

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,

8:17:52 a.m.

Defendant.

(DAY-3)

-----x

August 17, 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.
DAVID E. ROSS, ESQ.
Robinson & Cole, LLP
Attorneys for the Claimant
855 Third Avenue, Suite 2800
New York, New York 10022-4834
(212) 451-2905

J. GARDNER RYAN, ESQ. (A.A.G.)
Attorneys for the Defendant
Andrew M. Cuomo, Attorney General
of the State of New York
Poughkeepsie Regional Office
235 Main Street
Poughkeepsie, New York 12601-3194

A SWIFT SCRIPT

201 S. Research Place, #102, Central Islip, New York 11722
(888) 866-5134 ♦ (800) 860-5722 fax

<u>WITNESSES</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
For the Claimant:				
Peter Pitsiokos				
By Mr. Clasen	458		510	
By Mr. Ryan		470		511
Gerald Barton				
By Mr. Clasen	517			
By Mr. Ryan		530		
For the State:				
Robert Grover				
By Mr. Ryan	544		625	
By Mr. Clasen		583		631
William Fitzpatrick				
By Mr. Ryan	636			
By Mr. Clasen				

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	10	10

A SWIFT SCRIPT

(888) 866-5134 ♦ (800) 860-5722 fax

CLAIMANT EXHIBITS

<u>NOS.</u>	<u>DESCRIPTION</u>	<u>I.D.</u>	<u>E.V.</u>
	Management Zones		
10	Suffolk County Dept of Health Services, Sanitary Code Article 7, Groundwater Management Zones and Water Supply Sensitive Area	10	10
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 Map 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
D	Cameron Engineering & Associates - 6/21/04 Memo	245	252

A SWIFT SCRIPT

(888) 866-5134 ♦ (800) 860-5722 fax

STATE EXHIBITS

<u>NOS.</u>	<u>DESCRIPTION</u>	<u>I.D.</u>	<u>E.V.</u>
E	Letter by American Property Counselors re Gyrodyne Condemnation (8 pp)	260	319
F	Environmental Analysis and Permitting Review Assessment for Gyrodyne Property / Towns of Brookhaven and Smithtown / dated 1/09	260	319
G	Traffic Assessment Report by FitzPatrick Engineering / dated 11/08 (35 pp)	260	319
H	Appraisal Report by American Property Counselors	260	319
I	Final Generic Environmental Impact Statement for Stony Brook Univ Research & Development Campus Stony Brook / Volume I / Date of Acceptance by lead Agency 8/23/04	257	260
J	Town of Brookhaven Certification of Records		475
K	Map-Redevelopment Application of Gyrodyne		496
L	Smithtown Memorandum		
M	4 pages from Exhibit N - GYRO 00793-00796	499	
N	6/25/03 Redevelopment application of Gyrodyne submitted to Town of Smithtown	506	540

A SWIFT SCRIPT

(888) 866-5134 ♦ (800) 860-5722 fax

1 THE MONITOR: Today's date is August 17, 2009.
2 This is day three of the Gyrodyne case vs. The State of New
3 York, Claim Number 112279 and this is for the Honorable
4 James J. Lack.

5 Testing Mic-1. Testing Mic-2. Testing Mic-3.
6 Finally, testing Mic-4.

7 (Off the record.)

8 THE COURT: Good morning. I hope you all had a
9 good weekend. Mr. Clausen, you ready to go?

10 MR. CLASEN: Yes, I am, Your Honor. I'd like to
11 call my first witness for today, Pete Pitsiokos.

12 THE COURT: Right up here, Mr. Pitsiokos.

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 will be the truth, the whole
17 truth, and nothing but the truth so help you God?

18 MR. PITSIOKOS: Yes.

19 THE MONITOR: Please be seated. In a loud, clear
20 voice please say and spell your name and business address,
21 if you don't mind.

22 MR. PITSIOKOS: Sure. My name is Peter
23 Pitsiokos. That's spelled P-I-T-S-I-O-K-O-S. The address
24 is 1 Flowerfield, Suite 24, St. James, New York 11780.

25 THE MONITOR: Thank you.

1 MR. PITSIOKOS: You're welcome.

2 THE COURT: You may proceed.

3 MR. CLASEN: Thank you, Your Honor.

4 P E T E R P I T S I O K O S , was called for examination as a
5 witness herein after first being duly sworn and
6 testified as follows:

7 DIRECT EXAMINATION

8 BY MR. CLASEN:

9 Q. Good morning Mr. Pitsiokos.

10 A. Good morning.

11 Q. Tell me a little bit about yourself, educational
12 background and employment history, if you could?

13 A. Okay. I grew up in Schaghticoke, New York. I
14 graduated from Lord Noville (phonetic) High School and then went
15 on to Stony Brook University. I graduated from Stony Brook and
16 then after that I went to law school at Villanova University in
17 Pennsylvania. After Villanova, I got a job in Manhattan. I
18 worked there for a couple of years and then I returned home to
19 Schaghticoke where I worked for the Suffolk District Attorney's
20 Office for a few years after that. And then I got a call from
21 Gyrodyne.

22 Q. Are you currently employed by Gyrodyne?

23 A. Yes. I've been employed there since 1992.

24 Q. Just tell us, generally, what you've been doing there
25 since 1992?

1 A. Well, I started off as an attorney, but doing
2 managerial work as well for the company. And then, I've worked
3 my way up to my current position, which is chief operating
4 officer.

5 Q. Can you tell me a little bit about Gyrodyne, its
6 history of the company, if you could?

7 A. Gyrodyne was formed in 1946 and I think it was a
8 helicopter company. It was founded by a Grumman (phonetic)
9 engineer who started flight-testing helicopters in Massapequa.
10 And as the company started to get some government contracts,
11 they needed a larger piece of property to do the flight-testing
12 that was required under these Department of Navy contracts. So
13 they found a piece of property in Stony Brook and St. James, New
14 York, which was about 360 acres at the time. The problem with
15 the property, though, was that it was zoned residential. So the
16 company hired Roydan Klein who is the father of a former county
17 executive John Klein to get the property rezoned from
18 residential to industrial so that they could conduct the flight-
19 testing.

20 Q. Now when did that happen?

21 A. This was in 1951 -- '50 or '51.

22 Q. Okay. Now what did Gyrodyne do on this property?

23 A. Gyrodyne utilized, over the years, lots of
24 subcontractors to manufacture parts to put together these
25 helicopters so the final assembly of these helicopters was

1 taking place in about 70 buildings that were all built around
2 that time in the late '50s and early '60s most of the buildings
3 were built. And in the late '60s the Navy contracts were ending
4 and the company really was getting out of the helicopter
5 business, the company then started leasing those old industrial
6 buildings to "mom & pop" type businesses.

7 Q. Okay. And for how long did that last?

8 A. Well, that still goes on today. Actually, that
9 continued right through 'til I joined the company in 1992 and it
10 still goes on. I mean there are still -- some of those
11 buildings are still around and they're being leased out.

12 Q. In 1992 when you started at Gyrodyne, were they making
13 attempts to develop the Gyrodyne products?

14 A. No. I think it would be important to understand a
15 little bit about the company in that regard. Although the
16 company was a public company, it was really a family-owned
17 business. About 40 percent of the shares were owned by the
18 founder's family. So the main intent really of the family and
19 the business was to keep themselves employed. And so any
20 attempt to do anything that would get in the way of keeping the
21 company going and keeping those people employed really was not
22 something that the CEO at the time was interested in pursuing.

23 Q. When you say "these people" employed, who are you
24 talking about?

25 A. Well, the founder, of course -- the founder passed

1 away just before I got there in 1992. So the founder's son --
2 after the founder had been CEO for 50 years, the founder's son
3 then became CEO and the founder's daughters worked at the
4 company. The founder's grandchildren worked at the company, so
5 that's what I'm talking about.

6 Q. Now did this management change at any point in time?

7 A. In 19 --

8 Q. I'm talking about the family management, by the way?

9 A. Yes. What happened after the patriarch or the founder
10 of the company passed away is the family -- there were family
11 squabbles and these family squabbles went on until about 1999
12 when a new independent board came in and threw everybody out,
13 basically, and a new management team took over in March of '99.

14 Q. Now before the new management team took over; did the
15 old management take any steps in the late nineties to develop
16 this property?

17 A. Well, you could call them steps. There were a couple
18 of things that did occur. So for example, in the mid-nineties
19 the company commissioned a report from a consultant to start
20 looking at various possibilities for the development of the
21 property. And then in the late nineties, the company got
22 together with Tramer Crow Residential to talk about the
23 possibility of leasing some land, 25 acres and then an
24 additional 25 acres around the --

25 Q. Well, let me break them up.

1 A. Sure.

2 Q. The first thing what was that called, that first name?

3 A. The consultant's name was Henderson & Bodwell.

4 Q. And whatever became of that?

5 A. Nothing. It was just an internal, conceptual plan
6 that was used by the management to explore options, to look at
7 what the possibilities might be.

8 Q. How about Tramer Crow --

9 A. Tramer Crow --

10 Q. Wait. Listen to me --

11 A. I'm sorry.

12 Q. First of all, what was actually involved? You said
13 leasing some land, but what were they going to do on it and what
14 became of it?

15 A. Well, okay, I mean, again, nothing became of it. But
16 the fundamental problem here was that the management at the
17 time, the founder's family didn't want to sell anything. So all
18 they did --

19 MR. RYAN: Objection, Your Honor.

20 THE COURT: What is the objection?

21 MR. RYAN: We're talking about someone else's
22 intent.

23 THE COURT: Sustained.

24 MR. CLASEN: Okay.

25 A. In a --

1 Q. The question is what happened with Tramer Crow? Did
2 it go forward --

3 A. No.

4 Q. -- and did it involve building anything?

5 A. Nothing was built.

6 Q. Nothing was built. What was --

7 A. And it didn't go forward.

8 Q. What was intended to be built, though?

9 A. An apartment community.

10 Q. Okay. And it didn't go forward, right?

11 A. No.

12 Q. Okay. Did the old management do anything else to
13 develop the property?

14 A. Yes. We worked with Marriott Senior Living Services.
15 We submitted an application to the Town of Brookhaven for 126
16 units on 10 acres and that application was approved by the town.
17 It was a change of zone from the L-1 light industrial zoning
18 district classification, which is a classification under the
19 Brookhaven town code to a residential zoning district
20 classification.

21 MR. CLASEN: Your Honor, I'd like to show the
22 witness Exhibit 13, if I could?

23 THE COURT: You may.

24 (Handing document to the witness.)

25 Q. Take a moment, Mr. Pitsiokos, have you seen Exhibit 13

1 before?

2 A. Yes.

3 Q. What is that?

4 A. It's a letter from the town clerk of the Town of
5 Brookhaven dated February 1, 2000. It's addressed to me and it
6 is informing us that the town board on that day February 1, 2000
7 approved the resolution changing the zoning district
8 classification for purposes of construction this 126-unit
9 residential facility.

10 Q. You mentioned Marriott. Is this the Marriott
11 initiative?

12 A. Yeah. This is Marriott. This is the Marriott
13 initiative.

14 Q. What ever happened with respect to the Marriott
15 initiative? You got the approval; did it get developed?

16 A. Marriott got out of the assisted-living business and
17 didn't pursue it.

18 Q. Okay. Did you end up that withdrawing that?

19 A. Yes, we did.

20 MR. CLASEN: Can I show him Exhibit 14 please?

21 (Handing document to the witness.)

22 MR. CLASEN: Thank you.

23 Q. Is Exhibit 14 the withdrawal that you just referred
24 to?

25 A. What it is is a -- there are three pages here. One is

1 a letter from me dated October 31, 2002 to the town requesting
2 that the application that we filed back in '99 and that was
3 approved be withdrawn.

4 Q. But why did you do that?

5 A. Well, again, it was -- Marriott was out of the
6 business. But in addition to that, in October of 2002 the same
7 time as this letter is dated, we submitted another application
8 to the town to develop the property for a residential golf
9 course community.

10 Q. Is that called the Landmark?

11 A. Yes. That's the Landmark. Yes.

12 Q. As of this time the new management's in place, right?

13 A. That's correct.

14 Q. Okay. What steps, if any, did the new management take
15 beginning in 1999 to develop the property?

16 A. Well, in '99 now the family was no longer in charge of
17 manage, so it was in my opinion the first attempt to look at
18 comprehensive development of the entire property.

19 Q. Okay. Did they try to identify various possibilities
20 to develop --

21 A. We looked at --

22 Q. -- to develop the property?

23 A. I'm sorry. Yes. I'm sorry. We looked at numerous
24 possibilities and we -- and when I say "we," I'm talking about
25 the board of directors and management had two objectives in

1 mind. Of course, we wanted to maximize the value to the
2 shareholders of the company, but we also wanted to do something
3 that would be of benefit to the community at the same time.

4 And --

5 Q. Okay, let me stop you.

6 A. Yeah.

7 Q. The Landmark proposal was ultimately identified,
8 right?

9 A. Correct.

10 Q. Can you tell us what that entailed, the Landmark
11 proposal?

12 A. It was a residential community built around an overall
13 class golf course.

14 Q. Now why was that going to serve the two objectives
15 that you just mentioned that the board and management were
16 looking to pursue?

17 A. Well, the board of directors was, of course, as it
18 should be, wanting to maximize value to the shareholders. And
19 when we analyzed this project, we determined that by developing
20 this it would accomplish that goal. At the same time, though,
21 while maximizing the yield on the land it had the added benefit
22 of being able to generate something, develop something that the
23 community could be proud of, which was significant to the board.
24 The board is composed primarily of people who live in the
25 community. So it was very important for them that that be

1 accomplished.

2 Q. Now whatever happened with respect to the Landmark
3 proposal; was it submitted to either one of the towns?

4 A. Yes. Initially, it was submitted to the Town of
5 Brookhaven.

6 Q. And what happened?

7 A. Well, the Town of Brookhaven came back to us and said
8 for procedural reasons we'd prefer that you submit applications
9 to both towns simultaneously. So as a procedural matter, we
10 took back the application that we had filed in October 2002 and
11 then resubmitted them to both towns.

12 Q. In 2003?

13 A. Yes.

14 Q. Okay. Now how did the proposal go in Smithtown?

15 A. It went very well in Smithtown?

16 MR. RYAN: Objection, Your Honor.

17 MR. CLASEN: I withdraw the question.

18 Q. What transpired with respect to the proposal that you
19 put forward to Smithtown?

20 A. We obtained and received a public hearing before the
21 town planning board.

22 Q. At that public hearing, was there any opposition from
23 community members?

24 MR. RYAN: Objection.

25 THE COURT: Overruled.

1 A. No. The application was very well received, both by
2 the planning board and the members of the community. Of
3 course --

4 MR. RYAN: Objection. Move to strike.

5 MR. CLASEN: Your Honor, he's just -- he was at
6 these meetings. He's just --

7 THE COURT: It's as to the community. He can
8 give his reactions to what he saw, but he can't say how the
9 community thought of that. He can say what he saw at the
10 meeting, but leave it at that.

11 Q. At the meeting, did you observe any opposition from
12 any of the community members to the proposal being put forward
13 by Gyrodyne?

14 MR. RYAN: Objection, Your Honor. Again, it
15 calls for a characterization.

16 THE COURT: No. As to what he observed, I'll
17 allow, not what the community observed.

18 MR. CLASEN: Right.

19 A. At the conclusion of the hearing, the chairman of the
20 planning board of the Town of Smithtown, Robert Martin, stood up
21 and addressed the company.

22 THE COURT: Sustained.

23 MR. CLASEN: Okay.

24 THE COURT: He can't say what Robert Martin
25 observed.

1 MR. CLASEN: I understand.

2 Q. Did you observe any opposition?

3 A. Pardon me?

4 Q. Did you observe any opposition to Gyrodyne's proposal
5 to develop the property at the Smithtown hearing?

6 A. Except for the one or two people who come to every
7 hearing and object to everything that's --

8 THE COURT: Sustained. Why don't you go on? I
9 got the flavor.

10 MR. CLASEN: Okay. I understand. Do you want to
11 go to Brookhaven 'cause I didn't go to Brookhaven yet?

12 THE COURT: Okay.

13 Q. With respect to Brookhaven, did you have a hearing?

14 A. No.

15 Q. Any time did -- were you aware and observed any
16 community opposition to the Brookhaven --

17 A. No.

18 Q. -- proposal?

19 A. No.

20 Q. Okay. In fact, with respect to the entire Landmark
21 proposal, are you aware of any opposition other than these two
22 or three French players?

23 A. No.

24 Q. Okay. Are you aware of any opposition that the
25 community had with respect to anything that was proposed to be

1 done on the Gyrodyne property?

2 A. Yes.

3 Q. What?

4 A. The Stony Brook University taking of the property.

5 Q. What happened there?

6 A. The University held a hearing at the Wang Center on
7 campus and hundreds, if not thousands of people turned out for
8 this hearing in opposition to the University's plan for the
9 property.

10 Q. Thank you very much.

11 MR. CLASEN: Your Honor, I don't have any further
12 questions for this witness. Thank you.

13 CROSS EXAMINATION

14 BY MR. RYAN:

15 Q. Mr. Pitsiokos, you've been affiliated with Gyrodyne
16 since I think you indicated 1992?

17 A. July of 1992.

18 Q. And at that point you were a counsel to this
19 publicly-held company?

20 A. That's correct.

21 Q. And it was publicly held since the creation of the
22 company, correct?

23 A. Well, I think, as a technical matter, at the very
24 beginning it wasn't public in the mid forties and then shortly
25 after that in the early fifties it became a public company.

1 Q. In any event, sir, for the entire time of your
2 involvement it was a publicly held company?

3 A. Yes.

4 Q. It had a board of directors?

5 A. Yes.

6 Q. It issued annual reports to stockholders?

7 A. Yes.

8 Q. And it was obliged to attempt to maximize the value of
9 its operation for those stockholders?

10 MR. CLASEN: Objection, Your Honor. He's asking
11 now for a legal opinion.

12 Q. Well, your understanding of the company's role was
13 that it maximize --

14 THE COURT: You can ask him of his understanding
15 of the role. I'll sustain the first objection. I'll allow
16 the rephrasing of the question.

17 MR. RYAN: Thank you, Your Honor.

18 THE COURT: You're welcome.

19 Q. Your understanding of the role of the company was to
20 maximize for the stockholders the benefit of its operations --
21 financial return on its operations, correct?

22 A. Ultimately, the board of directors, yes, should
23 maximize the value of the shareholders.

24 Q. And since 1992 that's what this company has been
25 doing, correct?

1 A. If what you're asking me is whether it has been
2 working towards that goal, yes, it has been working towards the
3 goal of maximizing shareholder value.

4 Q. And your offices are on the Gyrodyne property,
5 correct?

6 A. Yes.

7 Q. And Gyrodyne is not one of the "mom & pop" companies
8 that you rent out to, correct? It has its own office
9 established there. You don't pay rent, do you?

10 A. Right.

11 Q. Those "mom & pop" companies, however, generate
12 approximately \$2 million in gross rental income, don't they?

13 A. Yes, they generate rental income, indeed.

14 Q. And that's annually reported to the shareholders?

15 A. Yes, it is.

16 Q. And the shareholders annually get to comment at the
17 annual meeting as to the operations of the company and whether
18 or not the board is fulfilling its expectation -- their
19 expectations of it, correct?

20 A. Well, they do have an opportunity to ask questions.

21 Q. And to vote on the board?

22 A. They vote for three directors every year.

23 Q. Right.

24 A. There are eight directors on the board currently.

25 Q. Now the concept of what to do with the 307 acres of

1 Gyrodyne's property in St. James has mutated over the years,
2 hasn't it?

3 A. I might use a different word, but it has evolved.

4 Q. Evolved. Back in the early nineties there was an
5 attempt to lease out lands for development to others.

6 A. In the late nineties.

7 Q. Mid to late nineties, correct?

8 A. From 1999 and -- yes.

9 Q. Well, that was a concept that the company had as early
10 as 1996, correct?

11 A. I'm pretty sure the date was later than that, but the
12 concept may have been there internally at that time.

13 Q. Well, do you recall in 1996, Mr. Pitsiokos,
14 participating in a study for the construction of a new collector
15 road and access road that would go through the Gyrodyne
16 property?

17 A. Yes. Yes.

18 MR. RYAN: May I have what's been marked as
19 Exhibit "J."

20 THE COURT: Yes.

21 (Handing document to Mr. Ryan.)

22 MR. RYAN: Thank you.

23 Q. I'm showing you what's been marked as Exhibit "J",
24 Mr. Pitsiokos. That is a study done for the Town of Brookhaven
25 and funded by the Town of Brookhaven's Industrial Development

1 Agency relating to a -- well, you're familiar with that study,
2 are you not?

3 A. Yes, I am.

4 Q. Your company participated in the study.

5 A. That's correct.

6 MR. RYAN: Your Honor, I would offer it.

7 MR. CLASEN: Isn't this what -- I apologize, Your
8 Honor, but I thought this already went in last week.

9 THE MONITOR: It didn't go in on the record,
10 though.

11 THE COURT: This was marked for identification
12 this morning, is that correct?

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

14 THE COURT: Yeah.

15 MR. RYAN: Mr. Clausen had objected that there
16 weren't copies. So I took it over the weekend and had
17 copies made.

18 THE COURT: No, I thought we'd --

19 MR. CLASEN: I thought this was marked last week.

20 THE COURT: It was -- then it was marked.

21 THE MONITOR: No.

22 MR. RYAN: I don't believe it was.

23 THE MONITOR: It wasn't.

24 MR. RYAN: -- actually, Your Honor, based on
25 Mr. Clausen's objection I had just asked Mr. King if he was

1 aware of it.

2 THE COURT: Well, in any event now that you have
3 a copy of what you didn't have last week, Mr. Clausen, do
4 you have an objection to -- if it's duplicitous, we'll iron
5 it out later.

6 MR. CLASEN: I apologize for being a little
7 compulsive on the housekeeping, but when it was given to me
8 this morning I said this is a copy what I used last week
9 and I just assumed it went in.

10 THE COURT: Okay. Well, obviously, it's not.

11 MR. CLASEN: I don't have an objection.

12 THE COURT: You don't have an objection?

13 MR. CLASEN: Correct.

14 THE COURT: And without objection, "J" marked for
15 identification earlier today is in evidence as "J" in
16 evidence.

17 (Whereupon, Defendant's Exhibit J was admitted in
18 evidence without objection.)

19 THE COURT: Proceed, Mr. Ryan.

20 Q. And if you could take a moment to refresh yourself by
21 looking -- your recollection by looking at that study
22 Mr. Pitsiokos.

23 A. Uh-huh.

24 THE COURT: Mr. Ryan?

25 MR. RYAN: Thank you.

1 Q. Have you had a chance to --

2 A. No. I haven't read it. I mean it's rather
3 voluminous, but I'm familiar with it.

4 Q. Now at page 1, Mr. Pitsiokos, it indicates that -- the
5 report in which your company participated indicates that it is
6 proposed that the vacant portion of the property -- and by
7 "property" I'm referring to Gyrodyne's 307-acre holding in
8 St. James -- be developed over a 15-year period. The
9 development would be of mixed uses, including research and
10 manufacturing facilities, offices, apartments, single-family and
11 adult housing, performing arts center and commercial uses. Did
12 I read that correctly?

13 A. Basically, yes.

14 Q. That was the plan for the development of Gyrodyne's
15 property over a 15-year period, as reported in December 1996,
16 correct?

17 A. Is that a question? No. What this document is is the
18 precursor to the Transportation Bond Act that was proposed by
19 then Governor Cuomo. And under the Transportation Bond Act, the
20 State of New York was asking for proposals. The Transportation
21 Bond Act never passed. And not only did it not pass, but some
22 time thereafter the president of the university, Dr. King,
23 issued a letter to the community indicating that the roadway
24 that is described in this document would never be built.

25 MR. RYAN: Move to strike.

1 MR. CLASEN: Your Honor, that's totally
2 responsive. He opened the door.

3 MR. RYAN: Your Honor, I asked whether this was a
4 statement of Gyrodyne's planned development of its
5 property.

6 MR. CLASEN: And he answered the question.

7 MR. RYAN: Well, no, Your Honor. He addressed
8 the nature of the study.

9 THE COURT: You ask another question if you like,
10 but I'm not striking what he said.

11 You ask another question if you like, but I'm not
12 striking what he said.

13 MR. RYAN: All right. I would move to strike the
14 statement of Dr. Kay --

15 THE COURT: That I'll strike.

16 MR. RYAN: -- as clear hearsay.

17 Q. Mr. Pitsiokos, wasn't that bond act you're talking
18 about an earlier manifestation of the desire to build a
19 connecting roadway in 1993 on that?

20 A. No.

21 THE COURT: Earlier or later?

22 MR. RYAN: Earlier. This is 1996.

23 MR. CLASEN: Objection. What does that have to
24 do with anything at this point in time?

25 THE COURT: That I'll sustain.

1 MR. RYAN: Your Honor, it has to do with
2 Mr. Pitsiokos' response. If the response is relevant,
3 certainly, a follow-up question to the response is
4 relevant.

5 THE COURT: Well, no, I'm finding we're getting
6 into -- I mean what does this really have to do with the
7 valuation proceeding, which is the nexus of this proceeding
8 of the appropriation by the State of New York of this
9 property?

10 MR. RYAN: If you wish me to, Your Honor, I will
11 certainly --

12 THE COURT: You can make a statement to me on
13 that, if you want.

14 MR. RYAN: Your Honor, I believe it has to do
15 with the fact that the Town of Brookhaven was aware that
16 any development of this property would require the
17 substantial improvement of traffic and access
18 infrastructure, which would include the construction of a
19 collective roadway leading from the state university --

20 THE COURT: Mr. Ryan, I mean we're getting way
21 far, but the Town of Brookhaven would want a substantial
22 improvement in the roadway, based upon -- and I haven't
23 read "J," but assuming that took place and you read off a
24 whole list of things, including performing arts and what
25 not that would take place on that property, if all that

1 took place it would have to be an improvement to the
2 roadway; is that your point?

3 MR. RYAN: No, Your Honor. My point is that the
4 improvement would have to take place for those developments
5 to occur.

6 THE COURT: All right. I'll accept all of that.
7 And now could we move on?

8 MR. RYAN: Very good, Your Honor.

9 THE COURT: Good.

10 Q. Mr. Pitsiokos, in 19 -- I'm sorry. Withdrawn. The
11 Gyrodyne Company applied to the Town of Brookhaven for a change
12 of zone for 10 acres of its property in --

13 A. This would be the Marriott?

14 Q. Yes, in the Year 2000.

15 A. It was around that -- well, the approval was in
16 February of 2000. Yes.

17 Q. Right. And that approval, Mr. Pitsiokos, was
18 conditional; was it not?

19 A. All approvals have conditions on them.

20 Q. Well, I'm specifically addressing the approval issued
21 February 1, 2000 by the Town of Brookhaven.

22 A. Yes.

23 Q. And what was the first condition of that approval?

24 A. Well, during the -- while we were applying for --

25 MR. RYAN: Your Honor, may I ask the Court to

1 address Mr. Pitsiokos to the question I've asked him.

2 MR. CLASEN: Well, Your Honor, if he's asking him
3 to merely read a sentence of the document in evidence, it's
4 inappropriate. I assume he wasn't doing that. He was
5 asking what the condition was they put on it. So he should
6 be able to testify, not merely read something. If he wants
7 to read something that's in evidence --

8 THE COURT: You asked him what was the first
9 condition.

10 MR. RYAN: Correct.

11 THE COURT: But you just expect him to read --

12 MR. RYAN: No.

13 THE COURT: -- what's already in evidence?

14 MR. RYAN: No. I expect him --

15 THE COURT: Well, he's trying -- all I heard was
16 a few words before you interrupted him. So I haven't heard
17 anything what has to do with a condition yet, so I can't
18 say he hasn't answered your question 'cause he hasn't
19 answered anything.

20 Q. Mr. Pitsiokos, what was the first condition that the
21 town imposed on its grant of permission to change this 10-acre
22 zoning from L-1 to PRCHC?

23 A. Officials of the Town of Brookhaven indicated to me
24 during the application process that they were willing to grant
25 us this approval --

1 MR. RYAN: Move to strike.

2 THE COURT: That I'll strike. I'll strike it.
3 Even I don't know what you're trying to get at. What kind
4 of condition are you talking about? I mean he's talking
5 about meeting with officials. I assume he was going to get
6 to a condition.

7 MR. RYAN: I assume we're going to get to my
8 question also, Your Honor. He indicated that the approval
9 was conditional. I'm asking him what the first condition
10 was, that's all.

