PRELIMINARY STATEMENT

Claimant-Respondent-Cross Appellant New York Central Lines, Inc. (referred to hereinafter as "CSX," in accord with the Brief of the State of New York) hereby cross-appeals from the Corrected Judgment of the lower court. In addition, CSX opposes the appeal of the Defendant-Appellant-Cross Respondent State of New York ("State").

In Support of CSX's Cross Appeal

In determining the amount of just compensation due to CSX, the lower court did not properly apply the Comparable Sales method of valuation. For railroad corridors, a Comparable Sales approach requires one to value the land and to value the corridor. The value of the corridor is measured by the "Corridor Factor." However, the lower court herein declined to apply a Corridor Factor, thus eliminating an essential component of value. In addition, with respect to four of the appropriated parcels the lower court declined to award any direct damages at all. There was no support in either the law or the facts for the lower court to do so. Accordingly, the lower court's decision was in error.

A property's value is made up of component parts. For most, the components

are the value of the building and the value of the land that the building sits on. For others, the property may have additional components, such as permanent easements or unused air rights.

In the case of railroad corridors, the value is made up of two components: the value of the land (a/k/a the "Across-the-Fence value" or "ATF value") and the value of the corridor itself, which is reflected by a "Corridor Factor."

The ATF value is self describing, as it assumes that the land within the corridor has the same value as the land adjacent to the corridor.

As for the Corridor Factor, a more detailed explanation is necessary. A corridor connects two points together and that connection and the ability to use the corridor to run a rail line, or a pipeline, or some other lineal use, is worth more than just the land itself. For example, assume that there are two identical rail corridors, one right next to the other, from New York to Boston. One corridor is a continuously used Amtrak passenger line and the other, a freight line that is used only once a year. Because they are side-by-side, the ATF value alone within each of these corridors is the same, let us assume $1 million. So how does one account for the fact that the heavily used Amtrak line is the more valuable? The answer lies with the Corridor Factor.

The Corridor Factor is the equivalent of a multiplier that reflects the importance and overall value of a particular corridor. It is arrived at by looking at comparable sales of railroad (and other) corridors. In the example above, comparable corridor sales may show that for heavily travelled Amtrak passenger lines, the Corridor Factor is 4, meaning that the overall value of the corridor is 4 x $1 million, or $4 million; while the Corridor Factor for an infrequently used freight line may be only 1.5, yielding an overall value of $1.5 million.

This method (land or "ATF" value x Corridor Factor) is called a Corridor Valuation. It is the railroad industry standard and the means by which buyers and sellers in that marketplace determine price. It is based on comparable land sales and comparable corridor sales and hence, a Comparable Sales approach.

In light of the above, it was error for the lower court to disregard the Corridor Factor and to value the Subject Properties using the ATF value alone. Not only did the lower court fail to apply a key component of value, but the end result was a faulty comparison between apples and oranges. The value of residential and industrial development property is not the same as the value of a railroad corridor. To make such a comparison ignores both the value added by connecting the end points of the corridor together but also the significant time, effort and cost that must be expended in order to

assemble the large tracts of land that are necessary to create the corridor. Yet, that is the comparison that the lower court made here. Accordingly, the lower court's decision should be reversed and the Subject Properties should be valued applying a Corridor Factor of 2.5.

In addition to the above, the lower court failed to award any direct damages for four parcels in which the State took title to permanent easements. This determination was unsupported and inadequately explained, as both parties agreed that CSX suffered direct damages as a result of this particular taking.

Accordingly, the lower court's decision should be reversed and CSX should also be awarded the value of its permanent easements over Parcels 130-F, 193-F, 194-J and 195-H.

In Opposition to the State's Appeal

The arguments within the State's appeal are entirely unsupported.

First, the State claims that the Comparable Sales Approach and Income Approach were unavailable and hence, the Cost Approach was the only permissible way to value the Subject Property. However, the evidence at trial showed otherwise.

