiplied them by the numbers that you were given?

14          A.     We utilized a software program called "Micro Trends,"  
15 which mirrors the trip generation manual in order to do the  
16 calculation for us because it is, typically, some kind of a  
17 regression equation.

18          Q.     I'm not suggesting you sat down with pencil and paper  
19 as a scratch pad and did the multiplication yourself.

20          A.     I used to do that.

21          Q.     You used a software program to make that  
22 multiplication.

23          A.     That's correct.

24          Q.     All right. But it's a function of multiplying the  
25 trips generated per use by the square footage dedicated for that

1 use, correct?

2 A. There is equations within the document that would tell  
3 you for a certain size development what the trips would be.

4 Q. And the same would be true of the industrial space.

5 A. That's correct.

6 Q. And you came up -- what was your total trips generated  
7 in the "B" scenario of a full industrial build out?

8 A. 28,430 vehicles per day.

9 Q. Okay. And that breaks down to your 4,224 vehicles in  
10 the A.M. peak and your 4,804 vehicles in the P.M. peak, correct?

11 A. Incorrect. Okay, as part of our analysis, there is  
12 existing industrial development on the property.

13 Q. Oh, I'm sorry. You backed out the existing  
14 development.

15 A. We took the existing traffic numbers out. So the  
16 number that was generated by the ITE in the trip generation  
17 manual, as part of our calculation, is greater than that number.  
18 And that's documented on page Roman numeral V of my study.

19 Q. Well, forgive me if I'm wrong, but isn't the 4,224  
20 based on a full industrial build out of the existing property?

21 A. It is based on the development as we just spoke about,  
22 the office and industrial use for the 308 acres minus -- that  
23 number is minus the existing traffic that comes in and out of  
24 the property. So the ITE would tell you that number is higher.

25 THE COURT: Is that where it say "Net New Trips?"

1 THE WITNESS: That's where it says "Net New  
2 Trips." That's correct, Your Honor.

3 Q. Okay. But you couldn't have a full industrial --

4 A. And that's documented in the study.

5 Q. Sure. I understand. You couldn't have a full  
6 industrial build out if you left the existing buildings there,  
7 right? You're tearing them down. You're removing whatever  
8 contribution they have to the existing "no build" condition.

9 A. We removed the existing traffic from the development  
10 for all five -- all four scenarios.

11 Q. Okay. So it's out the window.

12 A. Uh-huh.

13 Q. You've not considered the number. Did you ever count  
14 the number?

15 A. Yes, we did.

16 Q. Okay. And that's what you backed out?

17 A. That's what we backed out. That's correct.

18 Q. All right.

19 A. As documented in the study.

20 Q. So what you've done is take the ITE calculated numbers  
21 and added those to the background number, the "no build?"

22 A. The "no build" minus the existing industrial, which  
23 was removed.

24 Q. Right.

25 A. That's correct.

1 Q. For a net number. And that translates to 4,224  
2 vehicles in the A.M. peak?

3 A. During the A.M. peak condition.

4 Q. All right. And you just assumed a full build is what  
5 -- I mean why did you use the full build for the purpose of the  
6 comparison? Was that your instruction?

7 A. You actually asked two questions. First of all, I  
8 didn't assume anything in my work. And the second thing was --  
9 your question was what did I utilize? I utilized, as we  
10 discussed, the office and the industrial development.

11 Q. Okay. But why did you use a full build industrial?

12 A. We used two scenarios. We used the entirety and the  
13 remainder.

14 Q. Right. Right.

15 A. We did both.

16 Q. Sure. Could there be the development of a site that's  
17 less than full?

18 A. Hypothetically, sure.

19 Q. And did you use any developments of this site that  
20 were less than full?

21 A. Yes, when we did the remainder analysis of the 62  
22 acres, which is 20 percent --

23 Q. Let's stick to the entire --

24 A. -- 20 percent less traffic and it still has eight  
25 intersections that are problematic.

1 Q. Let's stick to your "B" scenario, "as of right" of the  
2 entirety in an industrial use.

3 A. Uh-huh.

4 Q. Did you use less -- did you analyze the traffic  
5 impacts of less than full development of the entire site in  
6 industrial use?

7 A. This was the office and industrial that was provided  
8 to us that we analyzed.

9 Q. Okay. Now answer my question. Did you analyze a less  
10 than full industrial use of the entire 308 acres insofar as  
11 traffic impacts?