11 THE COURT: Well, he's explaining how they
12 developed the first condition, I would assume.

13 MR. RYAN: That was not my question asking him to
14 explain how it evolved. I'm asking him what it was.

15 THE COURT: I'll tell you what. Why don't we do
16 it this way? Why don't you tell him what the first
17 condition was and ask whether or not he agrees that's the
18 first condition? Maybe that would short circuit the
19 process.

20 MR. RYAN: I appreciate the Court's suggestion as
21 to how I should conduct my cross-examination, but it's a
22 plain question and it's --

23 THE COURT: Well, since it's the third or fourth
24 time you're going over it, obviously, it's not very plain,
25 at least to the witness. You can try again, if you'd like.

1 MR. RYAN: Thank you.

2 Q. Mr. Pitsiokos, what was the first condition that the
3 town imposed on its grant of the change of zoning for the 10
4 acres from L-1 to PRCHC in February 2000?

5 A. This was for a 10-acre piece of property. Gyrodyne
6 owned 316 acres surrounding that 10-acre piece of property. The
7 town indicated to us that if they were to approve this that they
8 would make a condition of it that we would have to submit a
9 comprehensive development plan to the balance of the property
10 after this was approved and before we could get other approvals.
11 We understood this before the town issued the approval. So it
12 says here exactly that.

13 Q. Did this approval ever become effective?

14 A. Well, it was adopted by the town on February 1, 2000.
15 So to the extent that it was filed in the town clerk's office,
16 it says here in the letter "We will proceed to make this zoning
17 effective."

18 Q. Did Marriott -- well, did the Marriott proposal go
19 forward?

20 A. Well, as I indicated -- as I already indicated, the
21 company began discussions with and then ultimately entered into
22 a contract with Landmark and that application was submitted in
23 October 2002. So this --

24 MR. RYAN: Move to strike.

25 MR. CLASEN: Your Honor, he's not finished yet.

1 If he would like him finish the answer and if he wants to
2 strike a portion of it; but just to move to strike in the
3 middle of an answer I think is inappropriate. He's cutting
4 the witness off.

5 THE COURT: I'll accept the move to strike. You
6 are asking a question that he answered directly in direct
7 testimony. But if you want to try to get the answer again,
8 help yourself, Mr. Ryan. It's the same question Mr.
9 Clausen asked him, which he answered. You're not going to
10 impart to me anything I don't already know from testimony
11 the witness has already given; but you can continue to ask
12 the question, if you'd like.

13 MR. RYAN: Again, I'll adopt the suggestion as to
14 how I should conduct my cross-examination.

15 Q. Mr. Pitsiokos, has Gyrodyne ever applied to the Town
16 of Brookhaven for a change of zone to PDD?

17 A. Well, PDD the zoning classification that we sought in
18 the Landmark application I'm not sure what manqué or what
19 exactly the zoning district classification was. That would have
20 been the only time would be the Landmark application.

21 MR. RYAN: May I have Exhibit "C?"

22 (Handing document to Mr. Ryan.)

23 Q. Showing you Exhibit "C," Mr. Pitsiokos, does that
24 refresh your recollection as to the zoning classification for
25 which Gyrodyne Company of America, Inc. applied as part of its

1 Landmark proposal?

2 A. It says "D-1," not PDD.

3 Q. And the Landmark proposal, as I understood it,
4 Mr. Pitsiokos, called for the construction of a world-class golf
5 course and the development of 336 residential units?

6 A. Yes.

7 Q. Not 1500 or 1800 residential units?

8 A. Well, if you're asking what -- I'm not sure I
9 understand what you're driving at, but the -- as I explained to
10 Mr. Clausen, the company determined that it would derive the
11 same economic yield from this Landmark development -- the same
12 yield that it would from a higher density development because of
13 the nature of the development clustering these luxury homes
14 around a world-class golf course.

15 Q. Gyrodyne has never applied to any municipality for
16 approval of a zone change that would permit a density similar to
17 that that was considered here for clustered residences for 1500
18 to 1800 --

19 A. Well, when we received the Marriott approval --

20 THE COURT: Let Mr. Ryan --

21 THE WITNESS: I'm sorry.

22 THE COURT: Let Mr. Ryan finish his question.

23 THE WITNESS: Sorry.

24 Q. -- for the entire property?

25 A. The Marriott approval was 126 units on 10 acres, which

1 was a significant density. So by extrapolation and based on
2 what we had seen happening in both the towns of Brookhaven and
3 Smithtown in terms of density certainly an application like that
4 was not out of reach.

5 THE COURT: Sustained.

6 MR. RYAN: Thank you, Your Honor. Stricken.

7 THE COURT: Stricken.

8 MR. RYAN: Thank you.

9 Q. Mr. Pitsiokos, my question was a simple one. Has the
10 company ever applied to either Brookhaven or the Town of
11 Smithtown for approval of a change of zone relating to the
12 property that would allow the construction of 1500 to 1800
13 residences on entirety?

14 A. Those exact numbers, 1500 to 1800. No.

15 Q. The only application that has ever been submitted
16 regarding the entire property by the company has been one that
17 proposed 336 units?

18 A. No. That's not true.

19 Q. Regarding the entire --

20 A. Regarding the entirety?

21 Q. Correct.

22 A. Regarding the entirety there is an application pending
23 now before the Town of Smithtown for hundreds of units on the
24 remainder of the property, which is 60 some odd acres.

25 Q. That's not the entirety --

1 A. No. It's not the entirety.

2 Q. -- of the property we're talking about, Mr. Pitsiokos.

3 A. No.

4 Q. My question, again, is has the town -- has Gyrodyne
5 ever applied to either municipality for approval of a zoning
6 district or zoning considerations that would allow for
7 construction of 1500 to 1800 residences?

8 MR. CLASEN: Objection. Asked and answered.

9 THE COURT: That has been asked and answered.

10 MR. CLASEN: And I'm handling my own objections
11 on this one.

12 Q. The largest size or the only application for the
13 entire property submitted to any municipality was that of the
14 Landmark golf course proposal, correct?

15 A. No. Again, I just indicated that on the remainder
16 there is an application pending for hundreds of units.

17 Q. I'm talking about the entire property.

18 A. Oh, on the entire property? No.

19 Q. I'm sorry. The answer was yes? I didn't hear you.
20 Your voice dropped.

21 A. Could you just ask the question? I want to make sure
22 I'm answering --

23 Q. Sure.

24 A. -- the right question.

25 Q. Mr. Pitsiokos, is it true that the only application

1 that was submitted by Gyrodyne relating to the entire 308 or
2 12-acre parcel was the Landmark parcel that proposed a
3 residential 336-lot development around a golf course?

4 A. I believe during my tenure that that was the only
5 application filed.

6 Q. Since 1992?

7 A. I believe so.

8 Q. Well, based on your familiarity with the operations
9 and history of the company --

10 A. Uh-huh.

11 Q. -- did it ever file an application in either -- in
12 both towns for development of the entire property?

13 A. We contemplated numerous alternatives, as I indicated
14 previously, including applications for much higher densities.
15 But in the end that was the application.

16 THE COURT: Mr. Pitsiokos, I believe that
17 required a yes or no answer.

18 THE WITNESS: Oh, okay. That was the only
19 application we filed.

20 MR. RYAN: All right.

21 Q. So the answer was no to the question.

22 MR. CLASEN: That's the same -- you just answered
23 it. He's actually answered it two or three times.

24 THE COURT: Yeah. I think we have it in the
25 record.

1 MR. CLASEN: Good.

2 MR. RYAN: Your Honor, I'm trying to get it from
3 the witness.

4 THE COURT: Oh, I understand. I believe it's
5 there, Mr. Ryan.

6 Q. Now in your application to both Brookhaven and
7 Smithtown for the development of the entire property in 2003,
8 Mr. Pitsiokos, did you complete the environmental review?

9 A. Complete the review? No.

10 Q. Did you have a scoping in both towns for what reveal
11 would be necessary?

12 MR. CLASEN: Your Honor, I didn't ask anything
13 about environmental review.

14 MR. RYAN: Your Honor, he talked about the
15 application. This is a process -- a portion of the
16 application.

17 THE COURT: Continue, Mr. Ryan.

18 A. We certainly had numerous meetings, especially with
19 the Town of Smithtown.

20 Q. In both towns did you complete the scoping of what
21 would be required --

22 A. Yes.

23 Q. -- for the environmental review by Gyrodyne in order
24 for those towns to consider your application?

25 A. We may have started some scoping with Brookhaven as

1 well.

2 Q. My question is whether it was completed.

3 A. Completed? I don't think so.

4 Q. Mr. Pitsiokos, you're aware that traffic impacts are
5 one of the issues that were of serious concerns in both the Town
6 of Brookhaven and the Town of Smithtown relating to the
7 development of this property?

8 A. I believe the development of every property on Long
9 Island.

10 Q. But this is one of the largest, privately held
11 properties in Suffolk County, is it not?

12 A. It's probably among one of the larger ones.

13 Q. And you're aware, are you not, the impacts of
14 development of larger properties can be more significant and of
15 greater public concern than of much smaller sized properties?

16 MR. CLASEN: Your Honor, at this point in time I
17 assume we're asking a hypothetical. He hasn't quantified
18 what development we're talking about. But if --

19 MR. RYAN: All right. Withdrawn.

20 MR. CLASEN: -- that if you develop --

21 MR. RYAN: Withdrawn.

22 MR. CLASEN: -- for one house per 10 acres and
23 you do 10 acres with one house per 10 acres that the impact
24 would be more, whether there's any recognizable impact is a
25 different story.

1 THE COURT: Thank you, Mr. Clausen. Continue,
2 Mr. Ryan.

3 MR. RYAN: Thank you.

4 Q. Mr. Pitsiokos, you've mentioned your pending
5 application before the Town of Smithtown, relating to the
6 remainder --

7 A. I did.

8 Q. -- this remainder of 62.5 acres?

9 A. Approximately.

10 Q. Well, before we move onto that, Mr. Pitsiokos, your
11 application in the Town of Brookhaven and Smithtown --

12 MR. RYAN: Your Honor, may I have a document
13 marked? It's the Landmark that you provided me.

14 MR. CLASEN: I recognize the document. I object.
15 It has not been identified as a potential exhibit, okay.
16 We went -- I objected originally, Your Honor, because I
17 thought we were supposed to pre-mark it. Okay. The fact
18 that this witness was going to be called has been known
19 before the trial started, okay. I objected before when
20 stuff came in. And I believe Your Honor instructed him to
21 if he got anything else show it to him. I didn't get it.
22 Now he had that presumably this morning and knew he may use
23 it. As you may know, I have marked stuff that I have not
24 use and may not actually use, okay. I did prepare a
25 witness yesterday, okay, and if there was going to be

1 something -- I thought I showed the witness everything I
2 believed the witness could see because I had the universe
3 of the exhibits. I do not have it here. So that's a long-
4 winded way of saying, Your Honor, and I apologize for that,
5 that I object on the grounds that I believe all exhibits
6 had to be identified and produced to the other side
7 beforehand. It wasn't. And I've heard no reason why there
8 should be an exception made at this point in time.

9 THE COURT: Mr. Ryan?

10 MR. RYAN: Your Honor, this map was part of
11 Gyrodyne Company of America, Inc.'s 2002, I believe, annual
12 report. And on its cover I attempted over the weekend to
13 determine what exhibits I would be using during the
14 examination of Mr. Pitsiokos. I did not recollect at that
15 time that I had this map. I came across it this morning --
16 the color map, otherwise I would have copied it and given
17 it to Mr. Clausen, as I did the Brookhaven study.

18 THE COURT: I think Mr. Clausen's objection, not
19 that this is something he hadn't seen and we object. But
20 we have had discussions about things that were going to be
21 potentially used in trial, the exchange between the
22 parties. I've let you put in several things that have not.
23 Now this is something else. Is there a reason that in the
24 months proceeding the schedule date, the original schedule
25 date of the trial that that couldn't have been one of the

1 documents that you indicated you conceivably might be using
2 in direct or cross-examination of various witnesses before
3 the trial and put your adversary on notice --

4 MR. RYAN: Well --

5 THE COURT: -- that this was something that you
6 at least had an interest in that you may or may not be
7 bringing forth during the course of the trial?

8 MR. RYAN: Well, Your Honor, I had no knowledge
9 of what Mr. Pitsiokos would be talking about.

10 THE COURT: Well, you just said over the weekend
11 you were looking at it.

12 MR. RYAN: Correct.

13 THE COURT: Well, you didn't have any more
14 knowledge over the weekend. I mean I really don't
15 understand.

16 MR. RYAN: Your Honor, my indication was that
17 over the weekend I came across this document. I hadn't --
18 I had a cover page --

19 THE COURT: Well, now you're indicating to me
20 that this is something you never saw during the months that
21 you were preparing for this trial? This is just something
22 you found over the weekend?

23 MR. RYAN: If I may finish my statement, I will
24 indicate what I'm -- or attempt to say clearly what I'm
25 indicating. Your Honor, I did not appreciate that I had a

1 color copy of the same document that forms the face page of
2 the company's 2002 report to its stockholders. I had
3 appreciated that I might -- that there was that map, but I
4 was not intending to use it as part of the evidence because
5 of its lack of detail. It was black and white. That's all
6 I had. When I came across the color document that was
7 provided to me some time during the course of the
8 discovery, and perhaps I should have been more alert to its
9 existence, I appreciated what it was and I determined at
10 that time that I might use it. I've now indicated that I
11 would like to have it marked for identification.

12 Now my understanding of the Court's direction was
13 not that all -- the marking of exhibits relates to not
14 every piece of paper that may potentially be used on direct
15 or cross-examination, but those which a party intends to
16 offer into evidence as part of this case. That was my
17 understanding from the original statement.

18 THE COURT: You have no intention of putting this
19 into evidence?

20 MR. RYAN: Your Honor, I intend to examine
21 Mr. Pitsiokos regarding it --

22 THE COURT: Pitsiokos.

23 MR. RYAN: -- if it is opportune, I may offer it
24 into evidence. All I want now is it marked for
25 identification.

1 THE COURT: Off the record. I'll see counsel in
2 chambers.

3 (Off the record.)

4 THE COURT: Mr. Ryan, you have now identified
5 your two?

6 MR. RYAN: Yes, Your Honor. I have.

7 THE COURT: Okay.

8 MR. RYAN: They have both been --

9 THE COURT: And you've shown them to Mr. Clausen?

10 MR. RYAN: I have.

11 THE COURT: And Mr. Clausen, you're in receipt of
12 both "K" and "L"?

13 MR. CLASEN: I've looked at both "K" and "L,"
14 Your Honor.

15 THE COURT: Thank you. Mr. Ryan, continue.

16 MR. RYAN: Thank you.

17 THE COURT: Now wait a minute, these are just
18 marked for identification --

19 MR. RYAN: Identification.

20 THE COURT: -- at this point?

21 MR. RYAN: Correct.

22 CONT'D CROSS-EXAMINATION

23 BY MR. RYAN:

24 Q. Showing you Exhibit "K" for identification,
25 Mr. Pitsiokos, can you tell us what that document is?

1 A. It appears to be a map depicting the Landmark
2 residential golf course community and the clubhouse and the
3 adjoining uses as well, the industrial uses on the property and
4 catering facility.

5 Q. Mr. Pitsiokos, my question is simple. Can you
6 identify what it is?

7 MR. CLASEN: I thought that's just what he did.

8 MR. RYAN: Your Honor, I don't believe it's
9 proper form to testify as to the contents of it until it's
10 been admitted. That's all.

11 THE COURT: Well, what do you want him to
12 identify? He said it was a map of --

13 MR. RYAN: Sure.

14 THE COURT: -- a proposed golf course residential
15 dwelling.

16 Q. Mr. Pitsiokos, was that a map that was filed as part
17 of Gyrodyne of America Inc.'s application to the Town of
18 Smithtown for a change of zone in 2007?

19 A. Not 2007.

20 Q. I'm sorry, 2002 or '03?

21 A. It's not dated, but it appears to be that map.

22 Q. And the map was created by Gyrodyne, right, or on its
23 behalf by Landmark?

24 A. Yes.

25 MR. RYAN: I would offer it, Your Honor.

1 THE COURT: Mr. Clausen?

2 MR. CLASEN: Same objection as before, Your
3 Honor.

4 THE COURT: Understood. But we'll take it in
5 evidence as "K" in evidence.

6 (Whereupon, Defendant's Exhibit K was admitted in
7 evidence.)

8 THE COURT: Mr. Ryan.

9 Q. Mr. Pitsiokos, when the application was made to the
10 Town of Smithtown in 2003 for its necessary change of zone in
11 relation to the Landmark approval, was it proposed that the
12 existing industrial uses on parts of the property of Gyrodyne in
13 Smithtown be continued?

14 A. Well, you can see on this map that a substantial
15 number of the buildings, the industrial buildings would be
16 destroyed; so in many respects, no, that's not the case. There
17 are some buildings that were going to be utilized for
18 maintenance of the -- some of the existing industrial buildings
19 that were going to be utilized for maintaining -- the storing
20 equipment and maintenance of the golf course and the common
21 areas.

22 Q. On the map, Mr. Pitsiokos, is there a portion of the
23 property to the west adjacent to the Long Island Railroad that
24 is identified as industrial?

25 A. Yes. There is a small portion. But there's also

1 across the other side of the tracks you'll see where it says
2 "rain" there are other industrial buildings in there that are
3 destroyed or demolished as part of this plan.

4 Q. Mr. Pitsiokos, directing your attention to the
5 industrial-labeled portion, it contains five or six buildings.

6 A. There are three, actually.

7 Q. Oh, I'm sorry. Are they connected? The industrial
8 labeling was an indication of the continuation of industrial
9 uses on a portion of the property, was it not, Mr. Pitsiokos?

10 A. You know, at that time it was unclear how the -- how
11 that was going to be ultimately dealt with and there was a
12 significant concern by the developer and by management as well
13 that the condition -- the age condition of those buildings would
14 detract significantly from the rest of the site. So although
15 that word does appear there, at that time it was not determined
16 and certainly this had not been commented on by the town as to
17 what the ultimate fate of those buildings might be.

18 Q. Now the town never passed on the application at all,
19 correct, Mr. Pitsiokos?

20 MR. CLASEN: Your Honor, which town.

21 MR. RYAN: The Town of Smithtown, the town in
22 which the industrial property labeled on the map is
23 identified.

24 A. Well, as I indicated earlier, the Town of Smithtown
25 planning board conducted a public hearing and so to the degree

1 that the planning board attended that hearing and spoke at the
2 hearing that did happen.

3 MR. RYAN: Your Honor, may I have another
4 document marked? This is solely in response to
5 Mr. Pitsiokos' answer to my question. I had no idea that
6 it would be germane before that answer, in particular, the
7 statement that the industrial use would not be affected.

8 MR. CLASEN: You mind if I read it?

9 MR. RYAN: Not at all.

10 MR. CLASEN: Thank you.

11 MR. RYAN: Do you want the rest of it?

12 MR. CLASEN: I'd like to -- whatever you're going
13 to offer. I mean are you offering this?

14 MR. RYAN: It's part of a section of the project
15 narrative. And I wasn't offering it. I just wanted it
16 marked for identification.

17 MR. CLASEN: Well, maybe it would be a little
18 premature, Your Honor, before he -- he can mark it. My
19 understanding is he can mark anything for identification or
20 he can use anything to refresh a witness's recollection.

21 THE COURT: Just mark it "M" for identification
22 then --

23 MR. CLASEN: And if he just mark --

24 THE COURT: -- go from there.

25 MR. CLASEN: I mean he doesn't have to prior

1 disclose anything that he's going to use to refresh. He
2 could show his shoe to refresh as far as I'm --

3 MR. RYAN: Your Honor, that's all I'm asking that
4 it be marked.

5 MR. CLASEN: Yeah.

6 THE COURT: It's being marked "M" for
7 identification.

8 (Whereupon, Defendant's Exhibit M was marked for
9 I.D. purposes only.)

10 THE MONITOR: Do you want me to show it to the
11 witness?

12 MR. RYAN: Yes, if you'll show it to Mr.
13 Pitsiokos.

14 (Handing document to the witness.)

15 Q. Mr. Pitsiokos, I'm showing you a document marked as
16 Exhibit "M," which is taken from the application before the Town
17 of Smithtown relating to the Landmark proposal. Can you read
18 that, please?

19 MR. CLASEN: You want him to read all those four
20 or five pages?

21 THE COURT: He doesn't want it read out loud, do
22 you?

23 MR. RYAN: No. No, to himself.

24 THE COURT: He's just asking him to refresh
25 himself with it.

1 MR. CLASEN: Okay. Okay.

2 A. Okay.

3 Q. Have you had an opportunity to read that --

4 A. Yes.

5 Q. -- Mr. Pitsiokos? Does that refresh your recollection
6 that as part of Landmark's proposal the existing industrial uses
7 on 10 acres of the property was not to be affected?

8 A. Well, again, I think what you're referring --

9 Q. My question is simple; does that refresh your
10 recollection?

11 A. It refreshes my recollection to the extent that part
12 of the industrial park would be demolished and a small portion
13 of it would remain.

14 Q. On 10 acres, isn't that what's identified there?

15 A. That's the entire parcel of which those three
16 buildings are part of.

17 Q. Ten acres?

18 A. Yes.

19 Q. Now the existing industrial development on the entire
20 property occupies how many acres?

21 A. Well, when you say, "existing," since the university
22 has taken the property, they've demolished some of the
23 industrial buildings among those that they've taken. So I don't
24 know what you mean by "existing."

25 MR. RYAN: Your Honor, it was an unclear question

1 Mr. Pitsiokos.

2 Q. As to the 62.5 acres in Smithtown, how many acres are
3 occupied by industrial buildings today?

4 A. Today it's those same 10 acres.

5 Q. Those same 10 acres?

6 A. Right. Those same 10 acres because the balance has
7 been taken by the university and other things have been done
8 with them.

9 Q. My question relates solely to the 62.5 acres --

10 A. The remaining?

11 Q. -- in Smithtown, Mr. Pitsiokos. Did you not
12 understand that?

13 A. I do. I don't think you understand, however.

14 Q. My question --

15 A. The problem is is that the --

16 MR. CLASEN: Your Honor --

17 A. -- 60 --

18 MR. CLASEN: -- I object. This is just fighting
19 between the witness -- there's not question. There's
20 nothing here.

21 THE COURT: Mr. Ryan, the answer was 10 acres.
22 Can we move on, please?

23 MR. RYAN: Thank you.

24 Q. Mr. Pitsiokos, the current application before the Town
25 of Smithtown I want you to direct your attention to that. Has

1 scoping for the environmental review of that project been
2 completed?

3 MR. CLASEN: Objection. First of all, he wanted
4 to direct his attention to that application.

5 MR. RYAN: Correct.

6 MR. CLASEN: What exhibit is he referring to?

7 MR. RYAN: I'm not.

8 THE COURT: I think he means the current
9 application before the --

10 MR. CLASEN: Right. Okay.

11 THE COURT: -- Smithtown and the remainder; is
12 that correct, Mr. Ryan?

13 MR. RYAN: Yes.

14 MR. CLASEN: Yeah, at this point in time, I
15 object, Your Honor. The application, as I understand it,
16 was made long -- was made after the taking. Okay, I don't
17 know why it's relevant to anything at this point in time.

18 MR. RYAN: Your Honor, it was brought up on
19 direct examination.

20 MR. CLASEN: No, it wasn't, Your Honor. It was
21 brought up on cross and I didn't object the first time.

22 THE COURT: Yeah, it was brought up on cross. It
23 was never discussed on direct. You brought it up.

24 MR. CLASEN: Yeah. And now since we've gone --
25 we've already one it, okay, now we're apparently redoing it

1 again, I'm objecting to relevance and also we've gone
2 through this.

3 MR. RYAN: Your Honor, it was brought up on
4 direct to the extent of discussing the densely developed
5 and I believe that I have a right to cross-examine this
6 witness relating to that obligation since it was brought up
7 on direct.

8 MR. CLASEN: Your Honor, I guarantee on direct I
9 didn't ask about what happened to the property after
10 November 2005.

11 MR. RYAN: Your Honor, I'm not asking --

12 MR. CLASEN: -- because it's irrelevant. This
13 happened after November 2005, so I know I didn't ask
14 anything about what the new applications or what they're
15 doing now. He asked it.

16 MR. RYAN: Your Honor?

17 MR. CLASEN: Actually, he asked a question, which
18 called for that answer, which he got, okay, which I didn't
19 stand up and object to, okay. But now I'm objecting on the
20 relevance. What happened after November 2005 is not
21 relevant.

22 THE COURT: Mr. Ryan?

23 MR. RYAN: Your Honor, I'm not discussing
24 Mr. Clasen's questions to the witness. I'm discussing this
25 witness's sworn testimony to the Court, which included

1 reference to the application before the Town of Smithtown
2 made in 2007.

3 THE COURT: That was in response to a question
4 that you asked.

5 MR. RYAN: No, no direct examination discussing
6 the density issue.

7 MR. CLASEN: I don't remember that at all, but --
8 and I have my outline here. I'm kind of compulsive. I
9 follow my outline.

10 THE COURT: I'm sorry, Mr. Ryan. I have no
11 recollection of a question on direct about the pending
12 application in the Town of Smithtown on the remainder of
13 property. May I ask where you're --

14 MR. RYAN: My indication of its relevance has
15 nothing to do with the question that was asked Mr. --

16 THE COURT: I'm sorry. I have -- I don't
17 remember you asking the question. I tell you what I'm
18 going to do. Again, since there's no jury here, I'm going
19 to allow you to ask the question. Mr. Clausen, I'm going
20 to overrule your objection. When I examine the transcript,
21 if I find in the transcript that there was no direct
22 question in -- excuse me, no question asked in
23 Mr. Clausen's direct of the witness, I will strike anything
24 now that you're asking. If I do find, as you've indicated,
25 that such a question was asked, then we'll go from there

1 and it'll stay in.

2 MR. RYAN: I'll repeat myself, Your Honor. I am
3 no talking about relevance to Mr. Clasen's questions. I am
4 talking about relevance due to the contents of
5 Mr. Pitsiokos' answers to Mr. Clasen's questions.

6 MR. CLASEN: Your Honor, unless I --

7 MR. RYAN: The witness in response --

8 THE COURT: Mr. Ryan, I'll rephrase. If I find
9 anything in that the witness answered to Mr. Clasen's
10 question that indicates the current application for the
11 remainder property for the Town of Smithtown, I will keep
12 your questions and their answers in.

13 MR. RYAN: Very good.

14 THE COURT: If I don't, I will strike them.

15 MR. RYAN: Very good.

16 THE COURT: Clear enough? Good. Continue.

17 Q. Has to scoping for that proposal been concluded?

18 A. The scoping's been concluded. The generic
19 environmental impact statement has been submitted and we've
20 received first round of comments from the Town of Smithtown and
21 the application is moving along very nicely.

22 Q. Okay. The density of the proposed use of the
23 remainder in the Town of Smithtown, Mr. Pitsiokos, is less than
24 four to one -- four units per acre?

25 MR. CLASEN: I'm assuming I have a continuing

1 objection to these questions on the same basis --

2 THE COURT: I understand.

3 MR. RYAN: Right.

4 MR. CLASEN: Thank you.

5 A. I'd have to look at the application to refresh my
6 recollection of the densities.

7 MR. RYAN: May I have a document marked, Your
8 Honor, from which the previous exhibit was brought, which
9 is the entire application?

10 THE COURT: It'll be marked as "N."

11 (Whereupon, Defendant's Exhibit N was marked for
12 I.D. purposes only.)

13 THE MONITOR: Would you like me to show it to the
14 witness?

15 MR. RYAN: Yes. If you'll show it to Mr.
16 Pitsiokos.

17 (Handing document to the witness.)

18 A. No. This isn't the application.

19 Q. Oh, I'm sorry.

20 MR. RYAN: Your Honor, I do apologize. I gave
21 you the wrong one.

22 Q. Mr. Pitsiokos, how many units are proposed for the
23 remainder?

24 MR. CLASEN: Well, you just asked that question.
25 You got an answer, okay. Then showed him nothing to

1 refresh his recollection, so it's been asked and answered.

2 MR. RYAN: If I --

3 THE COURT: He asked a little different question.

4 MR. RYAN: Different question.

5 THE COURT: He was trying to ask the density
6 before. Now he's just asking the total number of units.

7 MR. CLASEN: Okay. Yes, slightly different.

8 A. Well, once again, I'd have to look at the application
9 to refresh my memory as to the exact number of units.

10 MR. CLASEN: Your Honor, not that it's terribly
11 relevant. What doesn't he just ask him approximately?

12 THE COURT: I'm sorry?

13 MR. CLASEN: Why doesn't he just ask him
14 approximately. I'm sure he can give us an approximation.
15 We can move forward.