Both parties had a multitude of comparable sales to choose from. CSX's appraiser had 14 comparable corridor sales, which represented but a fraction of the 100 corridor sales within his files. The State's appraiser had over 75 comparable corridor sales for his consideration. Accordingly, the "last resort" Cost Approach was not justified. Moreover, the fact that the State's appraiser ultimately chose not to use these 75 corridor sales (offering a bevy of contradictory excuses as to why not) does not eliminate the fact that there was an active market for railroad corridors.

The State also failed to mention that there was no evidence at trial on which to base the Cost Approach. While the State did attempt to calculate the cost of the improvements, the State admitted at trial that the vast majority of its cost calculations were incorrect. Nor did the State determine the Assemblage Factor, a multiplier similar to the Corridor Factor that takes into account the significant cost in creating a corridor, including planning, surveys, appraisals and purchasing and/or condemning the property.

Nor did the State address the fact that it relied on the Cost Approach at trial solely as a vehicle for the State's patently improper attempt to deduct alleged benefits from direct damages.

The State's second argument proposes that the lower court's decision should be modified to award CSX a mere 15% of the ATF value. This claim is based on the fact that the CSX railroad continues to operate, coupled with the State's allegation that certain legal restrictions on the Subject Property minimized the effect of its appropriation.

Besides the State's apparent abandonment of the Cost Approach in a mere matter of pages, the State fails to account for the fact that certain appropriated parcels now lie directly within the bed of the Brooklyn-Queens Expressway ("BQE") or are burdened with permanent retaining walls. Short of being able to erect a "CSX tollbooth" in the middle of the BQE, these appropriations have resulted in significantly more than a 15% loss in value to CSX. Nor does the fact that CSX did not suffer any consequential damages (*i.e.*, the railroad is still running) mean that the direct damages for the property taken must be reduced by 85%. Furthermore, there is no evidence that any of the alleged legal restrictions discussed by the State had any impact on direct damages.

In light of the above, the State's appeal must be denied in its entirety.

COUNTER-STATEMENT OF FACTS

While not necessarily inaccurate, the State's "Statement of Facts" fails to provide a complete account of the underlying action and supplies very few references to the Record. Accordingly, CSX presents the facts as follows.

The appropriation at issue arose from the State's Brooklyn-Queens Expressway ("BQE") Expansion Project. Starting with construction in the year 2000, the purpose of this Project was to widen and expand the BQE throughout parts of Queens County.

In order to facilitate construction, on January 6 and 10, 2000, the State appropriated certain property owned by CSX.[1] All told, the State took title to 236,836 square feet in fee, 43,856 square feet for permanent easements,[2] and 6,364 square feet for temporary construction easements.[3] ("Subject Property" or "Subject Parcels") As further discussed below, the property was a part of a freight railroad corridor in Queens.

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[1] Parcel 196 was appropriated on January 10, 2000. All other parcels were appropriated on January 6, 2000. Record on Appeal ("R") at 80-84, 159-163, 1267 *et seq.*

[2] R. 1390

[3] R. 1267, 1561, 2851

In order to more easily identify the property condemned, the State segmented it by "Map" and "Parcel Number" designations as follows:[4]

Parcel	Interest Acquired	Area Taken in square feet	Subject to Easement Restatement Agmt.
121	Fee	10,908.19	
122	Fee	2,110.90	
123	Fee	22,580	
124	Fee	24,133.34	
124-D	Fee	6,851.34	Yes
125	Fee	6,067.92	
125-E	Fee	2,713.48	Yes
126	Fee	35,565.59	
126-G	Fee	640.88	Yes
127	Fee	51,386.89	
127-I	Fee	1,380.04	Yes
128	Fee	26,916.22	
129	Fee	30,345.01	
130	Permanent Easement	5,529.50	
130-A	Permanent Easement	2,721.76	Yes
193	Permanent Easement	5,662.30	
193-F	Permanent Easement	2,176.69	Yes
194	Permanent Easement	11,658.66	
194-J	Permanent Easement	3,692.13	Yes
195	Permanent Easement	9,033.38	
195-H	Permanent Easement	3,381.59	Yes