12 A. No.

13 Q. Thank you. Now on the remainder when you considered  
14 the traffic from it, and by the remainder we're talking about  
15 the, what, 62.5 acres in Smithtown?

16 A. Okay.

17 Q. Is that what you were considering the remainder?

18 A. The remainder is the 62 plus or minus acres. Yes.

19 Q. All right -- in Smithtown?

20 A. That's correct.

21 Q. And you also did an "as of right" on the remainder.

22 A. That's correct.

23 Q. And you used almost a million, 910,000 square feet of  
24 industrial space, correct?

25 A. That's correct.



1 Q. No offices at all.

2 A. That's correct.

3 Q. Okay. Why not?

4 A. The numbers provided to me by the planning experts  
5 were what I relied upon for my analysis.

6 Q. All right. Well, I mean there's a proportion between  
7 office space and industrial space on the entirety. Why isn't  
8 there a similar proportion for an office and industrial space  
9 for the remainder? Did you ask?

10 A. If an office scenario had been provided to us, we  
11 would have analyzed it. What we would have found is the traffic  
12 would have been worse because office has a higher generation.

13 Q. I'm not asking you what you would have found,  
14 Mr. King.

15 A. Okay.

16 Q. And I'll ask you not to volunteer, other than in  
17 response to a question.

18 A. Sure.

19 THE COURT: Mr. Clasen?

20 MR. CLASEN: Your Honor, objection. That's your  
21 job.

22 MR. RYAN: All right.

23 MR. CLASEN: That's your job to instruct  
24 witnesses.

25 MR. RYAN: Right. Your Honor, I apologize. I

1 would ask the Court to instruct the witness to respond to  
2 the question and not to volunteer.

3 THE COURT: I will attempt to do that, Mr. Ryan.  
4 But you do know that you have a way of asking questions  
5 that sometimes produces the answer that get produced. I'm  
6 well aware that you also sometimes do not like the answer  
7 that's produced and therefore, has to react. However,  
8 people's natures are what they are.

9 Once again, if there were a jury here, we'd  
10 probably have something more to talk about. But since  
11 there isn't, knowing how you ask questions and knowing how  
12 you get answers, rest assured that I know the questions  
13 you're asking. I know the responses you're receiving. And  
14 take it from me, the response that's taken in and I  
15 wouldn't worry about it too much.

16 MR. RYAN: With that, I will continue, Your  
17 Honor.

18 THE COURT: Thank you.

19 MR. RYAN: Thank you.

20 Q. Did you ask why there was no split between industrial  
21 and office for the remainder 63 acres?

22 A. I did not.

23 Q. Excuse me?

24 A. I did not.

25 Q. You just took the number given you and put it into

1 your program?

2 A. I relied on the expertise that was provided to me.

3 Q. Now your executive summary at page VI, Roman numeral,  
4 indicates your -- it has a chart that indicates your conclusions  
5 as to the operation of 14 intersections?

6 A. Thirteen.

7 Q. You're right, 13. Correct?

8 A. Correct.

9 Q. And according to your analysis, Mr. King, only one  
10 intersection was failing to operate -- I'm sorry. Only one  
11 intersection was operating at an "F" level of service on the  
12 date in 2005?

13 A. Under which scenario?

14 Q. "No build," 2005 "no build."

15 A. The chart on page VI is referring to the P.M. peak  
16 hour. And during the 2005 "no build" our analysis showed that  
17 one intersection was operating in an "F". That's the  
18 intersection of 347 and Stony Brook Road.

19 Q. Okay. And the ratings that you've assigned -- no, I'm  
20 sorry. And on page V, we have the morning, correct?

21 A. That's correct.

22 Q. And that shows two intersections operating at an "F"  
23 with "no build."

24 A. That's correct.

25 Q. And that's at 347 and County Route 97 and Route 347

1 and Stony Brook Road?

2 A. That is correct.

3 Q. And in the afternoon, only Route 347 and Stony Brook  
4 Road operates at an "F", correct?

5 A. That's correct.

6 Q. Now an "E" can also be unacceptable, correct?

7 A. In certain regions of the country, yes.

8 Q. How about in New York?

9 A. New York drivers are more tolerant of greater delay at  
10 intersections, and that varies, depending on the roadway or the  
11 location. On 347, "E" is pushing it, but is probably what the  
12 drivers are used to. Part of the tolerance that a driver has  
13 for level of service is directly related to what they're used,  
14 what they're accustomed to.