16 THE COURT: I think we'll allow Mr. Ryan to
17 conduct his own cross.

18 MR. CLASEN: Thank you. Very good. I didn't
19 know that the precise number was terribly relevant to the
20 remainder.

21 THE COURT: Mr. Clasen, please.

22 MR. CLASEN: I'm sorry, Your Honor.

23 THE COURT: Mr. Ryan, do you have a question?

24 MR. RYAN: Thank you, Your Honor.

25 Q. Mr. Pitsiokos, I'm showing you Exhibit "L" for

1 identification, perhaps this can refresh your recollection.

2 A. Would you like me to read from it?

3 Q. No. I would not like you to read from it --

4 A. Oh.

5 Q. -- Mr. Pitsiokos. I would like you to indicate
6 whether or not that refreshes your recollection as to the number
7 of units that you were seeking to have permission to construct o
8 n the remainder if a zone change is granted?

9 A. Yes.

10 Q. And what is the number of units?

11 A. This is a memorandum --

12 MR. CLASEN: No, no. He --

13 THE COURT: No. He just asked the question
14 number of units.

15 THE WITNESS: Oh, all right.

16 A. 309 units.

17 Q. And do you know what the density on the property for
18 that proposed development is?

19 A. How are you calculating density?

20 MR. RYAN: Your Honor, I don't understand the
21 witness's -- can I ask questions?

22 Q. Do you know what the density of the proposed
23 development is?

24 THE COURT: I think it's a yes or no question.

25 THE WITNESS: Oh.

1 A. Well, to the extent that there are 309 residential
2 units proposed on the 62.5 acres, it's a math question --
3 roughly five units per acre.

4 Q. There has been no approval given for a change of zone
5 yet in the Town of Smithtown?

6 A. Well, the town has been indicating that they would
7 like to conclude this trial before -- they'd like to see the
8 conclusion of this trial before --

9 MR. RYAN: Move to strike. Your Honor, strike.

10 It was a yes or no question. It's either yes or it's no.

11 A. The approval? Have we received approval? No.

12 Q. Has the environmental review process necessary to the
13 board's consideration been concluded yet?

14 MR. CLASEN: He already asked him that.

15 THE COURT: Yes. Asked and answered.

16 Q. After the submission of the DEIS, are there any steps
17 before completion of the review procedure that you're aware of
18 that have yet to be completed before the board can consider the
19 application?

20 A. There are steps. Yes.

21 MR. RYAN: Nothing further.

22 THE COURT: Thank you. Redirect, Mr. Clasen?

23 MR. CLASEN: Just very briefly, Your Honor. Just
24 on one issue. Could I have the witness have Exhibits 13
25 and 14 --

1 THE COURT: Bring your microphone up.

2 MR. CLASEN: -- in front of him, please?

3 (Handing document to the witness.)

4 THE COURT: Proceed.

5 MR. CLASEN: Thank you, Your Honor.

6 REDIRECT EXAMINATION

7 BY MR. CLASEN:

8 Q. Mr. Pitsiokos, you were showed Exhibit 13 on
9 cross-examination and you were asked to tell us about a first
10 condition that was put on the approval of the Marriott
11 initiative; do you remember that?

12 A. Yes.

13 Q. And that was to subsequently provide a full plan for
14 the rest of the property?

15 A. That's correct.

16 Q. Okay. Exhibit 14, you withdrew the application,
17 right, that it granted the approval in 13, right?

18 A. Yes.

19 Q. I think you told us some of the reasons why you did
20 that withdrawal, right?

21 A. Yes.

22 Q. And what were they again?

23 A. Well, it's clear to me from the date on the letter,
24 which is October 2000, which was the same month and year that we
25 submitted the initial Landmark application that the reason that

1 we withdrew this is so that we could proceed on the Landmark
2 application, which included this 10-acre parcel.

3 Q. And actually, the Landmark included the entire
4 property?

5 A. Yes.

6 Q. Thank you.

7 MR. CLASEN: I have no further questions.

8 THE COURT: Redirect -- re-cross?

9 MR. RYAN: Yes, Your Honor.

10 RE-CROSS-EXAMINATION

11 BY MR. RYAN:

12 Q. Mr. Pitsiokos, referring you to Exhibit 13, it
13 required Gyrodyne to do things within six months --

14 A. Uh-huh.

15 Q. -- of the grant of the approval, correct?

16 A. Yes.

17 Q. Were those done?

18 A. Marriott got out of the assisted living business.

19 Q. My question is simple, Mr. Pitsiokos; were those
20 things done?

21 A. They were not.

22 Q. All right. So this was a dead application at the time
23 you were submitting --

24 A. No. No. And in fact, that's why the town required us
25 to withdraw it before they would accept the Landmark

1 application. It was not dead.

2 Q. Sure.

3 A. If it were, they wouldn't have asked us to withdraw
4 it.

5 Q. It was still a conditional approval. The conditions
6 of which had not been met, correct?

7 A. If it were our intention to proceed with this
8 application, we would have filed those conditions. It was
9 always understood before the approval that we would oblige the
10 town in putting forth those conditions.

11 MR. RYAN: Move to strike.

12 MR. CLASEN: Responsive, Your Honor.

13 MR. RYAN: Your Honor, my question was simple,
14 whether or not it was a conditional approval, the
15 conditions of which had not yet not -- had yet to be met?

16 THE COURT: All right. I'll strike it.

17 MR. RYAN: Thank you.

18 THE COURT: I'll strike it. You can re-ask it.

19 Q. And there are procedural rules in the town, are there
20 not, relating to a prohibition on seeking a rezoning change for
21 a property if you have done so within a set period of time
22 earlier?

23 MR. CLASEN: Objection, Your Honor. I object,
24 Your Honor. This is -- we're now beyond the scope of the
25 redirect, okay.

1 MR. RYAN: Your Honor.

2 MR. CLASEN: I'd ask about the procedural rules
3 for anything. He put into play why they didn't find --

4 THE COURT: Yes. Mr. Ryan, I think this is
5 something you carry out on your own cross, not on the
6 re-cross.

7 MR. RYAN: Your Honor --

8 THE COURT: Just because he mentioned Exhibit 13
9 doesn't open up the entire thing again.

10 MR. RYAN: Your Honor, the witness was asked
11 explicitly on redirect as to why the application did not go
12 forward and why it was withdrawn. I am exploring that on
13 my re-cross of the witness and this goes to that.

14 THE COURT: Mr. Ryan, still it goes too far. Go
15 on. If you have other questions directly on redirect, go
16 ahead.

17 MR. RYAN: Sure.

18 Q. Where there any considerations other than those you
19 expressed as to Marriott's withdrawal of its interest that
20 required your withdrawal of that application before the Town of
21 Brookhaven?

22 A. Absolutely not. It was Marriott getting out of the
23 business and Landmark filing the new application.

24 Q. And Marriott got out of the business -- oh, I'm sorry;
25 and Landmark filing the new application. All right, were you

1 aware of any limits on the filing of a new application when
2 there was a pending application?

3 A. No. The application wasn't pending. The application
4 had been approved. I think what you're confusing is the part of
5 the town code that speaks to filing a subsequent application.
6 The application had been filed --

7 MR. RYAN: Move to strike.

8 A. -- in 1999.

9 MR. CLASEN: Let him finish. He's asked a
10 question. He's getting the answer.

11 THE COURT: He's answering your question,
12 Mr. Ryan.

13 MR. RYAN: Move to strike as to what I'm confused
14 about.

15 THE COURT: No. Well, I strike --

16 MR. RYAN: Thank you.

17 THE COURT: -- as to what you're confused about.
18 I'll leave the answer in.

19 A. We were --

20 THE COURT: You're right. I'll never have in the
21 record that you were confused.

22 A. We were fully within our rights to file the Landmark
23 application within the provisions of the town code.

24 MR. RYAN: Nothing further.

25 THE COURT: You're excused, sir. Thank you.

1 THE WITNESS: Thank you, Your Honor.

2 (Witness excused.)

3 THE COURT: Mr. Clasen?

4 MR. CLASEN: I've got to go get my next witness,
5 Your Honor.

6 THE COURT: Okay. Would you like to take a break
7 for a couple minutes?

8 MR. CLASEN: We could. I think he's actually --
9 I've got to find him.

10 THE COURT: Fine. Let's take a -- I know where
11 he is. He's sitting in my chambers.

12 MR. CLASEN: Okay.

13 THE COURT: But why don't we take a break for ten
14 minutes and then we'll start again.

15 MR. CLASEN: Okay. Thank you, Your Honor.

16 (Off the record.)

17 THE COURT: Mr. Clasen?

18 MR. CLASEN: Yes, Your Honor. I'd like to call
19 my next witness, please.

20 THE COURT: Yes. Go right ahead.

21 MR. CLASEN: Thank you. Gerald Barton.

22 COURT CLERK: Step right over here.

23 MR. BARTON: Thank you.

24 THE MONITOR: Please raise your right hand.

25 (The party complies.)

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

4 MR. BARTON: I do.

5 THE MONITOR: Okay, for the record, in a loud,
6 clear voice please state and spell your name and also state
7 your business address, if you don't mind.

8 MR. BARTON: I'm sorry.

9 THE MONITOR: I'm sorry. Did I go too fast?

10 MR. BARTON: You went too fast. I'm from the
11 South.

12 THE MONITOR: I apologize.

13 MR. BARTON: You've got to go slow.

14 THE MONITOR: I apologize. Can you just say and
15 spell your name.

16 MR. BARTON: Gerald Barton.

17 THE MONITOR: Okay. And spell your last name.

18 MR. BARTON: B-A-R-T-O-N.

19 THE MONITOR: And also state your business
20 address.

21 MR. BARTON: My address?

22 THE MONITOR: State your business -- please. I'm
23 sorry.

24 MR. BARTON: Route 1 -- Castro Route 1, Monterey,
25 California. It's rural, so we don't have a number.

1 THE MONITOR: Okay.

2 THE COURT: You may proceed.

3 MR. CLASEN: Thank you, Your Honor.

4 G E R A L D B A R T O N , was called for examination as a
5 witness herein after first being duly sworn and
6 testified as follows:

7 DIRECT EXAMINATION

8 BY MR. CLASEN:

9 Q. Good morning, Mr. Barton.

10 A. Hi.

11 Q. Could you tell me a little bit about yourself from
12 your education, job experience?

13 A. As old as I am that's a dangerous question, but I'll
14 tell you shortly. I grew up in rural Oklahoma, a little town of
15 Stroud, Oklahoma halfway between Tulsa and Oklahoma City, about
16 800 people. It was a farm community, but it was a community and
17 my father was mayor there for 28 years. And then I went to
18 several university, finally had a degree in philosophy and a law
19 degree.

20 Q. And after you got your law degree, what did you do?

21 A. It was during the Korean War and I spent three years
22 in as a legal officer in the Pentagon and a little bit of time
23 in Washington in the Justice Department.

24 Q. Okay. And once you got out of the Army, what did you
25 do?

1 A. Now I got out of the Army and went back to Oklahoma to
2 do what I always intended to do, and that was develop real
3 estate.

4 Q. And tell me about what you did developing real estate
5 when you got back in Oklahoma?

6 A. Well, I went back and I would develop anything I could
7 finance, basically, like all developers. I would build office
8 buildings, shopping centers, apartment houses, residential
9 development. And in 12 years I made more money than I ever
10 thought I would. In retrospect, it wasn't that much money, but
11 at the time it was more than I ever thought I would. And I kind
12 of had a male menopause and said, okay, what do I want to do
13 with the only life I had? So I took a year off and worked as a
14 dollar-a-year person for the state as chief of staff for our
15 governor and decided what I wanted to do --

16 Q. What was that?

17 A. -- with life. And I decided when I was at UCLA Law
18 School I saw millions of acres being developed residentially and
19 as Gertrude Stein said about Oakland "There was no there there."
20 There was no sense of community, just one big subdivision after
21 another. So I decide what I want to do is to build residential
22 communities, and so that's what I started to do soon as I left
23 the state house, never got my dollar. You know how government
24 is, but I -- and so then I began developing residential
25 communities.

1 Q. Okay. Was this under the Landmark name?

2 A. Yeah. Well, I acquired a company that was an old
3 Zendorf/Shell company called Gulf State Land and Industries that
4 was about 200-year-old company, but had almost no assets or
5 liabilities. And changed its name to Landmark Land Company and
6 began developing the lawyer community and just west of New
7 Orleans was the first community.

8 Q. And roughly when was that?

9 A. I'm sorry.

10 Q. When was that?

11 A. 1971.

12 Q. Okay. And from '71 to the present have you been with
13 Landmark?

14 A. Yes. I'm still doing what I did before.

15 Q. Okay. And just tell us, generally, what Landmark
16 does?

17 A. I spent about 18 days a month on the airplane looking
18 for sites that I can take to a market I understand and develop
19 to a high-end residential community. We're most famous for golf
20 because it's easier to be famous for golf than it is a swimming
21 pool or a spa or a tennis court or something else. And so we
22 build residential communities, normally, abenitized (phonetic)
23 communities and I've built 27, 28 communities of five hundred or
24 a thousand acres or above and about 40 some golf courses and
25 several hundred tennis courts.

1 Q. Now did there come a time when you became involved
2 with Gyrodyne?

3 A. (No response.)

4 Q. That's a yes, right?

5 A. Yeah.

6 Q. Okay. How'd that come about?

7 A. Okay. In about 2000 -- the Year 2000 a man called me
8 who I did not know called Ken Wilpond. I knew the Wilpond, a
9 big real estate family in New York. I know Fred Wilpond that
10 owns the Mets and Ken is one of that -- members of the family
11 and he wanted to see if I would be his partner in developing a
12 large, closed Air Force Base. I think it was the Grumman Base
13 in Riverhead. And so they had -- the Defense Department had
14 turned back to the City of Riverhead the 300-acre airport and he
15 thought it would be a good place to build a residential
16 community. So I went up there, looked at that, spent about two
17 or three months looking at it, decided it would never get zoned.
18 It was just not going to get approval and so I told Ken I didn't
19 think it would every happen and left.

20 Probably six months or so later he called and said
21 would I come and met him in Long Island to come look at a piece
22 of property. So I came out with Ken and met the officers of
23 Gyrodyne, looked over Flowerfield and at that time he wanted to
24 buy Flowerfield and wanted me to be his partner. I told him
25 that when he bought it or entered into a contract to buy it call

1 me because lots of people talk about things that don't happen.
2 And so I said give me a call and so that's how I first met
3 Gyrodyne people and Flowerfield.

4 Q. Okay. How'd you actually get more involved with the
5 Gyrodyne people?

6 A. Later that year -- probably four or five months later
7 I got a call from someone at Gyrodyne that said would I be
8 interested in coming up and being -- to see if they had any
9 interest in having me as a developer and I have any interest in
10 being the developer. Now I just think that was towards the end
11 of 2001.

12 Q. Okay. So did you meet with them and look at the
13 property at that time?

14 A. Yes. I think probably the next three months I came up
15 probably every other week. We'd had a lot of people on the
16 ground analyzing different -- I'd say investigate this piece of
17 property. First of all, what you want to say is what is
18 intended appropriate for the fight itself. And second,
19 environmentally, is it possible to do that? Do you have flora
20 and fauna, protected bushes or bugs or whatever that might keep
21 you from developing. Finally, is it governmentally acceptable
22 and would it make any money? Is it worth doing? Is it going to
23 be a monument or is it going to be a successful development?

24 Q. And that's what you do as part of this --

25 A. Yeah. We spent about three months doing that and so

1 we were -- about probably eight people on my staff came up and
2 did different parts of that and I was involved in a little bit
3 of all those parts in looking at that.

4 Q. Okay. What conclusions did you come to?

5 MR. RYAN: Objection. Your Honor, this witness
6 was not disclosed as an expert.

7 THE COURT: An expert in what, Mr. Ryan?

8 MR. RYAN: Land development, apparently, since
9 that's his background.

10 THE COURT: I'm sorry. I'm failing to understand
11 the objection.

12 MR. RYAN: Your Honor, we're asking conclusions.
13 We're asking opinions of this witness as to the
14 developability of this parcel.

15 THE COURT: Yes. So? I don't see that as an
16 expert. He's asking him what conclusions he reached as a
17 potential developer.

18 MR. RYAN: No, Your Honor. We asking what
19 questions Landmark reached as a corporate entity involved
20 in a potential development and we're --

21 THE COURT: Fine, Mr. Ryan. Would you rephrase
22 your question please, Mr. Clasen?

23 Q. What conclusions did you, Jerry Barton, reach on these
24 issues?

25 MR. RYAN: Your Honor, I continue my objection

1 because Mr. Barton indicates that this was based on
2 analyses and work done by employees of Landmark, which we
3 do not have before us or anywhere disclosed.

4 THE COURT: Overruled. Continue, Mr. Clasen.

5 A. Well, I concluded that it was a good site for a
6 residential community. It was very appropriate. It had no
7 environmental impact problems that I saw that were unusual. I
8 met with neighbors. I met with organizations. I met with a lot
9 of people and I thought that the only political issue that came
10 up was traffic. And I thought that it would be successful if
11 done right. So those were my thoughts of that three-month
12 investigation.

13 Q. Okay.

14 A. Then we would decide that we would take on the task
15 and proceed.

16 Q. Now once you took on --

17 MR. RYAN: Objection, Your Honor, to the extent
18 it was based on an investigation to which other
19 contributed.

20 THE COURT: Overruled. Go on, Mr. Clasen.

21 Q. Once you decided to go forward with this project, what
22 happened next?

23 A. Well, we began to do all the kinds of analyses that
24 you would do to see what would happen, what would be the most
25 appropriate best use of the site. And you looked at that from

1 several different ways and you would decide what would work.
2 And so we -- then we came up with several plans and talked about
3 with the board and with the Gyrodyne officers about what we
4 thought was an appropriate site to make sure that we did not go
5 into the investigation of something they didn't want to do.

6 Q. Okay. Did you ultimately come to a conclusion as to
7 what the best proposal was to go forward?

8 A. I'm sorry. I have old ears.

9 Q. Did you ultimately come to a conclusion --

10 A. Yes.

11 Q. -- as to the best way to go forward with this project?

12 A. Yeah.

13 Q. What was that?

14 MR. RYAN: Objection.

15 THE COURT: Reason, Mr. Ryan?

16 MR. RYAN: The same reasons I've indicated, Your
17 Honor. We are asking opinions of this witness for which
18 there's no foundation, no exchange. If this witness is
19 here to testify as a fact witness, he can certainly testify
20 as to what he did.

21 MR. CLASEN: That's precisely what I'm asking.
22 He came with conclusions.

23 MR. RYAN: Your Honor, that's not what we're
24 asking. We have a corporate entity that did certain
25 things. If we want to -- rather than Mr. Barton's personal

1 views of that.

2 THE COURT: Overruled. Continue, Mr. Clasen.

3 A. Well, I concluded that this was a very appropriate
4 site for a very high quality country club, residential
5 community. And we proceeded to do plans, analysis, this type of
6 thing on that conclusion, presented that to the board and it was
7 approved by the board to proceed.

8 Q. Okay. And did you proceed after that?

9 A. Yes, we proceed. And worked probably for the next
10 year in great detail on that and doing the financial analysis
11 and all the kinds of analyses you would need to do to make sure
12 this was an appropriate, successful thing to do.

13 Q. And were these analyses coming up with that it was a
14 good idea to do them?

15 MR. RYAN: object.

16 Q. Was that the conclusion -- strike that. I withdraw
17 the question. These analyses, right, that you were doing,
18 right?

19 A. Yeah.

20 Q. Ultimately, what did you conclude as a result of these
21 analyses?

22 MR. RYAN: Objection.

23 A. Who?

24 Q. You.

25 THE COURT: Overruled.

1 A. I concluded that this was -- would be a very good
2 project. The people of Gyrodyne all lived in the neighborhood.
3 They knew all these things. They wanted very much to do
4 something good for the stockholders, but also good for the
5 community and I thought that was appropriate.

6 MR. RYAN: Objection.

7 THE COURT: Overruled.

8 MR. RYAN: Strike as to what Gyrodyne wanted.

9 THE COURT: I'll strike it as to what Gyrodyne
10 wanted. I'll allow in his conclusions of why he went
11 forward.

12 Q. Now did you participate in any of the public hearings
13 regarding this project?

14 A. We have -- traffic was the issue and I thought
15 surprisingly the main issue that came up with everybody in mind.
16 And so I suggested, and it was done, a very good traffic study
17 that we presented at a public hearing in, I think, a senior
18 center in Smithtown and it was well attended. I would guess 2
19 to 300 people attended and I thought it -- we presented the
20 study there and the crowd reacted. I stayed and talked to
21 everyone who wanted to talk about what I thought this would be
22 because change always creates fear. And what you need to do is
23 nothing defers fear like certainty. Tell people what really the
24 truth is and then they'll understand it and they make their own
25 judgment. So we had a long meeting, but a good meeting in

1 Smithtown.

2 Q. You also mentioned you had talked to some of the
3 residents when you getting first involved in this project,
4 right?

5 A. Yes. We talked -- and also I called personally on
6 many of the neighbors and I called on the university as a
7 neighbor, personally, and just see what was their problems and
8 all of that because we wanted to explain what we intended to do
9 and how it would fit in to the community as a whole. And so a
10 lot of those people were at that meeting; some were not. But I,
11 in doing this for 38 years, I saw less resistance here than any
12 time, except in two other cases, that I've ever seen.

13 MR. RYAN: Objection, Your Honor.

14 THE COURT: The nature of your objection,
15 Mr. Ryan.

16 MR. RYAN: Excuse me?

17 THE COURT: The nature of your objection?

18 MR. RYAN: Certainly. The comparison of the
19 objections that were raised here to other matters that we
20 have no knowledge of.

21 THE COURT: He's just giving a conclusion based
22 on his own knowledge of what he was doing. I just take it
23 in as that. Overruled.

24 Q. As a result of what you were doing here, which was you
25 mentioned attending hearings, talking to neighbors, talking to a

1 lot of people about this; were you -- did anybody express to you
2 any significant opposition to the Landmark proposal?

3 MR. RYAN: Objection, Your Honor.

4 THE COURT: That I'll sustain.

5 MR. CLASEN: Okay.

6 Q. Are you aware of any opposition to the Landmark
7 proposal?

8 A. Yeah. I think that almost always there is someone
9 that walk their dog in the area. They think it's a park. They
10 don't want to use it. That is very common. But I talked to no
11 one that really had serious opposition, but -- and after the
12 traffic was explained; I don't think they had serious problems
13 on traffic. But it's not hard to get people to say I'd rather
14 live to a high quality residential community than is an
15 industrial park and so naturally --

16 MR. RYAN: Objection, Your Honor.

17 A. -- you would expect that. And they did not have
18 hardly any opposition at all.

19 Q. Thank you.

20 THE COURT: To what part are you objecting?

21 MR. RYAN: The conversations with others, the
22 characterization of unknown conversations.

23 THE COURT: Yeah, I'll strike that part of it,
24 but I'll allow in the first part of his statement as to he
25 didn't speak to anybody who told him about problems.

1 Q. You mentioned before that you've been involved in a
2 lot of projects at Landmark, right?

3 A. That's correct.

4 Q. Okay. And you mentioned before that you initially do
5 a feasibility study of some sort? Remember there were certain
6 things you want to make sure is going to happen before you jump
7 in and get involved?

8 A. That's right. And to make clear this is something I'm
9 always very personally involved in because I think that's
10 something that's most important is is it worth doing.

11 Q. Okay. Now had you passed that initial stage with
12 respect to the Gyrodyne property?

13 A. In the Gyrodyne property?

14 Q. Yes.

15 A. Yes. Yes. Completely.

16 Q. Okay.

17 A. It was a complete package ready to be zoned.

18 Q. In your experience in I don't know how many -- it's
19 over 40 years at Landmark, right?

20 A. Yeah, 38.

21 Q. Thirty-eight years at Landmark, right? Once you
22 passed that feasibility stage, did any of these projects not
23 happen?

24 MR. RYAN: Objection, Your Honor.

25 THE COURT: Sustained.

1 MR. CLASEN: All right. Then I have no further
2 questions at this point then, Your Honor.

3 THE COURT: Thank you. You want to take your
4 microphone? Mr. Ryan?

5 MR. CLASEN: I do.

6 THE COURT: Do you need any time, Mr. Ryan or are
7 you ready to go?

8 MR. RYAN: I'm ready to proceed, Your Honor.

9 THE COURT: Then proceed, sir.

10 CROSS-EXAMINATION

11 BY MR. RYAN:

12 Q. Good morning, Mr. Barton.

13 A. Good morning.

14 Q. Still.

15 A. Yeah.

16 Q. Mr. Barton, the Landmark Company has a contract with
17 Gyrodyne to assist it in the course of this litigation, is that
18 right?

19 A. We did. Yeah.

20 Q. And that still continues through your testimony here
21 today?

22 A. No, it does not.

23 Q. Isn't Landmark being compensated in excess of a
24 million dollars for its cooperation in prosecution of this
25 action?

1 A. No. We had a participation in the profits made and
2 how that was orchestrated in that, certainly, I volunteered that
3 I would be happy to cooperate and we have no interest in any
4 future developments or earnings that was done.

5 Q. I didn't ask that, Mr. Barton. My question is whether
6 or not Landmark has a contract that provides for its cooperation
7 in advising and providing services to Gyrodyne Company of
8 America, Inc. in connection with this action?

9 A. As I remember it, about two years ago we had basically
10 a settlement agreement of ending the contract that we had. They
11 had a lot of commissions and different things in that contract
12 and certainly one of those things is that we would cooperate and
13 share any information, knowledge that we have on this thing.

14 Q. And you were provided as part of that settlement
15 compensation in excess of a million dollars?

16 A. Yes.

17 Q. The arrangement that you had with Gyrodyne in relation
18 to the development of this luxury residential complex and golf
19 course, did it provide for your participation in the building of
20 the residences?

21 A. Of the what? I'm sorry.

22 Q. The residences?

23 A. We would build or not build residential. Normally,
24 the philosophy would be that if you had good merchant buildings
25 in the area we would not build. In some areas we do build. And

1 so if we were going to be building houses was not defined at the
2 time the contract had terminated.

3 Q. At the time that you entered into the contract, were
4 you under contract to build the houses?

5 A. No. No. Who was going to build the houses wasn't
6 decided at that time.

7 Q. Your interest was solely in the development of the
8 golf course, correct?

9 A. No. No, develop of the community. And so the water,
10 streets, and sewer, the landscaping, the land planning, the
11 lifestyle, the spa, the fitness center, the hike and bike
12 trails, the whole community is what we do. One of the things is
13 golf.

14 Q. Were the lands to be owned by Landmark or owned by
15 Gyrodyne underneath the golf course?

16 A. It was all to be owned by Gyrodyne.

17 Q. Was it Landmark who prepared and submitted the
18 application necessary for the development --

19 A. To my knowledge, yes.

20 Q. -- to the municipalities?

21 A. Yes. There were obviously engineers and lawyers and
22 other experts, but I think we were a principal in that.

23 Q. You were the principal and you paid for the services
24 of those engineers, lawyers, planners.

25 A. We did not pay the engineers and lawyers. Gyrodyne

1 paid the lawyers and engineers.

2 Q. The other professionals involved, the architects --
3 must have had a golf course architect?

4 A. I believe that all those things they were approved by
5 and paid by Gyrodyne like you always want a local engineer.

6 Q. Well, I understand they were approved by. Whose
7 responsibility was it to make the application and obtain the
8 zoning approvals necessary?

9 A. I think it was my responsibility and Landmark's
10 responsibility.

11 Q. And you've acknowledged, Mr. Barton, that traffic was
12 a serious concern to the neighborhood and the municipalities in
13 this application?

14 A. It was -- yeah, it was the principal concern. Yes.

15 Q. Now as part of your due diligence conducted in
16 connection with determining whether or not to involve yourself
17 with the Gyrodyne property, were you advised of the state
18 university's discussions and offers to acquire the property?

19 A. At what time -- point in time. I believe I was in May
20 of 2000 after we submitted our application. But before that, I
21 don't know that they expressed the desire to come to condemn the
22 land until we were getting close -- ready to get it zoned and
23 then they did.

24 Q. Well, you had submitted this plan to the Town of
25 Brookhaven, correct, in 2000?

1 A. And Smithtown, I believe.

2 Q. In 2003?

3 A. I thought it was in 2002. I thought it was in May,
4 but I might be mistaken.

5 Q. I'm showing you what had been marked as Exhibit "N"
6 for identification, Mr. Barton; does that refresh your
7 recollection as to when this application was submitted?