[4] R. 1390, 1392, 1645-1654, 1830

Parcel	Interest Acquired	Area Taken in square feet	Subject to Easement Restatement Agmt.
197	Temporary Easement	181.69	
198	Temporary Easement	216.61	
199	Temporary Easement	1,346.80	
200	Temporary Easement	135.08	
205	Fee	6,157.25	
205-B	Fee	4,284.69	Yes
207	Fee	1,457.05	
207-C	Fee	3,337.24	Yes

The temporary easements were terminated on the following dates: Map 162, Parcel 197 and Map 163, Parcel 198, terminated on May 17, 2006; Map 164, Parcel 199 and Map 165, Parcel 200 terminated on May 18, 2006; Map 161R1, Parcel 196 terminated on January 6, 2010.[5]

The Subject Property is a part of a railroad corridor that is located between the Woodside and Jackson Heights areas of Queens between 30th Street and 37th Avenue.[6] This rail corridor, of which the Subject Property is a part, is known as the Fremont

[5] R. 445-446, 1390
[6] R. 162

Secondary Line.[7] It is but a small part of CSX's 22,000 mile national rail system.[8]

The Fremont Secondary is a freight line that runs from Oak Point Yard in the Bronx, crossing the East River over the Hell's Gate Bridge, to Fresh Pond Junction in Queens.[9] In total, it is approximately 8 miles long, 3.86 miles of which is owned by CSX with the balance belonging to Amtrak.[10]

The Fremont Secondary Line is the only direct freight rail link between Long Island, Brooklyn and Queens and the rest of the mainland.[11] The only other way to get a freight car back and forth is to float it on a barge from New Jersey to Brooklyn.[12]

Since CSX's acquisition of the Subject Property from Conrail in 1999,[13] freight traffic has almost doubled.[14] As of the dates of title vesting, the corridor was used by CSX, Canadian Pacific Railroad and Providence & Worcester Railroad. CSX operated five trains per week, each consisting of approximately 100 cars.[15] Canadian Pacific and Providence & Worchester each used the line approximately three times per week,

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[7] R. 163, 1423
[8] R. 1880
[9] R. 162-163, 1412
[10] R. 216-217
[11] R. 163, 216, 230, 1423-1424
[12] R. 1423-1424
[13] R. 1424

for a total of an additional 50 cars each way.[16] As of the dates of title vesting, it was anticipated that freight traffic along Fremont Secondary would further increase over time.[17]

The State's appropriation required CSX to relocate its rail line. Accordingly, new bridges, new rail line and new retaining walls were constructed. Had it not been for the BQE Project, these remedial measures would not have been necessary.[18] Therefore, the relocation and reconstruction was carried out and paid for by the State.[19] The State is also responsible for the maintenance of the new bridges and retaining walls.[20]

As it turned out, the property on which the bridges and rail line were relocated was owned by the State, either in fee or as a permanent easement in connection with the BQE Expressway. The State gained title to these properties pursuant to the instant appropriation. In order to keep CSX's railroad running, the State's appropriation also contained a reservation of rights to CSX:

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[14] R. 1428
[15] R. 217, 1425
[16] R. 218, 1425
[17] R. 230, 1424-1426
[18] R. 118, 121
[19] R. 148-149
[20] R. 122-123

> Reserving to the owner...the right, privilege and easement to construct, reconstruct, maintain and operate such railroad facilities as it may, from time to time, deem necessary...however, that no change in grade or alignment of the existing rail facilities shall be made, or additional facilities constructed, which will interfere with the highway, bridges or other facilities of the State of New York.[21]

Unfortunately, this language failed to provide CSX with the unencumbered right to relocate its rail line.[22] The new bridges, track and retaining walls were clearly a "change in grade or alignment of the existing facilities." Therefore, the State had the unilateral power to require the removal of any such improvements, then or in the future, which interfered with the "highway, bridges or other facilities of the State of New York." For example, what if the State decided to again expand the BQE, or to change the grade, in a way that interfered with CSX's rail line? CSX's rail line would be severed.