15 Q. Okay. Now the level of service is something that's  
16 assigned to these intersections by your analysis, correct?

17 A. It is assigned based on the delay calculation. Yes.

18 Q. In your analysis.

19 A. In my analysis. That's correct. I do not assign  
20 them.

21 Q. Well, which category it falls into is assigned based  
22 on the numbers that you've arrived at through your calculations.

23 A. Correct.

24 Q. All right. And your calculations are reflected in the  
25 various charts in your report, correct? Now, for the "no build"

1 analysis, where is your tabulation of the conditions of the  
2 intersection considered?

3 A. Are you asking me where the individual level of  
4 service worksheets are located?

5 Q. Yes.

6 A. They're within the appendix of the document.

7 Q. Okay. And that's an unpaginated appendix?

8 A. That's correct.

9 Q. Now Route 25A at Mills Pond Road, does that have a  
10 signal -- a three-color signal today?

11 A. It does not.

12 Q. As I recall your visual aid, Mr. King, it did.

13 A. That's correct.

14 Q. That signal came from where?

15 A. Based on my discussions with the New York State  
16 Department of Transportation and engineering calculations of  
17 work that I have done, which included a traffic signal warrant  
18 analysis, the standard for determining whether a traffic signal  
19 is allowed to be installed at a particular location, we did  
20 those analysis. We submitted them to the State and the State  
21 concurred. New York State Department of Transportation  
22 concurred that a traffic signal would be acceptable at this  
23 location.

24 Q. No objection. Mr. King --

25 THE COURT: I think Mr. Clasen and I both missed

1 that comment.

2 MR. RYAN: Excuse me?

3 THE COURT: I didn't hear what you said.

4 MR. RYAN: I was essentially speaking to myself,  
5 Judge.

6 THE COURT: Okay.

7 MR. RYAN: I apologize.

8 THE COURT: Okay.

9 Q. Now that was for a development on the remaining  
10 property, correct?

11 A. That's correct.

12 Q. You had indicated that the 62 and 1/2 acres remaining  
13 in Smithtown you had done a traffic impact analysis of its  
14 development or your company had.

15 A. I had done it. That's correct.

16 Q. Okay. And it was in that context that a signal was  
17 determined to be warranted, correct?

18 A. That is correct.

19 Q. Right. No signal is warranted today at that  
20 intersection?

21 A. No. Actually, it meets the warrants of a signal  
22 today.

23 Q. In your analysis.

24 A. In my analysis.

25 Q. Okay.

1 A. That's correct.

2 Q. But DOT has not constructed one there, so its analysis  
3 might differ, right?

4 A. Just because an intersection does or does not meet the  
5 warrant does not mean that the New York State Department of  
6 Transportation goes and constructs signals randomly. They have  
7 to have a request to do it. There are many, many intersections  
8 in this region that would warrant a traffic light.

9 Q. Right. Right, but the DOT was concerned, in its  
10 evaluation, of the impact of this development, correct -- it's  
11 impact on traffic?

12 A. No. We demonstrated to the New York State Department  
13 of Transportation that the location warranted a traffic light  
14 today. And it would be put in as mitigation part to that  
15 development.

16 Q. By Gyrodyne?

17 A. That's correct.

18 Q. Okay.

19 THE COURT: And that might be an appropriate  
20 place then to --

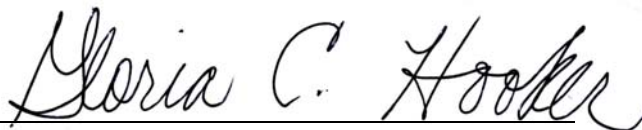
21 MR. RYAN: Thank you, Judge.

22 THE COURT: -- end for today and we will commence  
23 again tomorrow morning at 9:30. Thank you all very much.

24 (Whereupon, the matter was adjourned to August  
25 14, 2009. This proceeding concluded at 4:38:59 p.m.)

C E R T I F I C A T E

I, Gloria C. Hooker, certify that the foregoing transcript of the proceedings held on August 13, 2009, before the Honorable J. Lack, in the New York State Court of Claims, Hauppauge Part, in the matter of Gyrodyne Company of America, Inc. v. The State of New York, Claim Number 112279, was prepared using four-tract electronic transcription equipment and is a true and accurate record of the proceedings.



Gloria C. Hooker

Date audio transcribed:

September 11, 2009

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