8 A. Well, I don't remember it either way, but certainly
9 this says June 2003, which I'd assume is accurate.

10 Q. Right. Is that a copy of the application that --
11 well, most of the application that was submitted before the Town
12 of Smithtown, as indicated?

13 MR. CLASEN: Your Honor, is that in evidence?

14 THE COURT: No. That's "N." It's only marked
15 "N" for identification.

16 MR. CLASEN: Right. That's not in evidence, so
17 he shouldn't be reading from it.

18 THE COURT: I'm sorry.

19 MR. CLASEN: He shouldn't be reading from the
20 document. It's not in evidence yet.

21 THE COURT: I don't think he was reading.

22 MR. CLASEN: Counsel was.

23 THE COURT: He said --

24 MR. CLASEN: Counsel was saying isn't this a
25 blah, blah, blah, okay. It's not in evidence yet.

1 THE COURT: I don't think Mr. Ryan meant that
2 certain. I think he was just trying to identify it.

3 Q. Mr. Barton --

4 MR. CLASEN: I understand. But that was my
5 point, Your Honor. It's not in.

6 THE COURT: Your point is well taken.

7 Q. Mr. Barton, what is that document, Exhibit "N"?

8 A. Well, I can read what it says, but you know, I read
9 the document. I don't know. So it was --

10 Q. Can you identify what that document is?

11 A. I don't recall this specific document from 2003, but I
12 well might recall a lot of information in it, if I read it.

13 Q. Correct me if I'm wrong, you were responsible for
14 overseeing Landmark's application to the towns for the necessary
15 zoning approvals.

16 A. That's correct.

17 Q. And do you recognize that to be one of the
18 applications submitted by Landmark for the -- to the
19 municipalities for the necessary change of zoning?

20 MR. CLASEN: Objection, Your Honor. He's now
21 stating what the document is, okay. What he can do is he
22 can show a document; ask him it refreshes his recollection.
23 He can ask the witness to identify it. If the witness can
24 identify it, then move it in. But you can't backdoor it by
25 asking a question, which says what's in it.

1 THE COURT: Sustained.

2 Q. Mr. Barton, looking at that document, you don't
3 recognize what it is?

4 A. I can read what it says. I don't remember.

5 Q. I appreciate -- please, review the entire document and
6 refresh your recollection.

7 MR. CLASEN: On what?

8 MR. RYAN: As to what it is. Your Honor, this
9 may take some time. It's approximately 50 or 60 pages.

10 MR. CLASEN: Your Honor, may I take a look at
11 this for a split second?

12 THE COURT: Yes, Mr. Clasen, you may.

13 THE WITNESS: I'm confused as to what I'm asked.

14 THE COURT: Hold on, Mr. Barton. Just let
15 Mr. Clasen take a look at it.

16 MR. RYAN: Unless we can have a stipulation of
17 counsel as to what it is.

18 MR. CLASEN: This has got his notes on it, Your
19 Honor.

20 THE COURT: Mr. Ryan, there appear to be some
21 handwritten notes on that.

22 MR. RYAN: I'll ask you to disregard any penciled
23 indications on the back of it.

24 MR. CLASEN: He just asked would I stipulate it
25 coming into evidence with his handwritten notes certainly

1 on it.

2 MR. RYAN: We can redact --

3 THE COURT: Mr. Ryan, thank you. We can redact
4 out any hand --

5 MR. CLASEN: I understand, Your Honor. This,
6 right, was sitting on his desk. He knew he was going to
7 use this, okay, or at least knew he might use it like I
8 knew I might use the documents. So subject to those
9 objections, Your Honor, if you're asking me if I object on
10 authenticity grounds I haven't read through the whole thing
11 myself. I'm assuming he's telling us that this is a true
12 and complete copy, okay.

13 THE COURT: You are, Mr. Ryan?

14 MR. RYAN: Your Honor, that is a copy of the
15 application less the pages that were accepted from it for
16 purposes of being introduced --

17 THE COURT: They were introduced prior when he
18 lifted some pages out of there.

19 MR. RYAN: -- during Mr. Pitsiokos' testimony and
20 I would include those within the review by Mr. Barton.

21 THE COURT: Yeah. That was --

22 MR. CLASEN: These didn't come in, Your Honor.

23 THE COURT: Only for identification.

24 MR. RYAN: Only for identification. I would
25 include it as part of Mr. Barton's review.

1 THE COURT: He took them out of there.

2 MR. CLASEN: I know.

3 THE COURT: Yeah. He now wants to put them back
4 in.

5 MR. CLASEN: Right.

6 THE COURT: I assume you're trying to enter this
7 into evidence?

8 MR. RYAN: Your Honor, first I want it
9 identified.

10 THE COURT: Oh. Well, Mr. Clasen, we can either
11 have Mr. Barton review it to see if it refreshes his
12 recollection or you can short circuit the procedure by --

13 MR. CLASEN: That's what I'm trying to do.

14 THE COURT: Yeah, I understand.

15 MR. CLASEN: Okay, but I have about this --
16 clearly this was not complete and I'm holding up Exhibit
17 "N" because it's missing a few pages.

18 THE COURT: Which has been previously marked.

19 MR. CLASEN: Right. But if counsel's
20 representing this pile that I've got in front of me, which
21 is "N" and whatever the exhibit is a complete and complete,
22 accurate copy of the application, which because I've not
23 checked then --

24 THE COURT: And you're so representing, Mr. Ryan?

25 MR. RYAN: I am, Your Honor. That is the copy

1 that --

2 THE COURT: And he is so presenting that,
3 Mr. Clasen.

4 MR. CLASEN: Then subject to the --

5 MR. RYAN: -- as provided to me by the town.

6 THE COURT: Wait a minute, Mr. Ryan. Let
7 Mr. Clasen finish.

8 MR. RYAN: Go ahead.

9 THE COURT: Thank you very much.

10 MR. RYAN: Thank you.

11 MR. CLASEN: Subject to the objection, which I've
12 stated before several times over, and I know your position
13 on it Your Honor. I just feel like I have to state it.

14 THE COURT: Fair enough.

15 MR. CLASEN: I would have no other objections --

16 THE COURT: All right.

17 MR. CLASEN: -- of authenticity or anything else.

18 THE COURT: Then without objection, you may
19 proceed, sir.

20 MR. RYAN: Thank you. Your Honor, with that
21 stipulation, may we have the document marked in evidence?
22 I would offer it in evidence.

23 MR. CLASEN: It just did.

24 THE COURT: No. No. No. I haven't. I'm just
25 now -- I was just waiting for everybody to finish their

1 comments. I will now -- I'm losing track. This is now
2 "N," isn't it? "N" with "M."

3 THE MONITOR: "N" with "M," correct.

4 THE COURT: Yes. Thank you. "M" put back into
5 "N" is now put into == previously both marked for
6 identification is singularly put into evidence as "N," "M"
7 no longer existing.

8 (Whereupon, Defendant's Exhibit N was admitted in
9 evidence without objection.)

10 THE COURT: Mr. Ryan.

11 MR. RYAN: Thank you.

12 THE WITNESS: Mr. Ryan, I don't understand the
13 question.

14 THE COURT: There's no question before you at the
15 moment, Mr. Barton.

16 THE WITNESS: Good. I'm glad I don't understand.

17 THE COURT: Okay. You may proceed with your
18 questions before Mr. Barton, Mr. Ryan.

19 Q. Mr. Barton, the application that was made by Landmark
20 in 2003 for the zoning changes necessary to a development of the
21 golf course and luxury residential property included maintenance
22 of the park -- the maintenance of an industrial use of the site
23 also, did it not?

24 A. That's my recollection. Yes.

25 Q. And exhibit now "M" can then -- in evidence indicates

1 that, does it not?

2 A. I don't know.

3 MR. CLASEN: Your Honor?

4 THE COURT: Yes, Mr. Clasen.

5 MR. CLASEN: If he wants to direct him to a
6 specific page, which says it that would be maybe a proper
7 question. Then we get to the second part of it, which is
8 the document speaks for itself. If it says it, it says it.

9 THE COURT: Okay.

10 MR. CLASEN: Okay, it's in evidence at this point
11 in time.

12 Q. Mr. Barton, I'll direct your attention
13 to those pages that had been previously stamped --

14 THE COURT: Wait a minute, Mr. Ryan. I'm just
15 going to overruled Mr. Clasen and then you can go on from
16 there.

17 MR. RYAN: Thank you.

18 THE COURT: You're welcome.

19 Q. Mr. Barton, was the environmental reviews necessary to
20 the town's consideration of the zoning change application by
21 Landmark ever concluded?

22 A. I don't know the statute, but certainly the
23 environmental review was done and I don't know what the statute
24 said.

25 Q. Was it ever concluded by the town?

1 A. By the town? I don't know. It was concluded by
2 Landmark.

3 Q. And was that before the application was made?

4 A. Correct.

5 Q. There was no environmental review after the submission
6 of the application?

7 A. I believe shortly after the application it was
8 announced as property that was going to be condemned and I don't
9 think much happened after that.

10 Q. Okay, including any environmental reviews?

11 A. Not that I know of.

12 Q. And the public meeting that you were talking about
13 earlier, that was a public informational meeting, correct?

14 A. Well, no, it --

15 Q. That was not a public hearing?

16 A. No, it was not a hearing. You're correct.

17 Q. So that was not a hearing by either municipality that
18 would have say on the acceptance or rejection of the proposal?

19 A. No. All that was before we submitted an
20 application --

21 Q. Right.

22 A. -- which was done. As soon as that was done, the
23 property was condemned.

24 Q. Correct. That was just part of you communicating with
25 the community what you intended?

1 A. Correct.

2 MR. RYAN: Nothing further, Your Honor.

3 THE COURT: Mr. Clasen?

4 MR. CLASEN: I have nothing further, Your Honor.

5 Thank you very much.

6 THE COURT: Mr. Barton, thank you very much.

7 You're excused.

8 THE WITNESS: Thank you.

9 (Witness excused.)

10 THE COURT: Mr. Clasen?

11 MR. CLASEN: Your Honor, at this point in time
12 the Claimant has no further witnesses. We rest.

13 THE COURT: Thank you. Mr. Ryan, since it's 12
14 o'clock, why don't we take an early lunch.

15 MR. RYAN: Very good.

16 THE COURT: And at 1 o'clock you may proceed with
17 your case.

18 MR. RYAN: Thank you.

19 THE COURT: Thank you. We stand adjourned.

20 (Lunch recess.)

21 THE COURT: Mr. Ryan, you're up.

22 MR. RYAN: Thank you, Your Honor. I'd like to
23 Mr. Grover.

24 THE MONITOR: Please raise your right hand.

25 (The party complies.)

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

4 MR. GROVER: Yes, I do.

5 THE MONITOR: Okay, please be seated. In a loud,
6 clear voice please just state your name and also state your
7 business address.

8 MR. GROVER: My name is Robert Grover,
9 G-R-O-V-E-R, and my business address is 325 West Main
10 Street in Babylon, B-A-B-Y-L-O-N, New York and the name of
11 the company I work for, which I'll spell, since I forgot to
12 bring you a business card, is Greenman-Pedersen. That's G-
13 R-E-E-N-M-A-N dash P-E-D-E-R-S-E-N, Inc.

14 THE MONITOR: Thank you.

15 THE COURT: Mr. Ryan?

16 MR. RYAN: Thank you, Your Honor.

17 R O B E R T G R O V E R , was called for examination as a
18 witness herein after first being duly sworn and
19 testified as follows:

20 DIRECT EXAMINATION

21 BY MR. RYAN:

22 Q. Mr. Grover, can you tell us something about yourself?

23 A. Sure. Well, I grew up in Long Island. I'm a lifelong
24 Long Islander. And during the period of time I was in college,
25 which was from '68 to '72, I worked summers for a local

1 engineering firm named Greenman-Pederson and they actually
2 taught me some valuable things. I became quite proficient in
3 surveying and some other aspects of engineering. But also
4 during that period of time there was some really landmark
5 legislation that was passed, such as the National Environmental
6 Policy Act, the Federal Water Pollution Control Act amendments
7 of '72, Marine Mammal Protection Act -- a number of other very
8 important pieces of legislation were passed.

9 So when I graduated in '72, I was looking into
10 graduate schools because I wanted to further my education in
11 Environmental Science and in the period of time that I was
12 investigating possible graduate schools I had a call from the
13 owner of the company that I still presently work for and they
14 said, listen, if you have a couple of months to come in here
15 before you go back to school I could really use your help
16 because all of a sudden I'm getting all this stuff from the
17 Corps of Engineers and the DEC and they're asking me to do all
18 these environmental studies and I don't know anything about that
19 and I know you do. So could you come at least see what they
20 are? So I did. And 37 years later, I'm still there trying to
21 figure them all out.

22 Q. What is the nature of the work that you do today with
23 Greenman-Pederson?

24 A. I am a vice president and the director of
25 Environmental Sciences. My work runs a pretty wide gamut. I

1 think I would generally characterize it in breaking down into
2 four areas. Those are ecology, coastal processes, air and noise
3 primarily related to transportation projects and environmental
4 planning. In the environmental planning areas, which is
5 probably most germane to this proceeding, I have worked on
6 virtually every type of project that there is conducting
7 environmental analysis and permitting processes. I've done
8 quite a few golf courses, as a matter of fact, and worked on
9 some golf communities. I've done single-family subdivisions,
10 multi-family residential developments.

11 In fact, one of the golf courses that I most recently
12 worked on was the subject of a successful PDD. I work for
13 federal, state, county, town, and villages in terms of
14 governments. I also work for private individuals who are
15 proposing to build projects. And then I occasionally work for
16 groups such as community associations and environmental groups
17 in assisting them with the review of various projects. Some of
18 my projects that I'm just recently concluding or in the process
19 of working on are a review of the 475-acre Heartlands
20 development at the former Pilgrim State property. I'm
21 representing an adjacent township that has some vital interests
22 in the outcome of that project.

23 And I am working to review the Lighthouse Project,
24 which is the redevelopment of the Nassau Coliseum property with
25 the addition of about 2300 units of residential space and a

1 million square feet of office space and some commercial space.
2 And I'm doing that work for the Incorporated Village of Garden
3 City, which is very close to the site, and which also has some
4 very vital interest in the outcome of the project.

5 Q. In the course of these years doing these reviews,
6 Mr. Grover, have you gained familiarity with the processes for
7 approval for the development of private properties in Long
8 Island, and in particular, the Town of Brookhaven and the Town
9 of Smithtown?

10 A. Yes, I have.

11 Q. At my request, did you review the property at issue
12 here, Gyrodyne's 308 approximate acres situated between -- on
13 the border between the towns of Brookhaven and Smithtown?

14 A. I did.

15 Q. And in the course of that review, what did you do?

16 A. Well, I went to look at the property first. That's
17 always -- first-hand knowledge of a piece of property is always
18 critical to any evaluation. So I did go look at the piece of
19 property. I reviewed numerous documents that I have in my
20 library at work in terms of various maps and aerial photographs,
21 et cetera. I conducted interviews with the planning staff in
22 the Town of Brookhaven and the Town of Smithtown and I reviewed
23 the various documents that are on the desk of the court
24 reporter.

25 Q. What was pertinent to your evaluation of the

1 permitting process and prospects of this property?

2 A. Well, the basic parameters I was given were the
3 process that would have to be undertaken and the likely
4 prospects of success of a residential type planned development
5 district on the entire Gyrodyne property with -- and this is the
6 key really, with a yield of somewhere in the range of five to
7 seven residential units per acre.

8 Q. With that as the premise, what did your -- how did you
9 first proceed in your analysis?

10 A. Well, the first thing I do is I outline the various
11 steps that are necessary to be taken -- what agencies are
12 involved and what their role will be and then organize them into
13 a logical flowchart, so to speak, for getting a project like
14 this through the rather arduous environmental and zoning and
15 land -- and site plan review processes. And then one-by-one
16 took those steps and evaluated some of the difficulties that
17 would have to be overcome in order to make them come out to a
18 successful conclusion. And then I applied my own judgments,
19 based on my 37 years of experience as to the most likely outcome
20 of that environmental, zoning, and site plan review process.

21 Q. Mr. Grover, I'd like to hand you what's been marked
22 Defendant's Exhibit "L." Can you tell me what is? What is
23 that?

24 A. This is the report that I prepared in conjunction with
25 this matter.

1 Q. Referring you to page 3 of that report, does that
2 discuss the parameters that you were just talking about as the
3 basis for your analysis?

4 A. Yes, it does.

5 Q. I believe I heard you say that you were considering a
6 residential density of five to seven?

7 A. Well, I just basically said let's go with five and see
8 how that shakes out and that was the premise that I started
9 with.

10 Q. All right. Talking about the procedure that would be
11 necessary -- well, can you describe the Gyrodyne property for
12 us?

13 A. The Gyrodyne property consists of about 308 acres,
14 which is very largely undeveloped. There are some industrial
15 buildings on the property, but the bulk of it I would
16 characterize as undeveloped and it's a combination of pineal
17 woodlands and native grasslands.

18 Q. And where is this property located?

19 A. It's located next to Stony Brook University to the --
20 I believe to the west of Stony Brook University. It spans the
21 borders of the towns of Brookhaven and Smithtown.

22 Q. And how is it zoned?

23 A. It's zoned in both towns for light industrial use.

24 Q. In order for a residential development of this
25 property to occur, what needs to be done?

1 A. Well, there are a number of steps that would have to
2 be followed. It would require a zone change from the Town of
3 Brookhaven and a zone change from the Town of Smithtown and site
4 plan -- a successful site plan review, again, from both the
5 towns of Brookhaven and Smithtown. And in the process of going
6 through those steps there would be an extensive -- I'm going to
7 use occasionally the term "SEQR," which is S-E-Q-R, which is the
8 abbreviation for State Environmental Quality Review Act or State
9 Environmental Quality Review.

10 There's a rather extensive environmental review
11 process that would have to be undertaken under SEQR, which also
12 involves a substantial opportunity for the public to review and
13 comment and weigh in on the project. So they get to review it
14 both at the environmental review process period as well as the
15 site plan review and the zoning so that, essentially, they all
16 have three shots at it.

17 Q. How does this SEQR process, the environmental review
18 relate to the consideration by either town's board as to the
19 appropriateness of a zoning change?

20 A. Well, they cannot undertake the zoning change under
21 the State Environmental Quality Review Act or SEQR. This
22 constitutes what's known as Type 1 project and Type 1 projects
23 are presumed to, although don't necessarily always require
24 environmental impact statements. In the case of a project of
25 this magnitude, it is absolutely inconceivable that it would not

1 undergo a full environmental impact statement.

2 Q. And how is that review conducted?

3 A. Well, again, as with the other steps, as with the
4 other processes there are various steps. The first thing that
5 would have to happen would be that the applicant would fill out
6 what's known as an environmental assessment form, which is just
7 a brief vehicle for the reviewing agencies to use to take it to
8 the next step. In other words, is it a Type 1 action? Is it
9 most likely to require an environmental impact statement? And
10 then based on that and some internal review, they will make a
11 determination as to whether or not they're going to require the
12 applicant to prepare or they have the option themselves to
13 prepare a draft environmental impact statement.

14 Once they've made that decision to go through the
15 process requiring a draft environmental impact statement, then
16 they undergo what's known as a scoping process. Under SEQR's --

17 Q. What is that?

18 A. Well, under SEQR, the scoping process, which I'll
19 explain, is not mandatory as it is, for instance, under the
20 National Environmental Policy Act. However, again, in my
21 experience a project of this magnitude, it's inconceivable that
22 they would not undertake formal scoping. And what that is is a
23 review by in house planning staff to basically write -- the way
24 I like to describe it is they write the table of contents for
25 the draft environmental impact statement and they include a

1 substantial amount of detail under each chapter heading as to
2 how that issue will be addressed and what information might be
3 needed to generate it, et cetera.

4 Then that report, which is generally prepared by the
5 reviewing agency, would be called a draft-scoping document. The
6 draft scoping document then goes out for public review and the
7 reviewing agency will schedule what's called a scoping meeting,
8 which is a meeting that is basically an invitation to the public
9 as well as to interested involved agencies to come in and make
10 comments on the scoping document and present information as to
11 why they think that perhaps they didn't sufficiently identify
12 all the issues that needed to be addressed or they didn't go
13 into enough detail on how those issues will be addressed.

14 So once they conclude the scoping meeting and allow a
15 reasonable period of time for the public to submit written
16 comments, then the reviewing agency -- and at this point I'd
17 better reviewing to them as the lead agency. That's the
18 technical name under SEQOR. They would then take the draft
19 scoping document and consider and weigh all of the comments
20 received at the scoping meeting, the public scoping meeting as
21 well as any that are submitted in writing and prepare a final
22 scoping document, which becomes, again, the table of contents
23 with a great deal of detail about the content and organization
24 of the draft environmental impact statement.

25 Q. All right, you've referred to lead agency and the

1 reviewing agency's determination of scope. Where you're dealing
2 with two communities what happens?

3 A. Well, it gets messy and there are a number of possible
4 outcomes. Because there are two communities it is unlikely that
5 either of the two communities would want to cede the
6 responsibilities of lead agency to the other community. It in
7 this case --

8 Q. Why is that?

9 A. Well, because they have -- each town in this case has
10 a responsibility to their constituents to ensure that the
11 environmental review process is undertaken in a thorough manner
12 and that the input of their residencies and their own staff are
13 key to the preparation of the document. So lead agency it's a
14 very serious role. And in the case of a project that involves
15 two communities, as I say, it's highly unusual for one community
16 to take the lead over the other.

17 Q. In terms of the scoping when we're dealing with two
18 agencies or co-lead agencies with public responsibilities, is
19 the scoping a matter of compromise or is it a matter of adding
20 the requirements of both?

21 A. Well, it would be the requirements of both. As I
22 indicated in my report, the most likely outcome here, and this
23 is consistent with Mr. Golub's testimony of Thursday, the likely
24 outcome here is that the towns would serve as co-lead agencies,
25 although there is a procedure in state law for creation of an ad

1 hoc interagency commission or inter-municipality commission to
2 do this. I've never seen that done. The thing that can make it
3 a little bit awkward is that there is no provision; as far as I
4 can recall there's no provision in the SEQR regulations for
5 co-lead agencies, and yet, I've seen it done on numerous
6 occasions and I think everybody agrees that it's the best way to
7 proceed.

8 Q. Okay. After the initial scoping of what needs to be
9 evaluated, writing the table of contents, what happens?

10 A. Well, generally, the lead agency or co-lead agencies
11 would require -- they would go back to the applicant and at this
12 point they've already made the determination that an
13 environmental -- a draft environmental impact statement has to
14 be prepared. So in most cases there are two options under the
15 law. One is that the municipality undertake the preparation
16 themselves or the lead agency undertakes the preparation with
17 their own staff or by hiring consultants or however they choose
18 to do it.

19 The second option is that they can require the
20 applicant to do it. And in almost all cases with which I've
21 been -- in every case with which I've been involved, they have
22 required that the applicant do it because it's a significant
23 cost to prepare a draft environmental impact statement. And
24 although there are provisions for the lead agency to recover
25 costs for the SEQR process from the applicant, they can have it

1 both ways. They can require the applicant to prepare the draft
2 environmental impact statement and still recover the costs for,
3 in many cases, hiring their own consultants to review or having
4 their own in house staff undertake the review.

5 Q. In your view, Mr. Grover, what issues would be
6 pertinent to the evaluation of whether or not a zone change were
7 to be permitted for Gyrodyne's property?

8 A. Well, that would really have a lot to do with how the
9 SEQR process unfolds. In a case like this, during the scoping
10 process -- stepping back again to the scoping process, one of
11 the things that has to be identified is the range of
12 alternatives that need to be explored. That's a very strict
13 requirement of SEQR that you can't simply say this is the only
14 action that we're interested in undertaking and we're not going
15 to look at any alternatives.

16 The law requires that alternatives be presented in the
17 draft environmental impact statement and specifically says
18 things like change in location, which obviously wouldn't be
19 pertinent here because there's not a comparable property that
20 could be developed in the area. But one of the requirements of
21 SEQR is that, for instance, they present an alternative or
22 alternatives that included reduced magnitude or scale of
23 development.

24 So again, in my experience, having been through this
25 quite a few times, what would end up happening is that the lead

1 agency would say, all right, your proposed project is for
2 roughly 1500 units on 300 acres and that can be a proposed
3 action. You must also include a no action alternative, which is
4 tantamount to what was the end result when the state acquired
5 the property. The no action alternative essentially means
6 somebody's got to come in and buy it because you can't deprive
7 the landowner of any use of the property. But there's another
8 series of ranges of alternatives that would required to be
9 examined.

10 And the critical one here is the alternatives for a
11 change in magnitude of scale. The lead agency would require the
12 applicant in his draft environmental impact statement to include
13 an alternative with a substantially reduced scale. And of
14 course, they'd have other alternatives for different types of
15 layouts, et cetera. But probably the key alternative that would
16 have to be included here is the smaller project or one with less
17 density.

18 Q. Well, here we're dealing with a change of zone from an
19 existing industrial use to a residential use, correct?

20 A. That's correct -- well, we would be. Yes.

21 Q. Would range of alternatives just be limited to the
22 residential use or would it also include the industrial uses?

23 A. Oh, it could easily include a range. That's the -- I
24 don't know if I'll use the word "beauty," but that's one of the
25 things that a PDD allows for is that when a PDD is created it's

1 basically you're writing a zoning code for a piece of property
2 or a series of pieces of property and you can write just about
3 anything into that zoning ordinance that the town's going to
4 allow. So for instance, there could be a combination in the PDD
5 of residential. There could be industrial, as we saw in the
6 plan we were looking at earlier with the golf community. There
7 could be, for instance, as was discussed earlier, there could be
8 possibly an assisted living component to the PDD. It doesn't
9 have to be restricted, in my experience, to one use. Different
10 communities handle that differently. The PDD I worked on
11 recently in South Hampton had multiple uses and it was a very
12 successful project. So it doesn't have to be limited to one use
13 or to one type -- even it were all residential, it wouldn't have
14 to be one particular type of residential. It could be a mix of
15 different housing types.

16 Q. But for the purposes of your evaluation here involving
17 both Smithtown and Brookhaven, do the zoning codes in both towns
18 permit PDD?

19 A. Well, Smithtown does not have PDD. They have
20 something else and it's called a P -- I'll tell you in a second.
21 Let me just look in my report. I always forget what they call
22 it. They have a planned residential development district. I
23 don't make a great deal of distinction between these various
24 initials. All communities have different initials and different
25 names for these different specific or property-specific possible

1 rezonings and I don't make a great deal of distinction between
2 them just based on what they're called.

3 Q. Well, what, if any, provision is there in Smithtown
4 for a mixed-use parcel -- industrial, residential, commercial,
5 retail, whatever the mix might be?

6 A. I don't know specifically or I don't recall
7 specifically what the PRDD or Planned Residential Development
8 District in Smithtown includes, but in my discussions with the
9 Smithtown planning director --

10 MR. CLASEN: Objection, Your Honor. He's going
11 to tell us what the director said?

12 MR. RYAN: I don't know.

13 THE WITNESS: He said it to me.

14 THE COURT: I'm sorry.

15 MR. CLASEN: Objection. It's hearsay. He's
16 going to now tell us what the director said.

17 THE COURT: Oh, I'm sorry. I missed your first
18 part about the objection. Sustained.

19 Q. Without indicating anything told you by the director
20 of Smithtown's planning function, are you aware of any mixed use
21 zoning available in Smithtown?

22 A. I would have to go back and review the code. I don't
23 recall.

24 Q. With the submission of an environmental draft or draft
25 environmental impact statement, what happens then?

1 A. Well, the first thing that happens is it goes -- the
2 draft environmental impact statement it goes to the lead agency
3 or co-lead agencies and they have to then determine whether or
4 not it is complete. In other words, is everything that was
5 identified in the scoping document as a necessary ingredient of
6 the DEIS actually in the DEIS. And in most cases -- all cases
7 for a project this size there are a number of deficiencies found
8 in the DEIS. And therefore those deficiencies are enumerated in
9 a letter or series of letters from the town -- the various town
10 agencies and sent back to the applicant and with the
11 determination that the DEIS is incomplete and these are the
12 deficiencies that have to be corrected. Please correct the
13 deficiencies and resubmit the DEIS.

14 Q. And the DEIS, when it's conducting it's review, is it
15 retrospective, prospective; what time is it considering in its
16 evaluation of the suitability of the proposed action?