Accordingly, as part of the appropriation the parties entered into the "Easement Restatement Agreement" which clarified each party's respective rights, nun pro tunc, and gave CSX clear title to the relocated rail line.[23]

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[21] R. 1267, 1442 *et seq.*
[22] R. 166

QUESTIONS PRESENTED

CSX's Questions Presented

1) Did the lower court err when it failed to apply a "Corridor Factor?"

Answer: Yes. While the lower court properly found that the highest and best use of the property was as a corridor and that a Comparable Sales approach was required, it failed to correctly apply that method of valuation. In the marketplace, corridors are valued using the value of the land Across-the-Fence multiplied by a Corridor Factor. To disregard the Corridor Factor was to disregard an important component of value and an incorrect application of the Comparable Sales approach.

2) Did the lower court err when it declined to award any damages for the appropriation of certain permanent easements?

Answer: Yes. It was contrary to the law and facts for the lower court to decline to award direct damages for property appropriated by the State.

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[23] R. 166, 1645-1654

State's Question Presented

Whether just compensation to CSX for the taking of certain property in its rail corridor should equal the per-square foot value of adjoining private property, where the railroad's present use of the rail corridor is unaffected by the taking and any future use of the property is subject to legal restrictions that do not apply to the adjoining private property?

Answer: While CSX disputes the State's rationale, it does agree with the State's conclusion. The lower court erred when it equated the value of a railroad corridor with the value of adjoining residential and manufacturing property. The lower court misapplied the Comparable Sales method of valuation and should have applied a Corridor Factor, which is part of the Comparable Sales methodology used by buyers and sellers of railroad corridors in the marketplace.

ARGUMENT IN SUPPORT OF CSX'S CROSS-APPEAL

In determining the amount of just compensation, the lower court erred in failing to properly apply the Comparable Sales method of valuation and failing to award direct damages for four of the parcels that were appropriated by the State. Accordingly, the lower court's decision should be reversed.

I. The Condemned Property Should Be Valued Using a Corridor Factor of 2.5

When determining the value of real property, one must consider the individual components of that property. For example, when valuing a residential home, an appraiser would look at the value of the house and at the value of the land that it sits on. Each of these components contributes towards to overall value.

Assume that there are two neighboring homes, identical in every way, except that one home sits on ½ acre of land and the other enjoys 5 acres of land. The 5 acre property would be the more valuable. Conversely, assume that there are two neighboring homes, identical in every way, except that one home is 5,000 square feet and newly built and the other is 1,500 square feet and in poor condition. In this scenario, the new 5,000 square foot home would be the more valuable. Each component – the home and the land that it sits on – must be considered when determining the overall value.

In the instant matter, the lower court made two key findings that should have formed the foundation for the balance of its decision: (a) the highest and best use of the subject property was as a rail corridor[24] and; (b) the Comparable Sales methodology was the proper method for valuing rail corridors.[25]

However, once making these determinations, the lower court then erred in applying the proper methodology. It used one component of value, the ATF value (a/k/a land value), but disregarded the second component, the Corridor Factor. This was in error. Not only did the lower court disregard a key component of value, but it disregarded the marketplace, as the marketplace values corridors with the use of a Corridor Factor.

Using the residential example above, it was as if the lower court failed to consider the value of the house and held that the 5,000 square foot home was the same value as its 1,500 square foot neighbor.