17 A. I'm sorry. I don't understand those questions.

18 Q. Sure.

19 A. You use bigger words that I'm used to.

20 Q. Does it look backwards; does it look forward; does it
21 look as of the date of the report? What time period does it --

22 A. It certainly -- I don't know if there's any relevancy
23 in looking backward. It certainly does look forward. And one
24 of the elements that has to be included in a DEIS is the
25 potential cumulative impacts with other projects that may be

1 coming down the pike and other existing projects that may be
2 under constructions. Those all have to be included in a section
3 called "Cumulative Impacts." So certainly they look ahead.

4 Now in addition to that, project does not -- these
5 things go very slowly and so what has to be done is that the
6 lead agency and the applicant have to agree on a reasonable
7 timeline or they have to determine that if this is going to be a
8 successful project what is the most likely time that it will be
9 constructed. And obviously, that's some time in the future. So
10 that becomes the date -- the anticipated or expected date of
11 completion. So the impact analysis has to occur as of the time
12 of completion rather than now.

13 Q. Okay. And why is that?

14 A. I'm not sure how to answer that. It's the only
15 logical way to proceed. The impacts are going to occur -- begin
16 to occur while the project is under construction and continue to
17 occur after it's built. So the analysis of those impacts has to
18 be coincident with the time that they're going to occur.

19 Q. All right. After the submission of the DEIS and
20 potential resubmission, what's the next step?

21 A. Well, after the resubmission it goes back to the
22 previous step where it goes through a review by the lead agency
23 to see if the previously identified deficiencies have been
24 adequately corrected. If they have -- let me back up. If they
25 have not, then it goes back again for another round of revisions

1 and I've seen that happen on many occasions. If they are
2 successfully corrected, then the lead agency or co-lead agencies
3 will issue a notice of completion of draft environmental impact
4 statement and they will schedule it for -- they will make it
5 available to the public. They put it in libraries. They put it
6 on their website, et cetera. And they will schedule a public
7 hearing to hear comments on the DEIS.

8 Q. In the case of Gyrodyne's property, who gets to give
9 these comments?

10 A. Anybody who wants. You're not required to demonstrate
11 any standing to provide comments at a DEIS hearing. Anybody who
12 is affected or thinks he may be affected is welcomed to come.
13 It doesn't have to be from the community in which the lead
14 agency is operating. The comments will come from adjacent
15 communities. They will also come from other involved agencies
16 and they will come from interested agencies.

17 Q. On Long Island, like everywhere else, there are layers
18 of government. Where is head of the village, head of the harbor
19 in relation to Gyrodyne's property?

20 A. It's in the general vicinity. I don't know that it's
21 actually adjacent, but it's certainly close enough where they
22 would have a very serious interest in this project and they
23 would undoubtedly be asked to be part of this review and to
24 submit comments, very similar to what I'm doing right now, for
25 instance, on the Lighthouse Project in Hempstead representing an

1 adjacent village that does not have any -- it's not an involved
2 agency. It has no power to approve or deny the project, but
3 it's an interested agency because it has a great deal to
4 potentially stand or gain or loss from the project.

5 Q. And the properties of the County of Suffolk -- does
6 the County of Suffolk have an interest?

7 A. Absolutely, yes. It would go to the Suffolk County
8 Planning Commission for review as well.

9 Q. This is the environmental impact statement? All
10 right, what stage would it get to them?

11 A. Different municipalities do that differently in my
12 experience and I generally do not get directly involved in the
13 submissions to the planning commission, but in my experience
14 it's generally after the environmental review has been
15 concluded.

16 Q. And then what's the purpose of that submission?

17 A. To the planning commission?

18 Q. Yes.

19 A. Well, the planning commission consists of a bunch of
20 appointed planning experts as well as staff and they are charged
21 by law with making comments and reviewing projects in certain
22 locations, such as within 500 feet of a town line. And what
23 they do is they review them for compatibility with the county's
24 various land use plans and policies and Suffolk County health
25 code and things of that nature.

1 Q. And what, if any, effect does the commission's
2 approval or disapproval have?

3 A. Well, if the commission approves it -- well,
4 generally, they're going to have some comments of some type.
5 But if they approve it, then their involvement is concluded. If
6 they do not approve it, then there's a procedure for the lead
7 agency to overrule their disapproval with a certain super
8 majority or something to that affect.

9 Q. You keep referring to the size of this project,
10 Mr. Grover, how does size matter?

11 A. Well, the magnitude of environmental impacts are a
12 direct -- have a direct relationship to the size of a project.
13 And when I say "size," I would measure that both in terms of the
14 number of acres that are involved and the scale and magnitude of
15 the development proposed on those acres.

16 Q. Well, here we're talking about you were considering a
17 proposal for some 1500 residential units, correct?

18 A. Yes, that's correct.

19 Q. Is that big proposal?

20 A. By Long Island standards, it's enormous.

21 Q. Are you familiar with any other proposal of similar
22 magnitude on Long Island?

23 A. Well, the two that I'm currently reviewing, the
24 Heartlands in the old Pilgrim State property, which has been
25 going through this process for a good six or seven years now and

1 the Lighthouse Project in the Town of Hempstead, which is
2 considerably larger in magnitude and scale than Gyrodyne. And
3 that's going through a rather arduous review process also. It's
4 going to take -- it's been going on now for some years and in my
5 estimation it's going to continue to go on because there may be
6 potential litigants.

7 Q. After the completion of this review by the county and
8 the lead agencies and the public comment, what happens?

9 A. Well, there's a transcript -- there's a record of the
10 DEIS hearing and the lead agency then is charged with taking
11 that record, the totality of the comments made at the hearing,
12 along with any other written comments that were received during
13 the comment period and addressing all of those comments in the
14 form of a final environmental impact statement. So the final
15 environmental impact statement would consists of the draft
16 environmental impact statement with any necessary modifications
17 that resulted from the public hearing process as well as a
18 listing of all the comments made at the hearing, both verbally
19 and in writing and a response to every one of those comments.

20 Q. And once you have that, where are you in your process?

21 A. Well, you have to get that accepted too. That will
22 occasionally go through one or more iterations. And although,
23 again, there's really no provision in the SEQR regulations for
24 the applicant to prepare the final environment impact statement,
25 in practice, all of the lead agencies will require that the

1 applicant essentially do that. They will give the applicant all
2 of the written comments as well as the transcript from the
3 hearing and say catalog all these comments and provide responses
4 to them. Then the FEIS, once the lead agency is satisfied that
5 that's been done adequately, then the FEIS is issued by the lead
6 agency as a complete FEIS.

7 Q. As part of your evaluation of Gyrodyne's prospects,
8 did you consider what would be relevant to its progress through
9 the SEQR review?

10 A. Yes. And I should have added also that once the FEIS
11 is issued and complete the process isn't over. The lead agency
12 then has to prepare what's known as a Statement of Findings and
13 that becomes really a key because the Statement of Findings
14 allows the lead agency to issue what they're going to issue,
15 whether it be an approval or a denial and it allows them to
16 include whatever conditions to any potential approval that they
17 want. They're not obligated, for instance, to approve the
18 proposed project. They could issue, in their Statement of
19 Findings, an approval of one of the alternatives, such as a
20 reduced magnitude alternative.

21 And all through this process with these various
22 iterations of DEISs, it is very common for the applicant -- it
23 happens more often than not that the applicant will, in response
24 to the reception he's getting, will start whittling down the
25 project. And by the time it gets to the Statement of Findings

1 phase, it generally will not look like it did in the beginning.
2 It will have some -- there will be some concessions made and
3 some units that will be slashed and the project will be smaller
4 to an undetermined degree and then that will take place. I
5 forgot what your original question was because I got
6 sidetracked.

7 Q. That's all right. This Statement of Findings or the
8 final consideration of the environmental impact review that is
9 going on is a decisional stage by the municipalities and the
10 co-lead agencies?

11 A. The Statement of Findings is a decision document.

12 Q. And it has a direct impact on what is being -- the
13 proposed action that will be reviewed and approved ultimately?

14 A. That's correct. The proposed action that's -- or the
15 proposed project that is ultimately approved has to be
16 consistent with the Statement of Findings.

17 Q. And here we have two. Who would be making the
18 proposed findings in the case of Gyrodyne?

19 A. Well, the lead agency writes and issues the findings.

20 Q. And here would that be done independently or in
21 coordination? How would it be done with a co-lead agency?

22 A. They would sit in a room together and write the
23 findings and obviously, go back and forth between the two lead
24 agencies, which would, obviously, add some additional time
25 because they're going to have to ultimately come with a finding

1 statement that both townships are in agreement with.

2 Q. And again, would this be a matter of compromise or a
3 matter of adding the requirements of both towns together in
4 relation to the proposal?

5 A. Well, both. It could take whatever form the lead
6 agency deems as appropriate for the development of the property.
7 So there would be compromises built in, I would guess. And then
8 there would be the finding statement would have to reflect all
9 the concerns of both of the co-lead agencies, both towns.

10 Q. Now what particular environmental issues or impact
11 issues would be germane to Gyrodyne's property?

12 A. Well, the easy answer is the top three are traffic,
13 traffic, and traffic. But there are others that would be
14 germane as well. As I said earlier, there are some very nice
15 undeveloped property there consisting of pineal woodlands and
16 native grasslands that many people would like to see preserved
17 in some fashion or some percentage of them preserved. So there
18 are ecological issues that would need to be considered and
19 overcome.

20 There are groundwater issues that would need to be
21 overcome and in fact, Suffolk County Water Authorities in the
22 process of trying to establish a very large well field there
23 because of --

24 MR. CLASEN: Objection, Your Honor.

25 THE COURT: Mr. Clasen?

1 MR. CLASEN: What's happening right now is
2 irrelevant, Your Honor. What's happening now is
3 irrelevant.

4 THE COURT: Sustained.

5 Q. What groundwater issues are -- based on your review of
6 the matter, what groundwater issues would have to be addressed
7 in the environmental review?

8 A. The lead agency would require a full groundwater
9 analysis and that would consist of a number of items. Possibly,
10 the most important would be how much nitrogen is going to be
11 generated by the project. Nitrogen is a function of -- nitrogen
12 loading is a function of a number of things, most importantly of
13 which is the density, the residential density of a project of
14 this nature. In the case of, for instance, the Landmark
15 Project, there would be a secondary consideration and --

16 MR. CLASEN: Objection, Your Honor.

17 THE COURT: Mr. Clasen?

18 MR. CLASEN: There's nothing in his report about
19 the Landmark Project. He's limited to testifying about his
20 report and what's in his report. In his report, I don't
21 believe there's any evaluation of the Landmark Project.

22 MR. RYAN: If I may, your Honor? I believe the
23 witness clearly was just using it as a "for instance"
24 illustration of the issues he has reported on.

25 THE COURT: Then I'll take it in based on those

1 circumstances as a "for instance."

2 MR. CLASEN: Your Honor, with all due respect, I
3 don't know if the "for instance" is an exception to the
4 relevancy of expert testimony, which is limited to what's
5 in his report.

6 THE COURT: I understand, Mr. Clasen. So I will
7 take it in as relevant under the "for instance." Mr. Ryan,
8 continue.

9 Q. What groundwater concerns would be applicable and what
10 would that review entail?

11 A. As I indicated, the nitrogen loading from the
12 residential wastewater treatment systems would be a major
13 consideration, depending on the form that a PDD takes, if it
14 were a mixed use, for example, it could include elements such
15 as, for instance, a golf course. If that were to be the case,
16 then the nitrogen loading from the golf course itself would have
17 to be considered in the impact analysis.

18 THE COURT: Mr. Clasen?

19 MR. CLASEN: Your Honor, that hypothetical
20 situation --

21 THE COURT: Yeah, I think we've gone beyond that
22 now.

23 MR. CLASEN: Okay.

24 THE COURT: So sustained. And you can move on
25 Mr. Ryan.

1 Q. Other than nitrogen -- how does nitrogen loading bear
2 on the ultimate approvals and why is that important to the
3 Gyrodyne's property?

4 MR. CLASEN: Your Honor?

5 A. It's important for two reasons.

6 MR. CLASEN: Your Honor?

7 MR. RYAN: Withdrawn.

8 THE COURT: Yeah, thank you.

9 MR. CLASEN: Okay.

10 THE COURT: Thank you, Mr. Ryan for withdrawing.

11 Now you may go on.

12 Q. Why is the groundwater review necessary in the case of
13 Gyrodyne's property?

14 A. Any time a largely undeveloped piece of property is to
15 be developed, groundwater, especially on Long Island, becomes a
16 very important issue. Long Island has been designated by the
17 EPA as a sole-source drinking water area, meaning that all of
18 our drinking water comes from the groundwater. We have no other
19 source to get our water other than groundwater and maybe Poland
20 Spring, but our source of drinking water comes out of the
21 ground.

22 With that in mind, any time you take an undeveloped or
23 largely undeveloped piece of property it's going to have certain
24 groundwater impacts, depending on what you're going to do with
25 it. In the case of a residential -- am I going to fast?

1 THE MONITOR: Oh no. Go ahead.

2 A. In the case of a residential development, as I
3 indicated earlier, there are issues with the wastewater systems
4 for the houses. There are also issues with what we call "non-
5 point source pollution." That can take the form of anything
6 from pet waste from people walking their dogs to lawn chemicals
7 to drippings from the crankcases of automobiles to de-icing
8 salts that may be used on pavement surfaces within the proposed
9 project to household chemicals that are inadvertently poured
10 down drains. There are a whole host of groundwater degradation
11 possibilities with the development of property and the
12 groundwater analysis for a project of this nature would have to
13 evaluate all of those.

14 Q. Other than groundwater and traffic, traffic, traffic,
15 what else would be involved in -- or what other issues would be
16 essential to the review?

17 A. Well, I believe I already covered the ecological
18 considerations. In addition to that, there would be a great
19 concern -- and I've seen this to an increasing degree it seems
20 every year, a great, great concern over the impact of
21 introducing additional school children to the local school
22 districts. That's a real hot button issue and the reason for
23 that is that school districts are really, really struggling on
24 Long Island right now. The one I'm in, for instance, has very
25 little industrial development and we get hammered with taxes.

1 But the issue is if you add students to a school what's that
2 going to do? Is that going to require them to build facilities?
3 And if they do it generally means a very large tax hit to the
4 people of the community. So the people are very, very cognizant
5 of that and much more so in recent than ever in the past.

6 Q. Now you indicated that a development of 1500
7 residences is large for Long Island's standards. What, if any,
8 impacts would the development of residences have potentially on
9 schools?

10 MR. CLASEN: Objection, Your Honor. In his
11 report, right, he has said there is insufficient
12 information available to quantify potential school district
13 impact. Now if he's going to now do that, it's not in his
14 report, okay? He said he couldn't -- in his report, page
15 17, Your Honor, the paragraph right before "D" Open Space
16 Wildlife" he says, and I again quote, "There is
17 insufficient information available at this time to quantify
18 the potential school district analysis." So if he's going
19 to now --

20 MR. RYAN: Your Honor --

21 MR. CLASEN: The question right now he was asked
22 was to quantify.

23 MR. RYAN: No. That is not.

24 MR. CLASEN: Yeah, he said what do you have to
25 do? What schools are going to have to do? What are you

1 going to have to -- his report says he's not doing it.

2 THE COURT: Mr. Ryan?

3 MR. RYAN: Certainly, Your Honor. Your Honor,
4 the question can be responded to without giving a number as
5 Mr. Clasen fears. If it does, he can certainly object on
6 the basis that it's not in the report.

7 THE COURT: He is objecting on the basis that
8 it's not.

9 MR. RYAN: Excuse me?

10 THE COURT: He is objecting on the basis that
11 it's not.

12 MR. RYAN: But the question does not necessarily
13 call for a quantification. It can certainly indicate that
14 there will be an impact without quantifying it because of
15 insufficient data and I'm entitled to have this witness
16 testify to that.

17 MR. CLASEN: But Your --

18 THE COURT: That they'll be an impact?

19 MR. RYAN: That they'll be an impact.

20 MR. CLASEN: But he's already said hear he
21 doesn't have the information to quantify an impact.

22 THE COURT: Thank you, Mr. Clasen.

23 MR. CLASEN: And an impact of one or a million is
24 a --

25 THE COURT: That has probative value assigned to

1 it, but Mr. Ryan can ask the question as to whether or not
2 they'll be an impact. That's in his report. So Mr. Ryan,
3 you can certainly ask that question. As to the --

4 MR. CLASEN: The nature of the --

5 THE COURT: -- mitigation analysis procedure, if
6 we get into that then I will entertain your objection
7 again.

8 MR. CLASEN: But also, Your Honor, he can say --
9 if you're going to let him say there is an impact, that's
10 fine. Is it a large impact, small impact? He can't say
11 that. He said in his report he can't quantify --

12 THE COURT: We haven't gotten -- Mr. Clasen, we
13 haven't gotten there yet.

14 MR. CLASEN: Well, I'm kind of saying that you
15 want to make sure the --

16 THE COURT: I understand. That'll be your next
17 objection. Let him get to where you want to get to. Mr.
18 Ryan?

19 MR. RYAN: Thank you, Your Honor.

20 Q. What's the affect of putting 1500 residences -- does
21 putting 1500 residences impact schools and potential populations
22 of students?

23 A. It clearly does. There would be some --

24 MR. CLASEN: No. It's a yes or no. He said --

25 THE COURT: I think it clearly does, but if we're

1 going to get into more than that, then that goes beyond the
2 scope of the report.

3 MR. RYAN: Why does it?

4 THE COURT: Because the report very nicely says
5 that a mitigation procedure cannot be applied. It would be
6 a major issue that would have to be assessed in detail. If
7 that's what you want to get out, I'll read it into the
8 record that the report says it would be a major issue,
9 would have to be assessed in detail during the SEQOR
10 process. But how you're going to address that in the SEQOR
11 process we're not going to get into here, unless it was in
12 the report.

13 MR. RYAN: Your Honor, I'm not asking the witness
14 to address the mitigation. I'm asking the witness for what
15 is the obvious and it may be too obvious for the question.
16 But that putting 1500 or to question here.

17 THE COURT: He's answered that. There would be
18 an impact.

19 MR. RYAN: But I would like a record of it,
20 whether or not putting 1500 residences of any description
21 in this school district will have a serious affect on the
22 schools.

23 MR. CLASEN: That's the junx (phonetic), the
24 serious, Your Honor, in impact, okay. He could say an
25 impact, okay? But he said he can't quantify the impact.

1 Serious is quantification. Number one, Your Honor --

2 THE COURT: Let's go off the record. I'll see
3 counsel in chambers.

4 (Off the record.)

5 THE COURT: Mr. Ryan?

6 MR. RYAN: Thank you.

7 CONT'D DIRECT EXAMINATION

8 BY MR. RYAN:

9 Q. Mr. Grover, what would be the next step in moving
10 toward a residential development of the entire Gyrodyne
11 property?

12 MR. CLASEN: I'm sorry. I missed it. The next
13 step from what?

14 MR. RYAN: We were talking about the Statement of
15 Finding.

16 THE COURT: I'm sorry. We had a break. He's in
17 his list of considerations under an environmental impact
18 statement and the SEQOR process and he now -- you're going
19 to your next step; is that correct?

20 MR. RYAN: That's correct. Okay.

21 THE WITNESS: Ask the question -- answer the
22 question?

23 MR. RYAN: Yes.

24 A. Once the finding statement is completed and signed off
25 on by the co-lead agencies or lead agency, the environmental

1 review process is, for practical purposes, complete. That would
2 free up the town boards of both towns to go ahead and consider
3 the proposed zone change that would affect the property in both
4 Brookhaven and Smithtown.

5 Q. All right, and what considerations would be relevant
6 to that?

7 A. Well, that's why I say that for all practical purposes
8 the environmental review process is done. It's really not
9 because when the towns go to consider the zone change there are
10 certain tests that they have to apply and many of those tests
11 involve environmental impacts, for instance. And I outline some
12 of them, specific ones for each town in my report.

13 Q. What consideration would be given to traffic, if any?

14 A. Well, in the case of Smithtown there is a requirement
15 that a Planned Residential Development District accomplish the
16 goal of preventing overcrowding of land and avoid undue
17 concentrations of population and to lessen, and where possible,
18 to prevent traffic congestion on public streets and highways.

19 Q. What congestion would be at issue here?

20 A. Well, the issue here would be the traffic generated by
21 the proposed project on a local road infrastructure that is
22 incapable of handling it.

23 Q. What roads are we talking about, do you know?

24 A. Offhand, I don't recall the names of the roads.

25 Q. When there's an impact on -- an adverse impact on

1 traffic by a proposed or congestion by a proposed development,
2 what can be done?

3 A. When there's an impact from traffic?

4 Q. Yes.

5 A. Well, as I indicate in my report, there's an impact
6 hierarchy that should be looked at and is looked at by the lead
7 agency or in this case by -- which would be done, by the way,
8 during the SEQOR process. Now we're stepping back to the SEQOR
9 process. There's a hierarchy. The first thing that you look at
10 is -- if an impact from a project is identified, then the first
11 thing you look at is there any way of avoiding the impact. And
12 in this case, if the project is going to be 1500 units on 300
13 plus acres, I don't see any way that the project can be avoided.

14 Proceeding to the next step then, they would ask,
15 well, is there a way we can minimize the project -- no, I'm
16 sorry, minimize the impact. And the answer to that is yes.
17 There are ways that can minimize the impact. They can minimize
18 the impact by restricting the development to one of the
19 alternatives in the DEIS that produce less traffic, so the
20 traffic could be minimized to a great degree. The third thing
21 they would look at is can -- assuming there's still going to be
22 an impact, can it be mitigated? And the mitigation for traffic
23 impacts generally takes the form of road widenings or adding of
24 signals or changing in signalization timings, additional
25 signage. It could any of those -- any of those measures could

1 be employed to attempt to mitigate a traffic impact.

2 Q. And how can a private developer provide those public
3 improvements in the roadways?

4 A. Well, they can certainly -- they can offer to pay for
5 mitigation on public roadways. That's done quite often. The
6 problem that they would run into in this case is that the
7 mitigation that would be required --

8 THE COURT: Mr. Clasen?

9 MR. CLASEN: I don't know that the problem that
10 they're going to run into in this case is in this report.
11 He relies on the traffic report of Fitzpatrick, okay.

12 MR. RYAN: In your opinion, that may well be,
13 Your Honor, but he is --

14 THE COURT: I'm sorry?

15 MR. RYAN: That may well be that he's relying on
16 another expert's report that he has incorporated here; but
17 that is his -- if he's adopted it as his view, he can
18 testify to it.

19 THE COURT: Overruled. Go on.

20 A. So the mitigation in this case would have to take the
21 form, in my opinion, if road widenings, which would entail that
22 the taking of private property. And obviously, a private entity
23 does not have the ability to condemn private property in the
24 vicinity of its project, so that option would be foreclosed on
25 and then you would have to assess the likelihood that the

1 municipalities would be willing to take adjoining properties in
2 order to facilitate the appropriate mitigation, which would,
3 again, take the form of road widenings.

4 Q. At this point the application is before the town
5 boards, right? The PDD zone in the Town of Brookhaven does it
6 -- what are its requirements by way of a plan to the -- or by
7 way of adoption of it?

8 A. Well, the key one in this case is that the town board,
9 in reviewing the possibility of PDD, has to access the
10 compatibility with the surrounding environment, including the
11 existing street network that would impacted by the project.

12 Q. And in the Town of Smithtown where you have a planned
13 residential community, what issues would be before it in passing
14 any zoning application?

15 A. Well, it would be the same ones I listed before. They
16 have to prevent the overcrowding of land and undue
17 concentrations of population and to lessen and where possible
18 prevent traffic congestion on public streets and highways.

19 Q. Did you assess for us, Mr. Grover, the likelihood of a
20 grant of zoning changes here?

21 A. I assessed it in qualitative terms. Yes.

22 Q. And what's your view?

23 A. Well, I believe that the outcome could take a couple
24 of different -- there could be a couple of different outcomes.
25 I think the most likely one is that in the course of going

1 through this review process the project would get progressively
2 and progressively smaller. And so that the ultimate project
3 that may be approved would be, yes, possibly a PDD but it would
4 be for significantly less density, significantly more
5 reservation of open space and those elements of the reduced
6 project would mitigate or minimize and mitigate the potential
7 environmental impacts to a degree that would make it approvable
8 by the town.

9 Q. Did you attempt to perform any type of financial
10 analysis, whether or not a build out at the density that you
11 believe likely would be feasible?

12 MR. CLASEN: That's a yes or no.

13 MR. RYAN: It's a yes or no.

14 A. No.

15 Q. Why not?

16 MR. CLASEN: Objection. Why he didn't do
17 something?

18 MR. RYAN: Right?

19 MR. CLASEN: Why he didn't put something in his
20 report; that's what he's being asked. Objection.

21 THE COURT: Overruled. I'll allow it. Let's see
22 where it goes.

23 A. That's not within my expertise.

24 Q. Okay. All of these procedures, before we get to the
25 consideration by either town of possible zone change would take

1 time, correct?

2 A. Yes.

3 Q. How much time are we talking about?

4 A. I estimated a minimum of seven years.

5 Q. And seven years from what to what?

6 A. Seven years from initial submission of an application
7 to receipt of building permits. And again, that's for a much
8 changed project from the initial application.

9 Q. And then the project would need to be constructed,
10 correct?

11 A. That's correct.

12 Q. And sold for the impacts to be realized?

13 A. Oh, and --

14 Q. Occupied?

15 MR. CLASEN: Objection, Your Honor. This is not
16 in his report at all, okay, number one --

17 THE COURT: Sustained.

18 MR. CLASEN: Okay.

19 MR. RYAN: Thank you. Nothing further.

20 THE COURT: Would you like some time or you want
21 to go ahead?

22 MR. CLASEN: No. We just had a break a few
23 minutes ago.

24 THE COURT: Oh, it's fine with me. I'm thinking
25 of you, not me.

1 MR. CLASEN: No, I appreciate that.

2 THE COURT: I'd be happy if you just move
3 forward.

4 MR. CLASEN: Okay. Thank you, Your Honor.

5 CROSS EXAMINATION

6 BY MR. CLASEN:

7 Q. Good afternoon, Mr. Grover.

8 A. Good afternoon.

9 Q. Before you started working on this matter, how
10 familiar were you with the Gyrodyne property?

11 A. I was familiar with it. Again, I've lived on Long
12 Island my whole life. I'm very, very familiar with Long Island
13 geography, particularly the open spaces of Long Island because I
14 do have an interest, as I said before, in natural resources and
15 ecology. So I was aware of the project and I have in the course
16 of the years previous to my getting involved in this I have read
17 a number of newspaper articles and actually spoken to a number
18 of people who lived in the community who were vitally concerned
19 about the ultimate disposition of the property.

20 Q. When did you get involved in this matter?

21 A. I'm sorry?

22 Q. When did you get involved in this matter and preparing
23 your report?

24 A. I don't recall.

25 Q. Approximately.

1 A. My report's dated January 2009 and I believe it would
2 have been sometime in late 2007, early 2008. That's a rough
3 estimate.

4 Q. When you first got involved?

5 A. Yes.

6 Q. Okay. Now if I understand your report, you say that
7 the -- you conclude that the likely result of this whole process
8 would be the approval of a plan with low density, light
9 industrial or mixed use that preserves open space and minimizes
10 traffic; is that right?

11 A. Yes.

12 Q. So you're thinking likely one of two scenarios is
13 going to happen here, right?

14 A. Or a combination.

15 Q. Or a combination of those scenarios. Have you seen
16 Mr. Gulizio's report?

17 A. I have.

18 Q. Okay. Did he value either one of those scenarios?

19 A. I don't recall.

20 Q. Okay. Now what you do do is -- let me step back a
21 little bit. I read your resume. On all the projects that you
22 have listed there, you list yourself as an environmental
23 scientist pretty much. Do you remember that?

24 A. Yes.

25 Q. Yeah, okay. And that's really what you are. You're

1 not -- basically, you're spending most of your time looking into
2 environmental issues, not planning issues, right?

3 A. No. I actually am an environmental planner. I use
4 those two terms interchangeably, environmental
5 planning/environmental science.

6 Q. Okay. If you look at your resume, right, which is
7 attached to your report -- stick with me, okay. In the opening
8 line under "Professional Profile," you describe yourself as an
9 environmental scientist and planner, right?

10 A. That's correct.

11 Q. So you distinguish those two things right there -- an
12 environmental scientist and then you say planner, right?

13 A. No. I would lump them together as one category.

14 Q. Well, you didn't lump them together there and
15 throughout the rest of your resume you never use the word
16 "planner" again, do you?

17 A. I don't know.

18 Q. Okay. You talked about the areas that you've given
19 expert testimony in, right -- if you take a look at the second
20 to last page of your resume under "Expert Testimony."

21 A. Yes.

22 Q. And you mentioned you'd been giving testimony on noise
23 impacts, air quality, wildlife, wetlands, water quality, and
24 ecology, right?

25 A. That's correct.

1 Q. Have you ever given testimony in Court on rezoning
2 before?

3 A. Yes, I have.

4 Q. Okay. You didn't mention that here, though, right?

5 A. No. This is not a complete resume by any means.

6 Q. Ah, okay. In fact, do you describe here any case that
7 you gave testimony in regarding rezoning?

8 A. I believe I did when I sat down here this morning. I
9 was discussing two major projects that I'm involved in right
10 now.

11 Q. Are they in your resume?

12 A. No.

13 Q. Okay. So in your resume you don't have any of the
14 rezoning cases?

15 A. No. That's not true.

16 Q. Okay. Well, take your time. I don't want to rush
17 you.

18 A. All right, I will. Thank you.

19 Q. Okay.

20 A. The very first project in my list, the Sobonic
21 (phonetic) Neck private golf course property that was a rezoning
22 from 1-acre residential to a PDD.

23 Q. And in that description that you wrote here, did you
24 mention anything about you providing any advise or consultation
25 regarding rezoning --

1 A. I'm sorry?

2 Q. I read your little description of this thing here.

3 A. Yes. Yes.

4 Q. Do you mention in here that you're dealing with
5 rezoning?

6 A. Yes -- oh, do I mention it in here?

7 Q. Yeah.

8 A. I don't know.

9 Q. You don't know?

10 A. But it did. That was a rezoning.

11 Q. No. No. I'm just saying, looking in here, did you
12 describe that as you were giving rezoning advice?

13 A. I did not describe it in my resume, but that's what it
14 was.

15 Q. Okay. You described a whole lot things. You were
16 giving advice here, but you didn't describe the rezoning in that
17 case.

18 A. In many cases I did not give the full scope of my
19 services on these projects --

20 Q. In fact, they're all --

21 A. In fact, the second one right under that involves
22 rezonings as well.

23 Q. And again, there's no mention in your resume of
24 rezoning and there's no mention in your resume, except for the
25 opening one of planner, right?

1 A. I can correct that, but that's not necessarily a
2 representation of what I do.

3 Q. When you gave this resume, you knew it was going to be
4 attached to a report on a probability of rezoning, right?

5 A. That's correct.

6 Q. Okay. But you didn't feel it necessary to add
7 anything about zoning on it?

8 A. I didn't make any alterations to the resume. No.

9 Q. Okay. Now you spent a lot of time talking about SEQR
10 today, right?

11 A. Yes.

12 Q. Okay. Now if this property was going to be developed
13 industrially along the lines proposed in Mr. Gulizio's report,
14 would a SEQR process have to happen?

15 A. Yes.

16 Q. And did you see how he was proposing developing this
17 property?

18 A. Yes. It's been some time since I reviewed it, but
19 yes.

20 Q. You want to take a look at it to refresh you
21 recollection?

22 A. Sure.

23 MR. CLASEN: May I, Your Honor.

24 THE COURT: No.

25 (Handing document to the witness.)

1 Q. Now do you remember -- and take as much time as you
2 need to look at it -- what Mr. Golub has in mind in here is
3 subdividing the property up into essentially an industrial park,
4 right?

5 A. That's correct.

6 MR. RYAN: Objection, Your Honor. We're far
7 beyond what I asked this witness on direct. I'm not asking
8 -- I didn't ask him anything about Mr. Gulizio's appraisal.

9 MR. CLASEN: Your Honor, he's talking about the
10 probability of rezoning, okay. One of his -- in his
11 report, Mr. Grover's report, right, he mentions that one of
12 the things that they take into account when they're doing
13 SEQR, okay, the analysis as well as when you're doing
14 zoning analysis is the alternatives. I think you heard him
15 use the word "alternative" several times before. The
16 alternatives that were out there that are facing the
17 planning board, okay. I am going to deal with some of the
18 alternatives because I think when they're making the
19 consideration to rezone I believe the witness has already
20 testified and his report says they take into account
21 alternatives.

22 THE COURT: Well, I'll let you continue,
23 Mr. Clasen for a little while, but your main thrust on this
24 should be with...

25 MR. CLASEN: It is. It is.

1 THE COURT: Yeah. Okay, but just for a little
2 while, but if goes on longer than that Mr. Ryan will be
3 back on his feet.

4 MR. CLASEN: Okay.

5 MR. RYAN: Yes, I will, Your Honor. Thank you.

6 Q. Mr. Grover, you see what he has in mind here is
7 dividing into 5- to 10-acre lots for an industrial park and then
8 selling out about 250 of them for division?

9 A. I'm looking at a fairly large tone here. Could you
10 refer me to a particular page or section?

11 MR. CLASEN: Your Honor, give me one second,
12 please?

13 THE COURT: You may.

14 Q. Okay, take a look at page 71, if you could?

15 MR. RYAN: I'm sorry. That was 71?

16 THE COURT: Seventy-one is from?

17 MR. CLASEN: Gulizio's report -- Mr. Gulizio's
18 report.

19 Q. And you see under the area "Acre Unsold" it starts off
20 with 256.5 and it projects that over ten years that all of it
21 will be sold.

22 A. I see the line "Acres Unsold." I didn't hear the rest
23 of your question.

24 Q. Okay, it starts out at 256 acres and that it projects
25 those acres will be sold over a ten-year period; you see that?

1 A. Yes.

2 Q. Does that refresh your recollection because you say
3 you did read this report --

4 A. Yes.

5 Q. -- as to what Mr. Golub had in mind doing?

6 A. I reviewed this report, but it had very little bearing
7 on what I was doing.

8 Q. Okay.

9 A. So I don't have a great deal of detailed knowledge
10 about what's in here.

11 Q. Okay. The SEQR process that you mentioned, right, if
12 there was an industrial build out that would have taken about
13 the same time, if not more, than you're projecting for the
14 residential; isn't that correct?

15 A. No. It depends on the nature of the light industrial
16 build out. But I did say in my report that depending on the
17 nature of the light industrial build out that could have its own
18 set of environmental problems and hurdles to cross. Yes.

19 Q. The SEQR process itself all those hoops have to be
20 jumped through, whether you're doing the industrial or the
21 residential, right?

22 A. Correct.

23 Q. Okay. And you were here when Mr. King put on his
24 traffic study; isn't that correct?

25 A. No.

1 Q. You weren't here? Okay. Using Mr. Gulizio's
2 proposal, are you able to project how long that would take for
3 that part of the SEQR process?

4 A. I have not made that evaluation. In fact, I'd have to
5 really give that some serious thought as to the steps that
6 they'd go through because if it's an "as of right" development
7 the process is a little bit different. There's no rezoning.

8 Q. No. No. I thought when you walked us through you
9 said that SEQR took about five years and then the rezoning was
10 an additional two years?

11 A. May I refer to my report?

12 Q. Sure.

13 A. That sounds like reasonable estimate.

14 Q. Okay.

15 A. But it's wrong.

16 Q. Okay.

17 A. Let me find my list of steps.

18 Q. You've got the timeline on page 12.

19 A. I know. I have to go back to see my list of steps.
20 Step 4, 5, and 6 are the SEQR review process and I have that at
21 3.5 years.

22 Q. Okay. And Step 1 what is that for? Step 1, 2, 3, 9,
23 all right, what are they?

24 A. Step 1 is the building application in both towns.

25 Q. Right, which you're going to have to do if you're

1 doing the industrial build out, right?

2 A. Yes.

3 Q. Okay. In fact, other than Step 7, right, the steps
4 are going to be the same pretty much here for industrial versus
5 residential?

6 A. The steps but not the timelines.

7 Q. Okay. Well, obviously, the Step 7 timeline wouldn't
8 apply to the "as of" right, right, 'cause there's no rezoning?

9 A. Well, that's true.

10 Q. Okay.

11 A. Several of these -- Step 2 will not apply to the "as
12 of" right.

13 Q. Okay. So what would be the SEQR timetable for doing
14 an industrial build out, according to Golub?

15 MR. RYAN: Objection.

16 Q. Are you better able to do it now after having looked?

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

18 MR. RYAN: Objection.

19 THE COURT: What's the objection?

20 MR. RYAN: It's certainly well beyond the scope
21 of his direct. He's adopting him as his own expert.

22 MR. CLASEN: Your Honor, he spent a lot of time
23 saying how long SEQR was going to take, and in his report
24 he says that means people are going to throw up their hands
25 and say they're going to do industrial, okay.

1 MR. RYAN: If I may, Your Honor, no --

2 MR. CLASEN: I'm crossing him on that because how
3 long the industrial process --

4 THE COURT: Overruled, Mr. Ryan. He can answer
5 if he knows.

6 Q. Do you know?

7 A. I have not made that evaluation. It would be
8 substantially shorter than the timeline for a residential
9 development with 1500 units being proposed.

10 Q. The 1500 units that were being proposed what were they
11 going to consist of, as you understood them?

12 A. There was a mix of townhouses and I guess what they
13 call quads. I don't recall specifically.

14 Q. Do you recall how many of each that you were assuming?

15 A. Do I recall? No, I don't.

16 Q. Okay. Is it anywhere in your report the breakdown of
17 how you were attributing the Gyrodyne proposed development?

18 A. In terms of the mix of residential uses? No.

19 Q. It would matter, wouldn't it, for various things?

20 A. I don't think it would have any significant impact on
21 my evaluation.

22 Q. If I read your report correctly, what you say is --
23 you identify a series of impacts that would have --

24 MR. RYAN: Excuse me.

25 THE COURT: Go ahead.

1 MR. RYAN: I need to jump around because I can't
2 hear you, Mr. Clasen. Sorry.

3 MR. CLASEN: That's all right.

4 Q. You describe this lengthy SEQOR process that you said
5 would have to be undertaken with respect to the Gyrodyne
6 proposal, right?

7 A. Correct.

8 Q. Okay, and that's how you're getting the 3.5 years?

9 A. Yes --

10 Q. Okay --

11 A. -- For the SEQOR portion.

12 Q. Of the Gyrodyne proposal?

13 A. The Gyrodyne proposal for 1500 units on --

14 Q. Right.

15 A. -- 308 acres.

16 Q. Okay. Now you already told us a few minutes ago that
17 you don't know how long it would take to do it for industrial,
18 but you think it would be less, right?

19 A. It depends on the nature of the industrial type build
20 out, but that's not something that I analyzed. That would take
21 some time and effort to do.

22 Q. The first impact I think you identified that would
23 have to be dealt with was traffic, right? That's on page 15.
24 You identified a series of impacts. The first one was traffic,
25 right?

1 A. Yes.

2 Q. In fact, I think you referred to it as "Traffic,
3 traffic, traffic," right?

4 A. Earlier I did say that. Yes.

5 Q. I take it you thought the traffic issue was one of the
6 most important issues here, right?

7 A. Oh, clearly.

8 Q. Okay. Now you made no independent analysis whatsoever
9 of the traffic impact, did you?

10 A. I am not qualified to do that.

11 Q. Okay. You relied solely on the Fitzpatrick report,
12 right?

13 A. That's correct.

14 Q. And you read the Fitzpatrick report?

15 A. Yes, I did.

16 Q. And do you remember reviewing an analysis of the
17 impact that the proposed Gyrodyne proposal would have on
18 traffic?

19 A. I'm sorry. Could you repeat that?

20 Q. Certainly. And I may have been -- I apologize.
21 Remember the Gyrodyne proposal is something that's defined -- I
22 think it's a proposal, but let me see what it's called. The
23 proposed project is something that's defined in your report as
24 being "Gyrodyne building 900- to 1800-unit residential
25 development, including single-family homes, townhouses and

1 condominiums." That's page 3 of your report. That's how you
2 identified the propose project, right?

3 A. Correct.

4 Q. Now in order to come up to the determinations and the
5 conclusions that you're taking in page 15, you're basing them on
6 the Fitzpatrick report, right?

7 A. Yes.

8 Q. Okay. Did the Fitzpatrick report evaluate the
9 proposed project as defined in page 3 of your report?

10 A. I believe so. I don't specifically recall whether it
11 was in the report or if that was something that happened in some
12 of our meetings, but it was certainly identified by their
13 traffic experts to me.

14 Q. Okay. Was it identified to you what intersections
15 were affected by the proposed project?

16 A. Yes. But I don't recall specifically what they were.

17 Q. Do you remember how many intersections were affected?

18 A. No.

19 Q. You mentioned level of -- deterioration of levels of
20 service in your report. How many intersections had
21 deterioration in level of service?

22 A. I don't know.

23 Q. Is it more than one?

24 A. I don't recall. I'm not the traffic expert.

25 Q. I want to assume, for purposes of your opinion, that a

1 traffic study was done of the proposed project and the traffic
2 study reveals that there is only intersection that is negatively
3 affected by it and that could be mitigated very easily. Would
4 that change your opinion as to the impact of traffic on the SEQR
5 process for the proposed project?

6 MR. RYAN: Objection, Your Honor. It misstates
7 the record. There was no traffic impact study done for the
8 date when this project would come online and actually have
9 an affect.

10 THE COURT: Well, you can put that into the
11 record, but he can still ask his hypothetical and he's
12 asked them. You've tried to clarify what it's about.
13 Thank you very much, Mr. Ryan. And we'll view it in the
14 record.

15 Q. I want you to assume that there's a traffic study
16 that's been done -- impact study that's been done which shows
17 that if as of November 2005 the project had been developed at
18 the 900 to 1500-unit residential and that as a result of that
19 there was only one intersection that was negatively impacted,
20 okay. Assuming you were given that report instead of
21 Mr. Fitzpatrick's report, would that have changed your analysis
22 as to the relative importance of the traffic issue with respect
23 to SEQR for the proposed project?

24 A. I don't know the answer to that because I would rely
25 on the traffic expert giving me that information to tell me

1 whether it was a significant impact. The other aspect of that
2 that in my experience seems to get sort of lost in the shuffle
3 is that impacts don't just occur at intersections. Highways
4 have a certain capacity and sometimes those highways or the
5 capacity of those highways is exceeded and that -- again, that
6 also deteriorates the level of service of the highway or
7 roadway.

8 Q. Okay. Let me ask you a few questions. First of all,
9 did Mr. Fitzpatrick make any review of deterioration in highways
10 as a result of what Gyrodyne was proposing to do?

11 A. In the discussion I had with his staff, yes.

12 Q. Okay. How about in the report did you see anything?

13 A. I can't specifically refer to a section in the report
14 on that.

15 Q. What highways did he say were negatively impacted?

16 A. I don't recall.

17 Q. Okay. Let me go back. My hypothetical again was
18 you've got a different traffic study you relied upon, right?
19 That traffic study says only one intersection is negatively
20 impacted and that could be mitigated. I take it you would agree
21 that that would make the traffic issue a much lesser impact --

22 A. I would agree.

23 Q. -- from SEQR. And it would shorten the time period up
24 considerably too, wouldn't it?

25 A. Shorten the?

1 Q. Time period -- you had this three and a half years for
2 SEQR that you said was taking so long mostly because of traffic,
3 traffic, traffic. If the traffic study showed a much less
4 impact, it would certainly shorten that three and a half years,
5 wouldn't it?

6 A. If the traffic -- the end result was that there's no
7 traffic impact, then I would suspect the SEQR process would go a
8 little bit more quickly.

9 Q. Now the second impact you mentioned today, and it is
10 the second one in your report, was schools; right?

11 A. Correct.

12 Q. Okay. But you mentioned in your report that you had
13 insufficient information available at this time to quantify the
14 potential school district impacts, right?

15 A. Yes.

16 Q. When you looked at the next one, which was open space
17 wildlife, right, in that one you do mention a couple of things.
18 You do mention these native grasslands; remember that?

19 A. Sure.

20 Q. Now you've been to the property before?

21 A. I have.

22 Q. Okay. Well, native grasslands, you're talking about
23 the fairgrounds, for example?

24 A. Yes.

25 Q. That's a lawn they mow, right?

1 A. It is a periodically mowed. That is one of the ways
2 that you maintain a native grassland. If you don't periodically
3 mow it or burn it, it will not remain a native grassland. So
4 the use of that property as a fairground is the use that has
5 enabled it to become and remain an ecologically value native
6 grassland.

7 Q. The two proposed uses are industrial or residential.
8 In either case, this native grassland is gone, right?

9 A. That depends on how they're laid out.

10 Q. The wildlife that you're mentioning about here you
11 didn't mention any animals here. Do you have any particular
12 animals in mind?

13 A. Not specifically.

14 Q. Okay. Were any of these endangered species?

15 A. I'm not aware of any endangered species issues with
16 this property.

17 Q. Okay. So we're not running out of the habitats for
18 any of these animals?

19 A. Oh, we absolutely are.

20 Q. Which ones? What animal are we talking about here?

21 A. There are no less than 200 species of migrating birds
22 that utilize this property every year and particularly the
23 grassland birds. The grasslands are the most critically
24 endangered ecosystem on Long Island and we're losing many, many
25 species of animals as these grasslands disappear. That is

1 certainly something that would have to be very seriously
2 considered and assessed and possibly mitigated during the SEQR
3 process.

4 Q. And if we do an industrial build out, we're going to
5 have a very similar negative impact to these wildlife that are
6 there, right?

7 A. It depends on how it's laid out -- not necessarily.
8 There are --

9 Q. Well, most of them --

10 A. There are opportunities to preserve open space on a
11 property of this nature and still accomplish a development
12 scenario.

13 Q. Apparently, you're familiar with zoning and planning.
14 If a property is already zoned for a particular use, right, the
15 ability of the town to limit the development is somewhat less
16 than if a rezoning is required, right?

17 A. It's somewhat less. But through the site plan
18 approval process, they can occasionally steer the developer to a
19 direction to that would preserve certain areas of space. I
20 think the key is that I didn't do an environmental analysis. I
21 didn't do an environmental impact statement. I pointed out
22 issues that would have to be examined in the course of the SEQR
23 process.

24 Q. Okay. If Mr. Gulizio's proposed development of the
25 property was to occur, right, it would have a very similar, if

1 not larger, impact on the grasslands and the wildlife because
2 256 acres are being divided up into an industrial park, right?

3 MR. RYAN: Objection.

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

5 MR. RYAN: Objection, Your Honor. Again,
6 commenting on Mr. Gulizio's proposal and it was not --

7 THE COURT: Overruled.

8 Q. I believe it was part of his testimony -- go ahead.

9 A. I would have to actually look at a proposed site plan
10 to make that evaluation and I have not seen one.

11 Q. The fourth issue you mentioned here, as having an
12 impact is groundwater, right?

13 A. That's correct.

14 Q. Okay. Now first of all, with respect to the
15 groundwater you had the same conclusion as you did with respect
16 to schools, that you had insufficient information to evaluate
17 the specific groundwater impacts, right?

18 A. As I said, I did not conduct an environmental impact
19 statement. I identified issues that needed -- that had the
20 potential to be serious and required a hard look.

21 Q. You are contemplating, though, on the proposed project
22 that a sewer system would be built, right?

23 A. I don't have those specifics. It depends --
24 certainly, yes, that would be the case for 1500 units.

25 Q. Right. When you were describing the proposed project

1 you said -- you put in here that you assumed the development
2 would include a construction of a sewage treatment plant, right?

3 A. Yes. The proposed project would have to have sewage
4 treatment plant, whether the ultimately approved project would
5 have one is another matter. But yes, it would --

6 Q. The one you're analyzing and the one you're talking
7 about the impacts is the proposed project, right?

8 A. Again, I'm only identifying issues that need to be
9 studied as part of the impact analysis, and one of those is the
10 alternatives.

11 Q. Okay. Well, you are studying. Your report starts off
12 by saying you're studying the impact on the proposed project.
13 Is that what we're dealing with here?

14 A. I'm studying potential areas of environmental impact.

15 Q. For the proposed project or other projects?

16 A. Yes, for the proposed project.

17 Q. Okay.

18 A. And part of that analysis includes alternatives.

19 Q. And by the way, you're familiar with rezoning and the
20 process of rezoning, right?

21 A. Yes.

22 Q. And when a town board is looking at rezoning, one of
23 the things they do look at is if they don't grant the change of
24 rezoning, what's the alternative, right?

25 A. Absolutely.

1 Q. Okay. And here the alternative is to build this
2 property out as industrial, right?

3 A. Yes.

4 Q. Okay. Now you've been on the property. You've
5 mentioned it. It's surrounded by residences, right?

6 A. That's correct.

7 Q. I mean, generally speaking, people don't like to live
8 next to industrial; isn't that right? As a general rule of
9 thumb, would you not agree with that?

10 A. I'm not an expert in that particular area of where
11 people want to live. That's not something I normally consider.

12 Q. Well, I believe if it wasn't in your report somebody's
13 report and Mr. Gulizio testified that the rezoning process is
14 political in part, right?

15 A. It certainly is. Yes.

16 Q. And one of the things politicians are concerned about
17 is how their constituents are going to react, right?

18 A. Yes.

19 Q. And usually the constituents who react the most are
20 the ones who "not in my backyard," right?

21 A. That's generally accurate.

22 Q. And the backyard to this particular property, though,
23 is people living in residential communities, right?

24 A. Yes.

25 Q. Right, with two to three per acre, right?

1 A. In some cases on the Smithtown side lower.

2 Q. Lower? Okay. Now in order to evaluate the likelihood
3 of rezoning one of the things you have to consider is how is the
4 politician going to react.

5 A. Yes.

6 Q. Right? So then you have to know how his constituency
7 is going to react to putting industrial in the middle of their
8 residences, right?

9 A. Yes.

10 Q. They're not going to be happy, are they?

11 A. Well, I wouldn't say that because it's going to depend
12 on the nature of the industrial, how it's laid out. For
13 example, the type of light industrial that is being constructed
14 right now by Stony Brook University on a portion of this
15 property is being fairly well received from what I understand by
16 the community because it's very, very light. It generates very,
17 very vehicle trips and is otherwise has very, very little
18 impact. If I were a neighbor and I had a choice between that
19 type of light industrial development going there or 1500 units,
20 I'd go for the light industrial research-type park development.
21 Absolutely. People are going to look and they're going to say
22 which one impacts me the most?

23 Q. How about the development of 256 acres of this for an
24 industrial park versus residences? Obviously, I'm using Mr.
25 Gulizio's proposal versus residences. How would you, faced with

1 that choice in the rezoning process, how would you expect the
2 town board to feel the constituency would --

3 MR. RYAN: Objection, Your Honor. That is not
4 the choice before the board. The choice is a range of
5 possibilities.

6 MR. CLASEN: Your Honor, no. That's not an
7 objection.

8 MR. RYAN: It misstates the --

9 THE COURT: He's asking his hypothetical and
10 we'll take the answer under consideration.

11 MR. RYAN: Your Honor, the question called for a
12 binary choice between one proposal and another, and no
13 one's testified to that.

14 THE COURT: Fair enough. He could have said 3000
15 units too and just gotten an opinion of what thought. He's
16 asking a question and putting numbers in.

17 MR. CLASEN: I'm asking a question based on -- I
18 picked a number that was coincidentally in Mr. Gulizio's
19 report.

20 THE COURT: Coincidentally, I'm sure, but go on.

21 MR. CLASEN: Right. Okay.

22 Q. Faced with those alternatives, wouldn't you anticipate
23 a fair amount of community opposition to the industrial
24 building?

25 A. Again, I would have to look at a study plan to make

1 that determination because I would have to see what kind of
2 buffers are incorporated and the nature of the light industrial.
3 There are a host of things that would be considered. And again,
4 if that light industrial resembled what's being constructed on
5 the Gyrodyne property currently by Stony Brook University, I
6 would not anticipate a great deal of community opposition if
7 it's that or 1500 units.

8 Q. Let's just finish the SEQR part of this thing, then I
9 do want to move to the rezoning. Okay, but on the SEQR you say
10 it's going to take thee and a half years. And you say it's
11 going to do that because of four impacts, right, traffic,
12 schools, the wildlife and the groundwater, right?

13 A. I would have to include alternatives analysis in that.
14 That's going to have a great bearing on the amount of time this
15 takes.

16 Q. The alternatives to those impacts that we talked
17 about?

18 A. No. The alternatives to the project.

19 Q. Okay. Well, first let's deal with the first four of
20 them. The first four of them, the traffic one that's from
21 Fitzpatrick. You just buy in whatever he says and assuming it's
22 all true, right?

23 A. I am relying on his analysis. I'm not sure I --

24 Q. You're not adding any analysis. You have no
25 independent knowledge yourself. Everything you say about

1 traffic is just you taking Fitzpatrick's report and saying,
2 okay, I agree, right?

3 A. No. I think I need to stress again I did not do an
4 environmental impact statement. I did not conduct an
5 environmental analysis. I identified issues that would be
6 important in the course of the SEQOR process that had to be
7 looked at in detail and some of the specifics that would have to
8 be included in that hard look within the SEQOR process. The
9 ultimate environmental impact would be a heck of a lot bigger
10 than my 15, 20-page report, by orders of magnitude.

11 Q. Now I'm a little confused. You just said you didn't
12 do an environmental analysis, right?

13 A. That's correct.

14 Q. Take a look at the first page of your report. What's
15 it captioned?

16 A. "Environmental Analysis and Permitting Review
17 Assessment." That means it's an assessment of the permitting
18 that would be required and an assessment of the environmental
19 analysis that would have to be conducted in order to get this
20 project built.

21 Q. Oh, okay. So you're not making an environmental
22 analysis or a permitting review. You're just making an
23 assessment of both of these?

24 A. That's correct.

25 Q. Okay. If we change some of these things like, for

1 example -- well, let me back up. How much of the three and a
2 half years are you attributing to the traffic as was in
3 Mr. Fitzpatrick's report?

4 A. I wouldn't even attempt to breakdown a SEQR timeline
5 on the basis of individual issues.

6 Q. Okay. So if I asked the same question for the
7 groundwater, the schools, and the wetlands issue -- not the
8 wetlands, the wildlife conservation issue, you'd say the same
9 thing?

10 A. Those analyses of those issues, if they applicant has
11 a good team of consultants they all take place simultaneously.

12 Q. Doesn't the rezoning process occur simultaneously
13 because much of the considerations that go into the rezoning are
14 dealt with in the SEQR process?

15 A. There are a number of ways that can be done. In most
16 of the municipalities that I've worked recently they zoning
17 board allows the planning board to undertake the lead agency
18 status and then the planning board then goes through the SEQR
19 process, issues their finding statement, refers it back to the
20 planning board, which is responsible as an involved agency for
21 issuing their own finding statement and then proceeding with the
22 zoning review.

23 Q. Right. And the zoning review involves a review of the
24 same things in many cases -- in most cases, which have just been
25 reviewed in the SEQR process.

1 A. In many cases that's true. Yes.

2 Q. Okay. And presumably, they're all being kept informed
3 as to what's happening because we have many of the same players,
4 right?

5 A. Presumably, yes.

6 Q. Okay. But it's still going to take everybody, once
7 this approval occurs, another two years for them to do
8 everything all over again?

9 A. Well, they're not doing everything all over again.
10 The zoning would be reasonably fast after all the finding
11 statements are done, assuming that it was successful. The
12 subsequent site plan review can go on for a long time because
13 they're going to get into some real nitty-gritty details. It's
14 going to be much, much higher level of detail than the master
15 plan document that was used to generate the original zone change
16 application.

17 Q. Let's talk about the zoning application to rezone the
18 property, okay. You were here for Mr. Gulizio; is that correct?

19 A. I was.

20 Q. Okay. And he mentioned, I believe it was five factors
21 that were analyzed -- that he analyzed and he said should be
22 taken into account in order to decide probability of rezoning;
23 do you remember that?

24 A. Yes.

25 Q. Okay. One was he said you had to compare -- the first

1 one was the existing zoning, okay, on the property and how it
2 could be used with what's being proposed. That's one thing the
3 people looked at; do you remember that?

4 A. Yes.

5 Q. And you agree that's a factor that has to be taken
6 into account?

7 A. Absolutely.

8 Q. Okay. The second factor he says you have to take a
9 look at the nature of the surrounding area -- what does the area
10 surrounding the property look like? Is it resident, industrial,
11 what is it; remember that?

12 A. Yes.

13 Q. And would you agree that that's an appropriate factor
14 that has to be taken --

15 A. Absolutely.

16 Q. Okay. He also talked about the third factor being
17 site constraints, right?

18 A. That's correct.

19 Q. Okay, that's access to the property for various
20 different uses, right?

21 A. Well, it's more than that --

22 Q. And other constraints like topography and things like
23 that?

24 A. And the groundwater and the ecological considerations.
25 Yes.

1 Q. Then he mentioned the comprehensive plan; do you
2 remember that?

3 A. Yes.

4 Q. Okay. And you agree that's something that has to be
5 taken into account, right?

6 A. It absolutely does. Yes.

7 Q. Okay. And then, finally, he said you have to take a
8 look at what the towns are actually doing with respect to
9 rezoning applications; do you remember that?