[24] R. 8
[25] R. 10

(a) The Comparable Sales Approach Must Include a Corridor Factor

A "Corridor Valuation" is a Comparable Sales approach for railroads and other corridors.[26]

This methodology was explained at trial by CSX's expert appraiser, Charles W. Rex, MAI. Mr. Rex is an experienced, well regarded appraiser who specializes in the valuation of corridors. Mr. Rex has been a real estate appraiser for 35 years[27] and since 1995, has specialized in the valuation of corridors.[28] In that time, he has valued approximately 100 corridors,[29] primarily rail corridors, but also utility corridors and "rails-to-trails" corridors.[30] In gaining his expertise, Mr. Rex has studied the corridor market extensively and attempted to obtain and analyze every corridor sale across the country that he could find.[31] In fact, the State's appraiser noted at trial that many appraisers get their information regarding corridors from Mr. Rex.[32] Mr. Rex is even one of the authors of the definition of a "corridor" in the Dictionary of Real Estate Appraisal.[33] Throughout his career, Mr. Rex has been retained by a multitude of

[26] R. 240-241
[27] R. 150
[28] R. 152
[29] R. 153
[30] R. 152
[31] R. 155
[32] R. 1139
[33] R. 362

railroads including the CSX, Union Pacific Railroad, Norfolk Southern Railroad, Canadian Pacific Railroad, NYS&W Railroad, Central Oregon Railroad, Arizona Pacific Railroad and Florida East Coast Railroad.[34]

With this background, Mr. Rex affirmed that the "Corridor Valuation" method is the well established means by which to determine the value of a corridor.[35] Railroad corridors are sold around the country every year.[36] The Corridor Valuation methodology is the industry standard and what is used by buyers and sellers in order to determine price.[37]

Articles in evidence also attest to the validity of this methodology: *Valuation of Transportation/Communication Corridors* by John Dolman and Charles Seymour;[38] *Lessons Learned from Two Decades of Corridor Appraising*, by Charles Seymour and David Anderson;[39] and *The Continuing Evolution of Corridor Appraising: Back to Basics*, by Charles Seymour.[40]

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[34] R. 155-156
[35] R. 1428-1429
[36] R. 410
[37] R. 244, 247
[38] R. 1655, 1967
[39] R. 1669, 2005
[40] R. 1194, 2029-2038, 3409

In fact, at trial the State's appraiser relied on and cited to the above *Back to Basics* article[41] which specifically outlined the use of a Corridor Valuation, including a Corridor Factor:

> (1) the cost approach and income approach do not work; (2) only the sales comparison approach can be used; (3) the usual square or lineal yardsticks of direct comparison are extremely difficult or impossible to adjust, especially for time and location; (4) the across-the-fence x corridor factor methodology seems appropriate; (5) the time and location can best be measured by estimating the across-the-fence value from nearby land sales; (6) the corridor factor can best be established by a careful analysis of the best available land sales; (7) the resulting estimate of corridor value appears to be consistent with market actions.[42]

A Corridor Valuation is a three step process.[43]

The first two steps determine the value of the land alone within the corridor. The corridor is divided into segments based upon the adjacent land use[44] and for each segment, the "Across-the-Fence" value ("ATF") is determined based upon comparable sales.[45] As an example, if the property across-the-fence is residential land valued at $100 per square foot, then the ATF value, or land value, of that segment of the corridor

[41] R. 1194-1197
[42] R. 2038
[43] R. 153, 1428-1429
[44] R. 153, 242
[45] R. 153, 243, 1419

will be valued at $100 per square foot. The purpose of the ATF value is to measure location and market conditions (a/k/a the time adjustment) for the corridor.[46]

In the final step, a Corridor Factor is determined.[47] A corridor connects two points together and that connection and the ability to use the corridor to run a rail line, a pipeline, etc., is of greater worth than just the land itself.[48] Thus, the Corridor Factor is the equivalent of a multiplier that measures the importance of the corridor.[49]

Not all corridors are created equal. Using comparable corridor sales, one may learn, for example, that heavily travelled Amtrak lines have a Corridor Factor of 4, regional passenger lines have a Corridor Factor of 3, infrequently used freight lines have a Corridor Factor of 1.5 and that a corridor used for electrical lines alone has a Corridor Factor of 1.1

Thus, returning to example from the Preliminary Statement, if one assumes that there were two railroad corridors side-by-side, each having a land value of $1 million, an Amtrak line would have a value of $4 million (4 x $1 million) while the heavily used freight line would have a value of $3.5 million (3.5 x $1 million).