10 A. Yes.

11 Q. Okay. And you agree that these are the five steps you
12 have to take into account, right?

13 A. Well, those are five elements that go into the
14 consideration. There are others.

15 Q. Okay. Before we go to the others, let's go to the
16 application of these and we'll see where it takes us. First of
17 all, with respect to the existing zoning we're talking about
18 industrial versus L-1 industrial or LI industrial versus
19 residential, right? That's what's being faced, PDD for
20 residential purposes.

21 A. I didn't follow that. Could you repeat that?

22 Q. When the zoning -- when the town board is deciding
23 whether to rezone, right, they look at the existing zoning,
24 which is light industrial and they're comparing that to the
25 proposal, which is basically residential, right?

1 A. Yes.

2 Q. Okay. And they have to look at the implications that
3 would occur for either one of those, right?

4 A. That's correct.

5 Q. Okay. Now in this particular area, are you aware of
6 any major industrial parks? I'm talking about the area
7 surrounding this property or anywhere near this property.

8 A. Well, I'm aware of one that's under construction on
9 the Gyrodyne property.

10 Q. Well, you're talking about Stony Brook's development
11 of the portion they took?

12 A. Yes.

13 Q. Okay. That's an industrial park you'd call it?

14 A. I would. I would call that a light industrial use.

15 Q. Okay. Other than that, are you aware of any such
16 industrial parks that are anywhere near close proximity to the
17 Gyrodyne property?

18 A. No, I'm not.

19 Q. No you're not. And indeed, are you aware whether
20 there was any opposition to building the Stony Brook industrial
21 park that you're talking about?

22 A. I'm not aware of any, but I didn't hear of any.

23 Q. Didn't hear of any. Were you here earlier today?
24 Have you been here earlier today?

25 A. Yes.

1 Q. Did you hear Mr. Pitsiokos speak?

2 A. I did.

3 Q. Did you hear at the end of his testimony he mentioned
4 that when Stony proposed to take the property there were
5 hundreds of people -- thousands of people who attended the
6 meeting to complain about it; do you remember that?

7 A. I do.

8 Q. Okay. And that Stony Brook was taking the property
9 for developing the industrial park that they're starting to do
10 now, right?

11 A. That's correct.

12 Q. Okay. So if you're -- again, the politician's looking
13 at "as zoned" versus "potential rezoned," "requested rezoned,"
14 right, and you're trying to anticipate public opposition, you'd
15 anticipate that there'd be opposition here, right, based on even
16 what Stony's doing?

17 A. My recollection of the community's response to the
18 taking of the property and Stony's plans differs significantly
19 from that of Mr. Pitsiokos.

20 Q. Okay. Let's go to the second one, the nature of the
21 surrounding area. Would you agree that residential use is far
22 more consistent with the nature of the surrounding area than
23 would be light industrial use? Do you want me to repeat the
24 question?

25 A. (No response.)

1 Q. We're talking about the nature of the surrounding
2 area. Would it be more consistent to do residential versus
3 light industrial?

4 A. It would be more consistent to have residential to be
5 compatible with the surrounding development.

6 Q. Okay.

7 A. However, I have to clarify that and say that a further
8 test of the compatibility is not strictly residential versus
9 residential. It is density versus density. So having said
10 that, it may not be accurate to say that a residential
11 development with five units per acre is consistent with the
12 adjacent pattern of development in the neighborhood.

13 Q. Faced with a much lower industrial use; is that what
14 you're saying?

15 A. As I said earlier, I'd have to see the site plan and
16 how it's laid out. But it could be completely consistent if it
17 has appropriate safeguards and buffers and types of industrial
18 use built into the plan.

19 Q. Let's talk about the comprehensive plan. Now there is
20 not a comprehensive plan for Smithtown, right?

21 A. That's my understanding.

22 Q. Okay. So I take it you looked at that and said you
23 can't really look at the comprehensive plan and do anything with
24 Smithtown because it's fairly old, right?

25 A. Well, what I typically do is if a town does not have a

1 current comprehensive plan, then I take the position -- and I
2 don't know if this is a legal position, but it's one I've always
3 heard and taken is that the comprehensive plan is the existing
4 zoning.

5 Q. Okay. Now with respect to Brookhaven, we do have a
6 comprehensive plan; isn't that correct?

7 A. Yes.

8 Q. And you've read that comprehensive plan?

9 A. Read it --

10 Q. Yeah.

11 A. -- cover-to-cover? No.

12 Q. Well, did you look at in connection with giving your
13 opinion?

14 A. Yes.

15 Q. Okay. The plan does talk about reducing spot zoning
16 in Brookhaven; isn't that correct?

17 A. Yes.

18 Q. And you would agree that the Gyrodyne property is
19 clearly spot zoning, right?

20 A. I have a rather varied opinion on that. In my
21 opinion, PDDs are spot zoning. It was just a legal way of
22 getting around it. Having interjected that, yes, I would concur
23 that the industrial zoning of Gyrodyne is a form of spot zoning.

24 Q. Right, which the plan says is one of the things they
25 want to get rid of, right?

1 A. That's correct.

2 Q. Okay. And the plan also mentions getting -- rezoning
3 properties which were just nestled in the surrounding area that
4 wasn't anywhere near like the current zoning -- inappropriately
5 zoned industrial properties surrounded by residential that's one
6 of the things the plan says it's trying to get rid of, right?

7 A. Yes.

8 Q. Okay. And that's the Gyrodyne property, right?

9 A. Yes.

10 Q. Okay. Now you also mentioned in your report that the
11 discussion in the plan is generic and not specific to Gyrodyne;
12 do you remember that?

13 A. I'm sorry. Could you --

14 Q. Yeah. Sure. Page 7.

15 A. Of my report?

16 Q. Your report, yeah. You're talking about the
17 Brookhaven comprehensive plan at the top of the page. And what
18 you say is, "It is acknowledged that the Brookhaven
19 comprehensive plan discusses elimination of isolated industrial
20 zoned properties; however, this discussion is generic and not
21 specific to Gyrodyne." Do you remember that?

22 A. Yes.

23 Q. There is a specific reference and a map to rezoning
24 the Gyrodyne property, right?

25 A. Yes. I do stand corrected on that point.

1 Q. Okay. Did you notice that when you were doing your
2 report?

3 A. No. I did not.

4 Q. The fact that the comprehensive plan specifically
5 shows this property as being rezoned through a PDD that would
6 have had an impact on your report, right?

7 A. Not really, no, because again it all depends on the
8 form of the PDD. I did not conclude that no PDD could be
9 approved for this project. That was not my conclusion. My
10 conclusion was that if a PDD were pursued and approved it would
11 take a much different form with a much lower density than five
12 units per acre.

13 MR. CLASEN: Your Honor, could we have just a
14 couple of minutes only? Could we have a short break, Your
15 Honor?

16 THE COURT: Let's take ten minutes.

17 MR. CLASEN: Thank you, Your Honor.

18 (Off the record.)

19 THE COURT: Proceed, Mr. Clasen.

20 MR. CLASEN: Thank you, Your Honor.

21 CONT'D CROSS-EXAMINATION

22 BY MR. CLASEN:

23 Q. Now the next factor after the comprehensive plan that
24 Mr. Gulizio looked at was the actual rezoning that had occurred
25 in the two towns; do you remember that?

1 A. Yes.

2 Q. Now, when you did your report you had Mr. Gulizio's
3 report, right?

4 A. Yes, I did.

5 Q. And you reviewed that?

6 A. I did.

7 Q. And did you analyze each and every change of zoning
8 that occurred in the Town of Brookhaven and in the Town of
9 Smithtown from industrial to residential or from a different
10 type of residential to residential?

11 A. Did I analyze?

12 Q. First, did you analyze the 11 changes of zones that
13 Mr. Gulizio looked at?

14 A. I'm not sure what you mean by analyzed. I reviewed --
15 yes, I reviewed every one of those.

16 Q. Okay. How many rezonings have occurred in the Town of
17 Brookhaven from let's say 2003 to 2005, from industrial to
18 residential --

19 A. I don't know.

20 Q. Well, did you look to see if you saw any?

21 A. I got my examples from Mr. Gulizio's report and from
22 my meetings with the town planning staff in Brookhaven.

23 Q. Did you make any attempts to find any others or to
24 make sure you had them all?

25 A. No.

1 Q. It was important to know what the towns were doing,
2 right?

3 A. Well, as you said, I had Mr. Gulizio's report when I
4 prepared mine, so I relied on his listing of comparable -- what
5 he considered to be comparable projects.

6 Q. Okay. You made no independent review yourself. You
7 just relied upon Mr. Gulizio's?

8 A. In terms of similar projects that's correct.

9 Q. Okay. And that had no impact on your decision as to
10 whether the property could be rezoned for PDD; is that correct?

11 A. I have never stated that it could not be rezoned for
12 PDD.

13 Q. Okay. Let me phrase it a different way. Did that
14 have an impact on your opinion as to whether the property could
15 be developed as envisioned in your definition of proposed
16 projects?

17 A. I'm sorry. Could you repeat that?

18 Q. You looked at -- in the beginning you defined a
19 proposed project, which you contend is about 1500 units, right?

20 A. Correct.

21 Q. And in deciding whether or not there was going to be a
22 rezoning for that proposed project, did you take into account
23 the other rezonings that were identified by Mr. Gulizio?

24 A. I did.

25 Q. Okay. And did that make it likely that there would be

1 rezoning?

2 A. I would conclude that absolutely not.

3 Q. And the fact that it was in the Brookhaven
4 comprehensive plan as being rezoned as a PDD that also tells you
5 absolutely not, right?

6 A. As I said before, I have never said that this is not
7 appropriate for a PDD. We're talking -- our difference here is
8 in the density of the development and the PDD, not whether or
9 not a PDD would ever be approved for the property. I've not
10 said that it won't be approved.

11 Q. Well, did you look at what density it would definitely
12 be approved for under a PDD?

13 A. Definitely?

14 Q. Yeah. Pardon me. I withdraw the question. Did you
15 look into what density was reasonably likely to be approved for
16 rezoning under --

17 A. I have my opinions of that. Yes.

18 Q. Okay, which aren't in your report, though, right?

19 A. Correct.

20 Q. But there are certain levels that you would agree
21 there was a reasonable probability --

22 A. Yes.

23 Q. -- of rezoning, right?

24 A. Yes.

25 Q. I assume 1 is fine?

1 A. Yes.

2 Q. Two is fine?

3 A. I believe it would be between 1 and 2.

4 Q. Between 1 and 2 is what you're anticipating?

5 A. That's correct.

6 Q. Okay. Basically, one to half acre zoning is the best
7 that you think they would be approving when faced --

8 A. I think --

9 Q. -- when faced -- let me finish the question -- when
10 faced with having this property developed as industrial land or
11 an industrial park; is that what you're saying?

12 A. That's correct.

13 Q. And in your expert opinion, when you're looking at
14 these, that's exactly what the town boards do is they look at
15 the two alternatives. They know that they're not going to be
16 able to keep this land pristine and totally undeveloped. It's
17 going to be developed either as a right to certain density or as
18 a result, right?

19 A. Yes.

20 Q. This isn't a case where you get to say I want the
21 perfect world. It's maybe, if we look at it negatively, it's I
22 can either get hit in my knee or hit in my head. You always
23 pick the knee, right, using that example? Never thought of it
24 that way, have you?

25 A. No. No. You're completely confused me. I didn't

1 even know if there was a question in there.

2 Q. Sure. You mentioned before that people don't want --
3 nobody wants anything developed, if they can avoid it, right?

4 A. No. I didn't say that.

5 Q. Oh, okay. So the residents you think would be happy
6 with some development, right?

7 A. I think that they, on the whole -- obviously, there
8 are individuals who differ, but the general consensus is that,
9 yes, something is going to be built here and we want the
10 something to be built here that's going to have the least impact
11 on our homes and our neighborhoods.

12 Q. All right. Now let me ask one other thing. You also
13 assumed that a sewer system was going to be built here, right?

14 A. I assumed that a 1500-unit proposal would include --
15 it would have to include a sewage treatment plant. You said
16 sewer system.

17 Q. Oh, sewage treatment plant. Pardon me.

18 A. Sewage treatment plant.

19 Q. Why?

20 A. Because it exceeds the allowable flow of the Suffolk
21 County Health Department.

22 Q. Under what?

23 A. Under Suffolk County Health Code.

24 Q. Article 6?

25 A. That's correct.

1 Q. Okay.

2 MR. CLASEN: I don't have any further questions
3 at this time, Your Honor.

4 THE COURT: Redirect, Mr. Ryan?

5 REDIRECT EXAMINATION

6 BY MR. RYAN:

7 Q. Mr. Grover, when you were asked about the
8 considerations in Mr. Gulizio's report, and I hand you
9 Exhibit 1.

10 A. You want to take this one back?

11 Q. Sure.

12 (Handing document to Mr. Ryan.)

13 Q. Now Mr. Gulizio had five different considerations that
14 he indicated were relevant to the change of zone analysis -- his
15 change of zone analysis. That would be the surrounding
16 neighborhood, the existing zoning, the impacts of the change,
17 and the comprehensive plan and recent action by the town board,
18 correct?

19 A. Yes.

20 Q. You indicated there were other considerations.

21 A. Yes.

22 Q. What are they?

23 A. Well, they're actually listed in Mr. Gulizio's report,
24 starting at the bottom of page 7 and continuing to the bottom of
25 page 9 and they include things such as "To encourage

1 preservation and protection of the town's natural environmental
2 resources, including groundwater quality and quantity, the
3 diversity of plant and animal communities, and significant
4 habitats." Another one is "To encourage the preservation of
5 large, undisturbed contiguous areas of naturally vegetated open
6 space whenever possible adjacent to existing large public quasi-
7 public open space areas where adjacent locations are possible to
8 create natural open space linkages." There is a requirement or
9 a goal in the consideration of PDD to encourage the conservation
10 and enhancement of the visual quality and rural character of
11 undeveloped areas of the town by protecting visible open space,
12 et cetera.

13 Q. Rather than read them all, Mr. Grover, there's 22
14 itemized considerations, are there not?

15 A. That's correct.

16 Q. Not just the five that were mentioned, correct?

17 A. That's correct.

18 Q. And that's just for the PDD, right? The five that
19 were mentioned are those the only five that would be relevant to
20 the Town of Smithtown in its consideration of a zoning change?

21 A. No. Smithtown goes through a similar procedure. It's
22 not as well spelled out, but they have in their zoning code a
23 list of what I call tests against which they have to apply the
24 proposed project. One of which or two of which I cited in my
25 report and I believe I referred to earlier that two of their

1 goals or tests, again, tests against which a project has to be
2 measured are to prevent overcrowding of land and to avoid undue
3 concentrations of the population and to lessen, and where
4 possible, to prevent traffic congestion on public streets and
5 highways.

6 Q. In regard to Mr. Gulizio's concern for or reliance on
7 the terms of the Brookhaven comprehensive plan, as to Smithtown
8 you indicated there is no comprehensive plan or no written
9 document that organizes its plan.

10 A. Lacking that, I consider the zoning to be the
11 comprehensive plan.

12 Q. In effect, you take the current zoning and existing
13 zoning as a statement of the town's perception of what's
14 appropriate use for the land.

15 MR. CLASEN: Objection, Your Honor. The question
16 has been asked and that's leading.

17 THE COURT: I'm sorry.

18 MR. CLASEN: It's leading. It's leading,
19 L-E-A-D-I-N-G.

20 MR. RYAN: All right. I'll withdraw the
21 question.

22 MR. CLASEN: He just asked the question.

23 THE COURT: He withdraws it. He withdrew it.

24 MR. CLASEN: Okay. Sorry. I didn't mean to...

25 Q. How do you understand the existing zoning in terms of

1 the town's plan for the use of the land?

2 A. The existing zoning -- the way I usually phrase it is
3 the existing zoning represents the municipality's vision for
4 land use and development within their boundaries.

5 Q. Now in the Town of Brookhaven, it's PDD requirement
6 calls for a master plan, correct?

7 A. That's correct.

8 Q. Have you ever seen a master plan for a 1500-unit
9 residential development on this site?

10 A. No.

11 Q. Have you ever seen a master plan for the entire site?

12 A. Well, there was one that was discussed earlier today
13 that I have seen. Yes.

14 Q. Involving a golf course of the Landmark application?

15 MR. CLASEN: Objection, Your Honor. That's not
16 in this report.

17 THE COURT: Sustained.

18 MR. RYAN: Okay.

19 Q. Now the PDD development is that limited or what can be
20 put in under a PDD development?

21 A. Pretty much anything. It allows for -- as I said
22 earlier, I sort of consider it a legal type of spot zoning where
23 for a property or a group of properties the municipality and the
24 landowner or applicant would get together and craft a master
25 plan for that particular property, which becomes -- if approved,

1 becomes the zoning for that property or the PDD for that
2 property. And they're individually -- in my experience each PDD
3 has its own set of guidelines and requirements and standards
4 that have to be adhered to.

5 Q. In order for a PDD to be adopted, would the master
6 plan have to minimize any adverse affects?

7 A. That would part and parcel of going through the SEQOR
8 process, yes.

9 Q. And that would include traffic impacts and the effects
10 on housings or the effects on schools and all the others that
11 you related in your direct exam?

12 A. That's correct.

13 Q. You were asked questions about Mr. Fitzpatrick's
14 traffic analysis. In looking at the impacts of any change of
15 zone or any proposed project, what is being looked at or when is
16 being looked at?

17 A. I missed that. I'm sorry.

18 Q. When does the town look to, to give in its
19 consideration of whether or not a plan for a property is
20 appropriate?

21 MR. CLASEN: Objection, Your Honor. I don't
22 understand the relevance at this particular point at all.
23 We value the property as of November 2005.

24 THE COURT: Mr. Ryan, you going some place with
25 this?

1 MR. RYAN: Yes, Your Honor. That we have a --
2 the town evaluation is in the future and we have no
3 indication, other than Mr. Fitzpatrick's report, of what
4 that future impact could be.

5 THE COURT: Overruled, Mr. Clasen. You don't
6 have to move on.

7 A. So to answer your question, when you do an
8 environmental analysis, you need to have an agreement with the
9 lead agency as to when the project will be implemented. It's
10 known variously as the date of completion or estimated time of
11 completion. And that, of course, is always sometime into the
12 future because it requires a certain amount of time to build
13 these projects. So during the SEQOR process there would be a
14 selection of a date of completion and the impact analysis would
15 be projected as of that date.

16 Q. Okay. And did you understand Mr. Fitzpatrick's
17 analysis of traffic impacts here to relate to a time in the
18 future when this -- when the project being considered was
19 constructed?

20 MR. CLASEN: I know it's late, Your Honor, but
21 he's leading the witness.

22 THE COURT: I'm sorry.

23 MR. CLASEN: He's leading the witness.

24 MR. RYAN: All right.

25 MR. CLASEN: He's been doing so throughout this.

1 MR. RYAN: Withdrawn.

2 Q. How is it you understand --

3 THE COURT: That's sustained.

4 MR. RYAN: I withdrew it. Yes.

5 Q. How is it you understood Mr. Fitzpatrick's analysis of
6 the traffic impacts in regard to when those impacts would be
7 occurring?

8 A. As I recall, he did the appropriate thing and applied
9 growth factors to bring these impacts into the future. I don't
10 recall the specific dates that he used.

11 Q. Thank you.

12 MR. RYAN: Nothing further.

13 THE COURT: Re-cross?

14 MR. CLASEN: A little bit, Your Honor.

15 THE COURT: Bring your microphone.

16 MR. CLASEN: Thank you.

17 RE-CROSS-EXAMINATION

18 BY MR. CLASEN:

19 Q. If I understand you correctly on redirect, what you've
20 said is the magic date for looking at what you're going to
21 analysis is the date of completion for the project, right?

22 A. For a project of this nature, that would generally be
23 it. In some cases, on other projects, you would look at
24 estimated time of completion, plus estimated --

25 Q. I'm looking at this project.

1 A. -- time of completion plus 10, estimated time of
2 completion plus 20.

3 Q. I'm looking at this project. This project being the
4 project identified in the third page of your report. That's the
5 one you're analyzing, right?

6 A. Yes.

7 Q. Okay. And what you're saying now is you've got to
8 look at -- the magic date to look at the traffic impact is the
9 date of expected completion; is that correct?

10 A. Well, that's the date of looking at -- in general,
11 looking at the environmental impacts and when they would occur.

12 Q. And in this case, did Mr. Fitzpatrick use the date of
13 completion for this proposed project?

14 A. I don't recall specific dates. I believe he did apply
15 growth factors to account for the fact that there's a lag
16 between the time a project is proposed and completed.

17 Q. When you used this report to come up with your
18 determinations, right, you looked at the date that he used,
19 right?

20 A. I'm sure I read it, but I don't recall it.

21 Q. You must have looked at it and said that's the right
22 date. That's the expected completion date for the proposed
23 project, right?

24 A. No. Again, and I don't know why we keep going through
25 this, but I did not do an environmental analysis. I did not do

1 an environmental impact statement. I identified issues that
2 were going to have to be studied in detail. I did look at
3 Mr. Fitzpatrick's report to assist in my determination of
4 whether or not traffic and transportation was going to be a
5 significant issue that needed to be looked at on the project and
6 I concluded in the affirmative. I did not nor I would attempt
7 to do any kind independent traffic analysis.

8 Q. Well, did you look at his analysis and say he used the
9 right year?

10 A. I don't recall specifically the year.

11 Q. I didn't ask you if you recalled the year. You gave
12 an opinion in this case based on your reliance upon the
13 Fitzpatrick report and the Fitzpatrick report gives a date of
14 impact for the traffic, okay. And obviously, that's an
15 important date because if that's the wrong one you wouldn't have
16 been relying upon it, right?

17 A. I didn't rely upon any date. I did not assume a date
18 of completion.

19 Q. Okay.

20 A. Again, this -- and I did not do an independent
21 analysis.

22 Q. But if didn't --

23 A. And my point was the date of completion is going to be
24 established by the lead agency and it will be a date that is
25 later than the time when the applications are filed.

1 Q. Okay.

2 A. And what that specific date is is not relevant to my
3 analysis. I leave that up to the traffic experts.

4 Q. Well, wait. The traffic expert determines the date of
5 completion for the project; is that what you're telling us? You
6 told us a minute ago that he's supposed to use the date of
7 completion to make his traffic impact study, right?

8 A. During the course of an environmental impact
9 statement, yes. But there is no environmental impact statement.
10 My point was that the lead agency and the applicant would get
11 together and determine a time of completion and that the
12 ultimate environmental analysis and the environmental impact
13 statement for this project would project the impacts to that
14 date of completion. It doesn't have any bearing on anything I
15 did or Mr. Fitzpatrick did.

16 Q. Did the date that Mr. Fitzpatrick used for his study
17 have any bearing on your ultimate opinion?

18 A. No.

19 Q. So he could have used any date and you would have come
20 up with the same result?

21 A. I would have come up with the same opinion that this
22 is an issue that's going to have to be studied in great detail
23 during the SEQOR process with the completion of a very detailed
24 traffic report that would be reviewed and go through the entire
25 process. That was my only conclusion that this was something

1 that would have to be handled appropriately during the SEQ
2 process.

3 MR. CLASEN: No further questions, Your Honor.

4 THE COURT: Thank you. You're excused, sir.

5 THE WITNESS: Thank you, Your Honor.

6 (Witness excused.)

7 THE COURT: Mr. Ryan?

8 MR. RYAN: Nothing further.

9 THE COURT: No. No. I know you have nothing
10 further. Your next witness.

11 MR. RYAN: Yes, thank you. Mr. Fitzpatrick.

12 THE MONITOR: Please raise your right hand.

13 (The party complies.)

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

17 MR. FITZPATRICK: Yes, I do.

18 THE MONITOR: Please be seated. For the record,
19 in a loud, clear voice please say and spell your name and
20 also your business address.

21 MR. FITZPATRICK: William D. Fitzpatrick,
22 F-I-T-Z-P-A-T-R-I-C-K, 26 Julia Drive, Hyde Park, New York
23 12538.

24 THE MONITOR: Thank you.

25 THE COURT: Mr. Ryan?

1 MR. RYAN: Thank you, Your Honor.

2 W I L L I A M F I T Z P A T R I C K , was called for
3 examination as witness herein after first being
4 duly sworn and testified as follows:

5 DIRECT EXAMINATION

6 BY MR. RYAN:

7 Q. Mr. Fitzpatrick, will you tell us something of your
8 education background and training?

9 A. Yes, sir. I graduated from Union College,
10 Schenectady, New York with a bachelor's Civil Engineering. I
11 also have a Masters of Science degree from Union in
12 Administrative and Engineering Systems. I'm a professional
13 engineer in the states of New York, California, and Florida.
14 And I am a certified professional traffic operations engineer,
15 certified by Institute of Transportation Engineers.

16 When I graduated from college, I started my career
17 with the New York State Department of Transportation in what is
18 referred to a Region "A." It's the Hudson Valley. It's the
19 southern counties north of New York City, to include
20 Westchester, Rockland, Orange, Ulster, Putnam, Dutchess, and
21 Columbia Counties. I started in the Design Construction Group
22 as a junior engineer. Within a very short time I transferred
23 over to the Traffic, Engineering and Safety Group and I spent my
24 entire career in the Traffic, Engineering and Safety Group.

25 When I retired some 35 years later, in 2004, I was in

A SWIFT SCRIPT

(888) 866-5134 ♦ (800) 860-5722 fax

1 charge of that department. I was the director of Traffic and
2 General Safety for the Hudson Valley. We had broad
3 responsibilities that all related to traffic and safety. We had
4 seven different units and as I had mentioned before that my area
5 of -- my geographic area were those seven counties, involving
6 all the state highways and the local highways relative to
7 traffic control.

8 We had a unit that transformed or basically applied
9 the New York State Manual of the Uniformed Traffic Control
10 Devices to the infrastructure and that includes establishment of
11 all of the controls on the roadways from signals to stop signs
12 to speed limits, et cetera. We had another group that planned,
13 designed and operated the traffic signals and we had over 1500
14 signals in Region "A." That was the Traffic Operations Group.

15 We had the Design Review Unit, which reviewed for
16 traffic and safety issues all of the capital projects that would
17 be initiated by Region "A" in the Hudson Valley and that
18 typically over \$200 million worth of contracts a year. And our
19 responsibility there was to review them for traffic and safety.
20 We had the proper applications of standards and specifications.
21 We also had a Safety Capital Group that would initiate safety
22 projects. They could be simple projects that could be
23 accomplished by main forces or they could be projects that would
24 elevate to a capital program project. And the basis for that
25 was the analysis of accidents and so we were the custodian of

A SWIFT SCRIPT

1 the records that came from DMV and all the police agencies in
2 the state to build a database that we could review and make
3 decisions upon.

4 We also issued all of the highway work permits. There
5 were 2 to 3,000 a year. They would be access permits. They
6 would be vehicle permits, overweight vehicle permits or
7 oversized vehicle permits. And we also reviewed all of the
8 applications that came to the state for access to the state
9 highway system.

10 We also had the responsibility for Motor Carrier
11 Division enforcement and we worked with the state police and we
12 had crews of inspectors who would inspect trucks over 10,000
13 pounds and make decisions on whether to take them out of
14 service, et cetera. And we also had responsibility of two other
15 crews who would inspect all of the public transit buses,
16 including the school buses twice a year.

17 And finally, we had an Intelligent Transportation
18 System Group that was responsible for incorporating technology
19 into traffic control. You see a lot of it here in Long Island
20 with the variable message signs. We built a \$50 million
21 transportation management center in Hawthorne/Westchester, which
22 is shared with the state police and other local agencies,
23 transportation and police agencies to gather information and
24 disseminate it out to the public in a timely fashion.

25 After I retired from the State of New York, I went

A SWIFT SCRIPT

(888) 866-5134 ♦ (800) 860-5722 fax

1 with the Chasin (phonetic) Companies, which is a private
2 engineering consulting firm for three years. And the reason I
3 went there was that they wanted to start a transportation
4 division, so I said I would give them three years to start that
5 up and running and we did operations, construction inspection,
6 and some minor design work. And since January 2008, I've been
7 the principal of Fitzpatrick Engineering, LLC, and I concentrate
8 on traffic and safety issues, accident reconstruction, forensic
9 type engineering and that brings us up-to-date.

10 Q. In the course of your professional activities,
11 Mr. Fitzpatrick, have you had --

12 THE COURT: Mr. Ryan, could get your microphone,
13 please?

14 MR. RYAN: Oh, I'm sorry.

15 Q. In the course of your professional experience and
16 activities, Mr. Fitzpatrick, have you had any involvement in the
17 assessment and review of traffic impacts from developments or
18 changes in the highway systems?