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[46] R. 153, 243, 463, 1419
[47] R. 153
[48] R. 1429

Although the above are simply illustrative examples, they show how the Corridor Factor is used in practice to value and differentiate between different types of corridors.

All of the property within the corridor is valued as the same, irrespective of whether it is the property directly underneath the railroad tracks or the property adjacent to the railroad tracks.[50] As an analogy, returning to the example of the residential home, the land underneath the house is the same price as the land in the backyard and the same price as the land underneath the driveway. For railroad corridors it is no different. At trial, the State was in agreement.[51]

In the instant matter, CSX's appraiser evaluated 14 comparable corridor sales.[52] These sales represented all of those for which Mr. Rex had verifiable information and which had transpired prior to the date of title vesting.[53] For each sale, he confirmed the information with the buyer and/or seller, including that the sale was an arms-length

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[49] R. 153-154, 230
[50] R. 507-511
[51] R. 948 (when asked whether the property's value was "dependent on whether or not the track is actually located on them? Or is it their presence within the corridor?" the State's appraiser responded, "It is their presence within the corridor. I had a railroad corridor, that is what we valued before and that is what we valued after. And, basically, there has been no change in the functional utility of that corridor in the before and after"); R. 1172-1173 (same); R. 2844-2845 (the State's appraiser valued the property within the corridor based on the adjacent land use and did not differentiate as to whether any particular parcel or portion thereof contained the tracks, ballast, etc.)
[52] R. 249, 1392
[53] R. 249-250

transaction.[54] Mr. Rex also confirmed what "in-kind consideration" may have been a part of the sale,[55] the ATF value that was used by the parties to that particular transaction,[56] and the Corridor Factor relied upon by the parties to the transaction.[57] Based on these 14 sales, Mr. Rex determined that the applicable Corridor Factor was 2.5 with respect to the Subject Property.[58]

Likewise, the State also agreed that a Comparable Sales approach that utilized "recent comparable corridor sales, adjusted for differences, would provide the best indication of value for a right-of-way."[59]

In light of the above, it was error for the lower court to disregard the Corridor Factor. The Corridor Valuation methodology, which includes a Corridor Factor, is a Sales Comparison approach.[60] It is the industry standard with which to value a corridor,[61] the methodology relied on by buyers and sellers in the marketplace[62] and is

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[54] R. 249, 258, 1213-1214, 1593 *et seq.*
[55] *Id.*
[56] R. 245, 1593 *et seq.*
[57] R. 1593 *et seq*
[58] R. 305, 1550
[59] R. 2815. As discussed in greater detail below, the State ultimately declined to rely on its 75 comparable corridor sales and offered a dizzying array of contradictory excuses as to why not. The lower court properly rejected the State's various explanations and determined that a Comparable Sales approach was required.
[60] R. 240-241
[61] R. 1428-1429
[62] R. 244, 247

supported by numerous treatises.[63] Having properly determined that the highest and best use of the Subject Property was as a rail corridor[64] and that the comparable sales methodology was the proper valuation technique,[65] it was error for the lower court to then disregard a key component of value within the Corridor Valuation methodology.

In light of the above, the lower court's decision should be reversed and the Subject Property should be valued using a Corridor Factor of 2.5, as supported by the evidence.[66]

It must also be noted that the lower court's determination that a Comparable Sales approach was required, together with the State's failure to submit a Comparable Sales valuation or determine a Corridor Factor, thereby required the lower court to accept CSX's appraisal.[67]

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[63] R. 1194, 1655, 1669, 3409
[64] R. 8
[65] R. 10
[66] R. 305, 1550
[67] *Gyrodyne v. State*, 89 AD3d 988, 989 (2d Dept 2011) ("Having rejected the State's appraisal, the trial court was bound to either accept the claimant's appraisal or explain the basis for any departure"), citing cases

(b) The Lower Court Compared Apples to Oranges

One of the rationales relied upon by the lower court in disregarding the Corridor Factor was its belief that the mere application of the ATF value was a proper Comparable Sales approach.[68] As explained above, the lower court's reliance upon the ATF value alone, without a Corridor Factor, was not a Comparable Sales approach. Simply put, the lower court was comparing apples to oranges. The State, albeit for different reasons, is in agreement.[69]

The Comparable Sales method is "based on the principal of substitution. This principal states that no one would pay more for a property than the value of a similar property in the market. This approach consists of gathering data on reasonably substitutable properties and adjusting their sale prices for various factors affecting value. The resultant indication of value is an estimate of a price one might expect to realize upon the sale of the property."[70]

In the instant matter, using the ATF value alone was not comparing railroad

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[68] R. 16

[69] Brief of the State, pp. 11-12 ("the Court of Claims determined the market value of the property taken within CSX's rail corridor essentially by applying the value of the property adjacent to the rail line (the ATF value) to the taken property. As set forth below, this method of determining the award was in error. It assigns to this limited use corridor the values of the surrounding densely populated and more broadly useful lands...")

[70] R. 2815

corridors to railroad corridors. Rather, the lower court was comparing the value of vacant residential and manufacturing land with a railroad corridor.[71] When valuing a railroad corridor, vacant residential and manufacturing land is not "similar property in the market." Nor if one were to sell a railroad corridor, does the mere value of residential and manufacturing land reflect "a price one might expect to realize upon the sale of the property."

As readily admitted and then inexplicably ignored by the lower court, the Dictionary of Real Estate, 4th Edition, an authoritative text,[72] considered the ATF value to be an intermediate value only:

> the Across-the Fence Value is "A land valuation method typically used to estimate the value of [a] real estate corridor...other considerations include corridor factor, usage factor, adjustments – see also corridor valuation...Before the consideration of any adjustment factors, the ATF value accounts for location and market conditions. Accordingly, this is an intermediate value without or prior to the consideration of the corridor factor."[73]

Accordingly, it was in error for the lower court to use the ATF value alone to value the Subject Property.

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[71] R. 16-17
[72] R. 1091-1092
[73] R. 15, 1092

(c) The Lower Court Confused Direct Damages and Consequential Damages

The lower court also declined to apply a Corridor Factor based on its determination that "the record is insufficient to demonstrate that the permanent takings impaired CSX's ability to run its freight operations or run them under any well-founded view of future operations."[74] However, this rationale confuses direct and consequential damages.

In condemnation, there are two types of damages. Direct damages are for the value of the property condemned.[75] "Consequential damages, also known as severance damages, reflect the fact that in addition to the loss of value of the property actually taken, the condemnee's remaining property may suffer a diminution in value as a result of the loss of the condemned parcels." [76]

Herein the direct damages are for the value of the property actually appropriated; in other words, for the value of the fee property, permanent easements and temporary easements taken by the State.

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[74] R. 10

[75] *Murphy v. State,* 14 AD3d 127, 132 (2d Dept 2004)

[76] *Murphy,* 14 AD3d at 132 (citing cases); *Matter of Town of Oyster Bay*, 174 A.D.2d 676, 677 (2d Dept 1991)

To the extent that the State's appropriation impacted or prevented CSX from being able to run its railroad on the balance of the property not taken, such would have been a consequential damage. Here, there were no such damages due to the fact that the State, at its own expense, undertook the construction of new bridges, tracks, etc., so that CSX could continue to operate its rail line.[77]

In the instant matter, the lower court essentially determined that due to the fact that there were no consequential damages (*i.e.*, the railroad continued to operate), it would change the methodology in which direct damages were calculated by excluding the Corridor Factor. This was in error.

Clearly, one has nothing to do with the other. One cannot change the manner of calculating direct damages based upon whether or not there are consequential damages. To put it another way, there was no support for the determination that if the railroad can no longer operate, the direct damages are calculated using the ATF value multiplied by a Corridor Factor, but if the railroad can still operate, the value is the ATF value alone.