19 A. Yes. As I mentioned before when I was with the
20 Department of Transportation, our responsibility was to make
21 assessment on studies submitted by consultants to the Department
22 who eventually wanted access to the state highway system. So I
23 or my staff have seen literally hundreds of traffic impact
24 studies. And since my retirement, I have conducted studies
25 myself. I have reviewed studies for municipalities, for

1 counties. So yes, I'm intimately familiar with traffic impact
2 studies.

3 Q. At the request of my office, Mr. Fitzpatrick, did you
4 undertake to evaluate the traffic impacts relating to a build
5 out of the Gyrodyne property?

6 A. Yes.

7 Q. And how did you go about that?

8 A. Well, my charge, as I understood it, was to evaluate
9 the infrastructure around the Gyrodyne property. And I
10 conducted extensive research, included staff in that research
11 since my staff includes people in Long Island who actually had
12 some -- who had the same responsibilities in Long Island that I
13 had with DOT in the Hudson Valley. And so I -- the first thing
14 I did was I met with staff and visited the sites and tried to
15 learn the history of not only the property, but the
16 intersections and the road system. That's the first step.

17 And the second step was to -- there had been an FGEIS
18 done by SUNY, which addressed many of those intersections, so I
19 certainly reviewed that document. I was aware of other studies
20 that have been done concerning the intersection level of service
21 and safety of the infrastructure around the Gyrodyne property.
22 So I brought myself up-to-date with that.

23 And I was also aware of a -- the only other proposal
24 that I had at that point in time was the proposal by Gyrodyne
25 for a number of single-family units and a golf community for the

1 entirety of the project or the entirety of the property. So I
2 made an assessment of what was available, what I'd seen in the
3 field, what my research had given me, and what had been
4 submitted by SUNY and then what was under consideration for some
5 period of time in any event by Gyrodyne. And I made an
6 assessment of the capacity, the operations, and in some cases
7 the safety of the intersections that potentially would be
8 impacted.

9 Q. And how did you go about identifying the particular
10 intersections that were at issue?

11 A. Well, initially, by reviewing the area and then
12 eventually by reviewing the reports that had been discussed
13 locally that my staff had been aware of, by looking at the SUNY
14 EIS, the FGEIS. And then, I also looked, as I mentioned, at the
15 proposal by Gyrodyne for the entire parcel. But it was after
16 some 40 years of experience and having seen and been part of
17 many, many development proposals it's second nature to go out
18 and take look at the area and you get a pretty good sense of
19 what the capacity and the activity and the operation issues will
20 arise by looking at the intersections and the roadways
21 themselves. You can't do one without the other.

22 Q. In your evaluation of Gyrodyne's proposal for
23 development of the entire property --

24 THE COURT: I'm sorry, Mr. Clasen?

25 MR. CLASEN: I was letting him go ahead and

1 finish the question, Your Honor. I just didn't want to
2 miss it and give the answer.

3 Q. How many residential units did you consider were to be
4 added to it?

5 MR. CLASEN: Your Honor, his report refers to two
6 different proposals. So could we figure out what proposal
7 he's talking about -- I think.

8 MR. RYAN: Your Honor, that's certainly a matter
9 that can be clarified with further questions. But if the
10 witness understands it... If he considered two different
11 proposals, he could say so.

12 THE COURT: Let's see if I can understand the
13 answer, Mr. Clasen.

14 MR. CLASEN: All right.

15 THE COURT: Then we'll go from there. You can
16 answer it, Mr. Fitzpatrick.

17 A. Well, I considered all of the information that was
18 available at that time prior to doing the report, which included
19 the SUNY proposal. It included a land use proposal by
20 Brookhaven. It included the proposal by Gyrodyne for the -- I
21 believe it was 336 luxury single-family homes and an 18-hole
22 golf course. But the intent of my report was much broader than
23 that. It was to evaluate the ability of the intersections
24 surrounding the property to handle any additional traffic. It
25 didn't matter what the proposal was going to be or if it changed

1 over time, which it has changed over time. In fact, as I got
2 more information, then I started to look at more reports and I
3 made in depth evaluations of those reports, including the 1500
4 residential and the full build out of the industrial.

5 Q. In your assessment of the existing pre-construction
6 conditions at the intersection, what was your assessment of the
7 intersection at Route 25A and Old Mill --

8 MR. CLASEN: Mill Pines.

9 A. Mills Pine.

10 MR. RYAN: Mills Pines Road. Thank you.

11 MR. CLASEN: Could we have a clarification of
12 existing -- what year. What year was --

13 MR. RYAN: Pre-construction.

14 MR. CLASEN: What date are we talking about? The
15 word "existing" I think it means 2009 when I hear the word
16 "existing." Is he saying existing as of the date of taking
17 or some other date?

18 THE COURT: I assume he means existing as of date
19 of taking, correct?

20 MR. RYAN: Correct.

21 THE COURT: Right, in November 2005.

22 MR. CLASEN: Okay.

23 A. Well, my assessment of that date was made when I was
24 brought into this case, which necessarily was 2007. But my
25 research showed me that nothing had changed at virtually any of

1 the intersections since 2005. And in fact, since 2004, when the
2 Gyrodyne study was looking at then existing, which was 2004. So
3 my evaluation dealt with the 2005 date as well as the other
4 dates that would be important, moving forward, moving into the
5 future.

6 Q. And was that -- how was that intersection functioning?

7 A. Well, from my observation of it, and from my research
8 of it, it was problematic. That intersection -- any
9 intersection along 25A was problematic. 25A itself was
10 problematic relative to capacity and safety. But the
11 intersection of Mill Pine Road had sight limitations, horizontal
12 curve. It had a drainage problem. There clearly was a problem
13 in traffic egressing from Mills Pond Road onto 25A. There were
14 a few gaps in the stream of traffic on 25A. 25A was carrying
15 somewhere around 23,000 cars a day. So it was problematic.
16 There was a problem, no doubt about it.

17 Q. And how did you consider the impact of any development
18 on the Gyrodyne property of 336 or 1500 residential units on the
19 operations of that?

20 A. Well, not only --

21 MR. CLASEN: Wait, wait, wait. Your Honor? Your
22 Honor?

23 THE COURT: Mr. Clasen?

24 MR. CLASEN: He didn't analyze the 1500 scenario,
25 okay. That's not in his report, the 1500 scenario. He

1 mentions it in the last page. That's not what he looked
2 at. He looked at the golf scenario.

3 MR. RYAN: If I may, Your Honor. The witness has
4 just indicated that his assessment of the intersections
5 were as to the effects of development regardless of the
6 particular number of units.

7 THE COURT: Mr. Clasen?

8 MR. CLASEN: That's not what he said.

9 THE COURT: Mr. Clasen, those are
10 cross-examination questions. If you've gone through his
11 report and you want -- if he wants to ask him and get an
12 answer, he can answer. If you're not satisfied with the
13 answer, you can cross-examine as criterion or criteria that
14 he utilized in making his report. He can then give an
15 answer. If you don't like it, you can ask more questions.
16 But Mr. Ryan can, in his direct, can solicit whatever
17 question he'd like. If you think it's not contained
18 correctly in the report or not stated right that's why we
19 have cross-examination.

20 MR. CLASEN: Your Honor, I thought it was a
21 totally appropriate objection if you ask a question on
22 direct it's calling for an answer on a scenario that you
23 didn't put in your report -- if it's not in this report, he
24 can't bring it in by direct testimony and leave me to
25 cross-examination. His report does not analyze the impact

1 of the 1500. So if he now tells us what the impact of the
2 1500 is he's testifying outside the parameters of his
3 report.

4 MR. RYAN: If I may, Your Honor. We have a
5 statement at page 33 of Mr. Fitzpatrick report, "That plan
6 calls for a density of -- referring to the 336 gold course
7 units -- "That plan calls for a density of 1.07 units per
8 acre. Therefore, with the development of three to six
9 units per acre, 1500 units, as proposed by Daniel J.
10 Gulizio, the traffic impacts would be far greater." All
11 I'm asking is if --

12 MR. CLASEN: But that's not -- that would no way
13 ever be interpreted as a traffic impact study. It's a
14 conclusion. He says, well, if you're going to do it three
15 times it's more.

16 THE COURT: Mr. Clasen, I'm going to overrule the
17 objection. You can make those points in your
18 cross-examination as to what analysis he did to come up
19 with the statement that's in his report, absolutely. But
20 Mr. Ryan right now has a question and I'm going to allow
21 him to ask it. Mr. Ryan.

22 MR. RYAN: You don't remember it either?

23 THE WITNESS: No.

24 THE COURT: You were asking for the conclusions
25 relative to --

1 MR. RYAN: Yes. As to the effects of development
2 of the Gyrodyne property at the intersection of Route 25A
3 and Mill Pond Road, regardless of 336 residential units or
4 50 units.

5 MR. CLASEN: Objection. The impact of what
6 regardless? He says it's 300 or 1500. Is this witness
7 going to tell us it's the same impact? It doesn't matter
8 how many units are there?

9 THE COURT: Well, he hasn't said that yet,
10 Mr. Clausen. So why don't we just get the answer out --

11 MR. CLASEN: fine.

12 THE COURT: -- and then you can either move to
13 strike it, not object, object or -- let me hear an answer
14 and we can go from there. Again, there's no jury,
15 Mr. Clasen, so I'm fully well able to throw it out, not
16 consider it, consider it as the case might be. But why
17 don't we just move on so we can get an answer.

18 MR. CLASEN: Okay.

19 A. The intersection was currently in failure so any
20 additional traffic at all would keep it in failure and make it
21 worse. So it wouldn't matter what the magnitude of the
22 development was, whether it was industrial, whether it was
23 residential it would not matter. It would have an impact. It
24 wouldn't be a good impact.

25 THE COURT: In other words, sir, if I can just

1 ask you a question, what you're basically saying is as far
2 as you're concerned the intersection of Mill Pond Road and
3 New York State Route 25A that intersection was already at,
4 excuse my terminology, the saturation point and that any
5 further expansion of any kind whatsoever would have
6 deleterious affect upon that intersection?

7 THE WITNESS: Yes, Your Honor.

8 MR. RYAN: Thank you.

9 THE COURT: Okay, now we're all satisfied. If
10 that's where are that's fine with me and now we can move
11 on.

12 Q. Did you give consideration to what, if any, ability
13 there would be for a private developer to mitigate that impact?

14 A. Well, I was aware of the fact that there'd been
15 another proposal which had planned on mitigation by signaling
16 the intersection and that certainly would provide a positive
17 assignment of right-of-away but it also would incur additional
18 queuing of vehicles on all approaches. So the mitigation also
19 included turn lanes, both on Mills Pond Road. There's a very
20 short turn lane there now, but I presume they wanted a longer
21 turn lane, which would necessary and a left-turn lane for
22 westbound on Route 25A.

23 And my concern with that is that it did meet some of
24 the warrants. There are a number of signal warrants that DOT
25 uses and it did meet one or two of those warrants. I think the

1 four-hour warrant and something else. And DOT did give
2 preliminary approval, saying, yes, it meets the warrants, but
3 that's only the first step. My concern and their concern,
4 eventually, would be the ability to create the turn lanes. What
5 impact it would have on the character of Route 25A. 25A is a
6 scenic and historic roadway and any expansion of pavement on a
7 scenic and historic roadway is very difficult to do, to get
8 approval for it. If it's based on safety, you have a better
9 chance. If it's based on capacity, you probably won't get
10 approval for it.

11 THE COURT: Mr. Clasen?

12 MR. CLASEN: I object. None of that's in his
13 report. I would move to strike it.

14 THE COURT: Sustained. I mean all that will be
15 stricken.

16 Q. Mr. Fitzpatrick, you gave consideration -- did
17 intersection of Route 25A and Stony Brook Road did it have or
18 did you review its operations?

19 A. Yes, I did.

20 Q. And what is it you concluded?

21 A. Well, that intersection has a very strange
22 configuration and it includes a couple of roads with curves on
23 Stony Brook and going down towards the intersection eastbound on
24 25A it has a vertical curve coming down. Research had indicated
25 there were real drainage problems there and that intersection

1 too was operating poorly, both from a safety and a capacity
2 standpoint.

3 THE COURT: When you say "configuration," did you
4 mean Ash (phonetic) Manor Road and 25A? You said it had
5 the same configuration as what?

6 THE WITNESS: I thought I said it had poor
7 configuration.

8 THE COURT: Oh, I thought I heard "the same."
9 Okay, poor configuration. Fair enough.

10 THE WITNESS: And I could elaborate on that. The
11 eastbound route 25A has the left-turn movements being made
12 into Stony Brook Road away from the center of the
13 intersection, so there actually are multiple points of
14 conflict. There's one for the left turn turning into Stony
15 Brook, which is to the east of the intersection. And then
16 you've got the egressing left from Stony Brook being made
17 at a point further west. It's a very unusual configuration
18 based on that. It undoubtedly has to do with the poor
19 sight lines as you approach the intersection from the west
20 on 25A.

21 Q. And it current functioning, how does it operate -- and
22 by "current," I mean pre-build on Gyrodyne.

23 MR. CLASEN: When is that?

24 MR. RYAN: As of 2005.

25 MR. CLASEN: 2005?

1 MR. RYAN: Yes.

2 THE COURT: Yes, that's what he said.

3 MR. CLASEN: Okay, because his report there's
4 only intersection in 2007, not 2000. That's what he's
5 talking about. He brings everything up to 2007. His
6 report -- the pages we're looking at right now on page 30
7 of his report he's talking about this intersection in 2007.

8 THE COURT: Mr. Ryan, it says, "The 2007 analysis
9 indicates."

10 MR. RYAN: Correct, Your Honor. The witness has
11 indicated that he reviewed the SUNY Report, which does a
12 "no build," a 2007 analysis, which is the "build analysis"
13 and projection forward.

14 MR. CLASEN: SUNY is 2004 and he brings it up to
15 2007. His question now is November 2005. We're talking
16 about a different date that's not in his report.

17 MR. RYAN: Your Honor, it's between the two.

18 THE COURT: That's the date between 2004 and
19 2007?

20 MR. RYAN: It's 2005.

21 THE COURT: Well, it's also 2006.

22 MR. RYAN: Correct. And I'm asking the witness
23 about 2005.

24 MR. CLASEN: Objection, Your Honor. That's not
25 what the report's about.

1 MR. RYAN: If I may, Your Honor. Again, the 2005
2 traffic conditions are not the ones that are issued --
3 necessarily at issue here. What are at issue is the
4 traffic conditions as such time, as the development is
5 likely to be occurring or concluded.

6 THE COURT: And that's the position the State has
7 taken.

8 MR. CLASEN: Okay. Fair enough.

9 MR. RYAN: Which certainly relates to earlier
10 conditions.

11 THE COURT: Go ahead, Mr. Ryan. You have a
12 question?

13 MR. RYAN: I had a question.

14 THE COURT: I think you better repeat it.

15 Q. As of the time before construction of the Gyrodyne
16 property, Mr. Fitzpatrick, how was the intersection of Stony
17 Brook Road and 25A functioning in its ability to handle the
18 traffic that was present?

19 MR. CLASEN: Objection, Your Honor. The question
20 is -- it says before construction. That's everything
21 including today because there's been no construction.

22 MR. RYAN: No, there has been construction since
23 the taking, Your Honor.

24 THE COURT: Construction by the State.

25 MR. RYAN: Correct.

1 THE COURT: On what they've appropriated.

2 MR. RYAN: Correct.

3 THE COURT: Yeah, but I suggest, Mr. Ryan, when
4 you ask questions, since there are so many different times
5 and so many different scenarios that you attach to it just
6 not the word "construction," but please try to use the
7 timeframe, that would make it clearer for the Court and
8 obviously also clearer for your adversary so that we have
9 an idea of just which scenario you're talking about,
10 specifically, when something as traffic is being discussed.
11 Thank you very much.

12 THE WITNESS: You want me to answer that
13 question?

14 MR. RYAN: Yes, please.

15 THE COURT: Well, wait a minute. I need a date
16 too of what we're talking about.

17 Q. In and around 2005.

18 A. Well, my report deals with 2004 and 2007. It was SUNY
19 data existing for them when they did the report was 2004. Their
20 build date was 2007, so we're talking about that whole timeframe
21 and the operation of that intersection was poor, at best.

22 THE COURT: So it went from 2004 or 2007 or both?

23 THE WITNESS: Both. Between 2004 and 2007 it was
24 poor. And in 2007, once you add the traffic from the SUNY
25 project, it got worse. And any other traffic added to it

1 would make it even worse.

2 Q. And your analysis, using data from those two dates
3 covers the periods in between those two dates, Mr. Fitzpatrick?

4 A. Well, yes. The intent when you do an assessment. And
5 this is an assessment. This is not a traffic impact study. I
6 adopted the information from the SUNY report and then from the
7 proposal for the 336 units of luxury single-family homes and the
8 golf course. But the intent of this was to evaluate the
9 intersections. Regardless of what was being proposed, is the
10 existing acceptable? If it's not, what's needed and will it get
11 worse with time and development.

12 THE COURT: An then, once again, if I can, are
13 you saying, sir, that your evaluation from the 2004 Stony
14 Brook report again is that this road had all that it could
15 take and obviously things hadn't changed by 2007, so
16 therefore in 2004, 2005, 2006, and 2007 your opinion is
17 that regardless of what have happened is that this road is
18 full; is that what you're saying in terms of any type of
19 traffic situation?

20 THE WITNESS: Yes, Your Honor. And not only full
21 from a capacity standpoint, but also from a safety aspect
22 and from a character aspect. In other words, certain
23 portions of that roadway had a dedicated bike lane on it,
24 not this northern portion, but I'm talking about the entire
25 operation of not only the intersections but the roadway.

1 THE COURT: So this would be regardless of
2 anything to be built or not to be built or proposes and any
3 kind of scenario whatsoever for the subject property?

4 THE WITNESS: Yes, Your Honor. The sensitivity
5 to development is very great here so that whatever
6 development was proposed it eventually implemented had to
7 be sensitive to these issues.

8 THE COURT: Thank you, Mr. Ryan.

9 MR. RYAN: Thank you.

10 Q. The impact of the construction of -- well, what could
11 be done regarding the impact from the construction of 1500
12 residences in relation to the operations of Mill Pond Road and
13 25A?

14 MR. CLASEN: Objection. It's not in his report.

15 THE COURT: Sustained. And that is not under any
16 consideration of this report, Mr. Ryan.

17 Q. Mr. Fitzpatrick, at page 5 of your report here, which
18 is Exhibit "G," you make a statement that "As a result of these
19 critical constraints relative to traffic engineering operational
20 issues, it appears that full build out of the entire 313 acres
21 previously owned by Gyrodyne Company of America, Inc. would
22 entail mitigation actions that would not be viable. As such,
23 redevelopment would simply be not probable." What mitigation
24 actions are you referring to?

25 A. Well, there were a number of intersections. We talked

1 about 25A and Mills Pond and Stony Brook, but there are other
2 intersections too that would have to receive mitigation. And
3 the issue will be ultimately is the mitigation, for instance, a
4 signal at Mills Pond with turn lanes is it possible? Is it
5 viable ultimately? And if it's not, can a portion of that
6 action be completed? In other words, could you signalize
7 without turn lanes and therefore not need additional pavement?
8 If there was a safety issue that you were trying to review and
9 mitigate, then that might work.

10 If it's purely a capacity problem, then that wouldn't
11 work because the queues would get longer and longer. Those are
12 the types of things that would have to be considered at Stony
13 Brook and 25A there's a significant drainage problem there and
14 so you would have to determine whether signalization along the
15 drainage improvements and possibly turn lanes -- extension of
16 turn lanes there would need additional right-of-way and there
17 are homes very close to the intersection.

18 The 347 intersections there are number of them that
19 were reviewed. They all in failure at certain times of the day
20 now and it would be necessary to mitigate, to some extent the
21 traffic that would be placed on there. And the assessment of
22 the type of mitigation would depend on the amount of traffic
23 placed on those intersections additionally to what's there now.
24 And a proper application of the ITS generation rates or the
25 manual itself and the capacity analysis, the proper inputs would

1 be key to a fair analysis or evaluation of those intersections,
2 which would then lead to development of potential mitigation.

3 Q. You were in Court when Mr. King testified?

4 A. Yes, I was.

5 Q. And you heard Mr. King testify as to the impacts on
6 the studied intersections relating to the construction of 1500
7 residences?

8 A. Yes, I did.

9 Q. Mr. King concluded that such construction would result
10 in an increase in volume during A.M. peak hours of 323
11 vehicles --

12 A. Well, that was with the --

13 Q. -- in the morning and 343 net in the evening.

14 A. Well, that was after he deducted the existing. It was
15 more like 460 something in the A.M. and 560 something in the
16 P.M. That's what he said would be generated by the parcel, by
17 the 1500. And I strongly, strongly disagree with that.

18 Q. Why?

19 A. Because in using --

20 MR. CLASEN: Not in his report.

21 MR. RYAN: If I may, Your Honor. These were
22 exchanged rebuttal reports. It could not be in his report.

23 THE COURT: It could what?

24 MR. RYAN: It could not be in his report.

25 THE COURT: Overruled. I'll allow the question.

1 A. The ITS generation manual is a -- it was called by
2 Mr. King as the bible and it is. But it has to be used with
3 discretion. And they say it throughout the manual that you just
4 cannot use numbers that don't make sense. And I suggest, go
5 into detail here, I suggest that 1500 units of residential
6 development is going to generate more than the numbers he
7 gave -- more than 450 in the A.M. and in the evening 560, or
8 whatever it was. That's less than one third of the units and
9 you have to take into consideration where you are. You're in
10 Long Island. There's no mass transit here. There is no --
11 these are not age-constrained units as presented. So therefore,
12 you have to look logically at this and this is what the manual
13 tells you to do. And it also provides you a very specific
14 procedure to determine whether you use the plots, the equations
15 or the weighted average rates. And it's very clear in the
16 manual and you go down a list of things and you answer yes or no
17 and it tells you which to use.

18 He, in my opinion, and in the opinion apparently of
19 the manual, he used the wrong ones.

20 MR. CLASEN: Objection, Your Honor. This is an
21 expert report that they could have put in as a rebuttal
22 because we had a time period after we put our rebuttal
23 reports to exchange additional reports. Neither side chose
24 to do, number one. Number two, you remember this chart
25 we're talking about the peak hour. We're not talking about

1 the whole day. The 320 are the additional for a peak hour,
2 okay, is what we're talking about here, not over the course
3 of 24 hours.

4 MR. RYAN: That is what I'm discussing here, Your
5 Honor.

6 MR. CLASEN: Okay. But more importantly, Your
7 Honor, this is an opportunity for him to essentially put in
8 a surrebuttal report, much like a lot of the exhibits that
9 we're getting that we never saw beforehand that we should
10 have gotten beforehand if we wanted to do it.

11 THE COURT: I understand what you're saying,
12 Mr. Clasen, but I'll let the witness's answer stay on the
13 record for the probative value to be assigned to it.

14 Q. Mr. Fitzpatrick, you indicate that the ITE trip
15 generation utilized by Mr. Kind was incorrect in what way?

16 A. The database of land use presents a data plot.
17 There's three different ways that you can --

18 MR. CLASEN: I assume I have a standing objection
19 to these, Your Honor, so I don't have to jump up every two
20 seconds?

21 THE COURT: We'll allow you to take an objection
22 to all of this.

23 MR. CLASEN: Okay.

24 THE COURT: I understand.

25 MR. CLASEN: Okay. Thank you, Your Honor.

1 THE COURT: You're welcome.

2 A. There are three methods to determine trip generation
3 for a specific land use and size. One is a data plat. One is
4 the regression formula, if there is one. And one is the
5 weighted average rate. And the manual goes into great detail
6 about being very careful how you use those various methods. And
7 it refers to two issues. One is relative to the weighed average
8 rate. You have to determine whether or not the -- let me get
9 the term right here -- the standard deviation is acceptable.
10 And relative to the regression formula, you have to determine
11 whether what they call the coefficient of determination, which
12 is an R-square, whether that prevails. So you have to make that
13 determination.

14 And if I do that for -- well, first of all, the first
15 thing that the manual tells you that look at the range of the
16 data. And here we're talking 1500 units. The data range of
17 the database doesn't go out to 1500 units. It doesn't even go
18 out pass 1300 units. And even pass a few hundred units, there
19 are only two surveys provided in the database. So right away,
20 the manual says use local data. Do not use this manual. It's
21 not going to be effective. It's not going to be accurate.

22 But even if you decide to do that it then goes on --
23 to use the manual anyway, it goes on to say in this particular
24 case you can sue the regression formula if your coefficient
25 determination is over .75. In this case it's .76 and it says

1 you can use the weighted average rate if the standard deviation
2 is less than 110 percent and here it's like 75 percent.

3 THE COURT: Where would I find all this in your
4 report?

5 MR. CLASEN: I'm sorry, Your Honor. I can I --

6 THE COURT: I'm just asking a question.

7 MR. CLASEN: I need to get -- can I get an
8 objection before we get an answer to anything else?

9 THE COURT: No. Let's let me try to get my --
10 where do I find this in your report?

11 THE WITNESS: Well, I didn't have the 1500 unit
12 when I did the report.

13 THE COURT: No, this whole analysis.

14 THE WITNESS: By looking at -- what I say in the
15 report is you have to look at the generation and you have
16 to look at the capacity.

17 THE COURT: No. The whole analysis you've just
18 given on how to do that; is that in your report?

19 THE WITNESS: It's precisely not in my -- no,
20 it's not detailed in my report.

21 THE COURT: Mr. Clasen?

22 MR. CLASEN: Move to strike it for the reason
23 it's not in the report, Your Honor. Number two, he's
24 testifying about a document that's not in evidence. He's
25 telling exactly what a document says.

1 MR. RYAN: If I may, Your Honor. Mr. Fitzpatrick
2 is addressing Mr. King's report and his testimony, which
3 again, the reports were exchanged in rebuttal.

4 THE COURT: Yeah, but you had an opportunity to
5 cross-examine Mr. King with respect to the basis of his
6 analysis and from whence it came and what was included and
7 not included and that would have been the proper place to
8 do so, not after the Claimant has closed its case and
9 you're not putting your own witness on in which you're
10 seeing to invalid a report brought out by Claimant for
11 which you had twice the ability to cross-examine and I
12 believe Mr. Fitzpatrick present in the courtroom if you
13 choose to cross-examine with respect to the basis by which
14 Mr. King developed the figures which he used, not only in
15 his presentation, but in the video presentation that
16 because part of the record and you didn't.

17 MR. RYAN: If I may, Your Honor. Mr. King was
18 identified as a rebuttal witness. He's testifying as part
19 of a case-in-chief. If he had testified in rebuttal, as
20 the reports were exchanged then perhaps these procedural
21 objections would make some sense, but it's all being mixed
22 in as part of cases-in-chief. And for me not to be able to
23 comment on Mr. King's testimony through the course --
24 through my expert who also files a rebuttal report, is, I
25 believe, unduly limiting.

1 THE COURT: Mr. Clasen?

2 MR. CLASEN: Your Honor, he clearly had it. We
3 exchanged initial reports and we exchanged rebuttal
4 reports. And if you remember everyone had a third
5 opportunity, if they wanted to, to submit reports in
6 response to any of the reports that were already submitted.
7 Neither party chose to do so, okay. I could have; he could
8 have. In which case we'd both be in a position to have
9 seen the report and know what the person's going to say
10 with respect to ours. That was over a year ago -- well,
11 not over a year ago, whatever it is -- ten months, seven
12 months ago.

13 THE COURT: Yes. I've sustained the objection.
14 Go on -- we're going to have to break in a couple minutes
15 anyway Mr. Ryan unless you'd like to take this opportunity
16 to break now until tomorrow morning.

17 MR. RYAN: I would, Your Honor.

18 THE COURT: Okay. Yes.

19 MR. RYAN: Thank you.

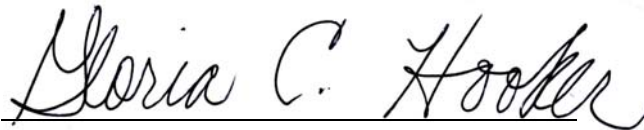
20 THE COURT: We'll break to tomorrow morning at
21 9:30. Let's go off the record for a moment before we do
22 that, please.

23 (Off the record.)

24 THE COURT: We stand adjourned until tomorrow
25 morning at 9:30.

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 17, 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-track electronic transcription equipment and is a true and accurate record of the proceedings.



Gloria C. Hooker

Date audio transcribed:

September 8, 2009