The direct damages to CSX are based upon those property rights that were lost,

[77] R. 118, 121-122, 126, 148-149

not the fact that some property rights may remain.[78] Nor is there any support for the position taken by the lower court, either within case law or via expert appraiser testimony.

In light of the above, the lower court's decision should be reversed and the Subject Properties should be valued applying a Corridor Factor of 2.5.

II. The Lower Court Improperly Denied Just Compensation for Certain Permanent Easements

Among the property appropriated by the State were four permanent easements within Parcels 130-A, 193-F, 194-J and 195-H and consisting of 11,972.17 square feet.[79]

CSX contended that the State's appropriation of permanent easements in these parcels had resulted in a loss of 50% of the property's value[80] and calculated said loss at a total of $724,470.[81] The State contended that the appropriation only resulted in a

[78] *Boston Chamber of Commerce v. Boston*, 217 US 189, 195 (1910)
[79] R. 1390, 1392, 1645, 1830
[80] R. 320, 1552-1557
[81] R. 1558, 1561

5% loss in value and valued this taking at $25,509.35.[82]

However, contrary to all evidence at trial, the lower court determined that the permanent easements had no value and denied CSX any just compensation for them. The lower court's sparse explanation for its decision was as follows: "Given the Court's determination on the Franchise Agreement limitations, the Court finds no lost value to CSX."[83]

This decision was in error. Besides the fact that the lower court misinterpreted the Franchise Agreement, there was no permissible basis on which to deny direct damages for the property that had been appropriated.

(a) It Was Unconstitutional for the Lower Court to Deny Direct Damages

Whether within a railroad corridor, a development site, a residential home, or some other type of property, a permanent easement is one of the "bundles of sticks" of property rights. A permanent easement has value and while appraisers may reasonably differ over what that value is, it is certainly not $0. Indeed, it was undisputed at trial

[82] The State did not separately calculate the value of Parcels 130-A, 193-F, 194-J and 195-H. Accordingly, the amount was extrapolated using the applicable square footage for each parcel (R. 1830) and the State's value per square foot. (R. 2859) Thus, according to the State the value of the fee property was $510,187.04. The State claimed that the permanent easements that it appropriated were only worth 5% of that value (R. 2860), or $25,509.35

that the appropriated permanent easements had value.

To deny all just compensation for these permanent easements is to violate the constitutional mandate that the property owner be indemnified so that he may be put in the same relative position, insofar as this is possible, as if the taking had not occurred.[84] It is the general rule that "just compensation" is the fair market value of the property at the date of the taking,[85] and the fair market value is the price for which the property would sell if there was a willing buyer who was under no compulsion to buy and a willing seller who was under no compulsion to sell.[86] The fundamental question, then, to be answered by the court in valuing damages is "What has the owner lost?" and not "What has the taker gained?"[87]

The lower court did not reasonably explain its departure from the above constitutional principles, nor its departure from the evidence presented at trial wherein both parties agreed that the appropriated permanent easements had value.[88]

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[83] R. 13, 18

[84] *City of Buffalo v. J.W. Clement Co., Inc.*, 28 NY 2d 241, 258 (1971); *Rose v. State of New York*, 24 NY 2d 80, 87 (1969); *Marraro v State of New York*, 12 NY 2d 285, 292-293 (1963)

[85] *Matter of Board of Water Supply of City of New York*, 277 NY 452 (1938); *County of Erie v Fridenberg*, 221 NY 389 (1917)

[86] *Keator v. State of New York*, 23 NY 2d 337, 339 (1968)

[87] *Boston Chamber of Commerce*, 217 US at 195

[88] *I/M/A City of New York (Reiss)*, 55 NY2d 885, 886 (1982) ("in determining an award to an owner of condemned property, the findings must either be within the range of the expert testimony or be supported by other evidence and adequately explained by the court")

Accordingly, the lower court's decision was in error.

(b) The Lower Court Misapplied the Franchise Agreement

As set forth above, the lower court's decision was based on what it perceived to be the limitations placed upon the Subject Parcels by virtue of the 1907 Franchise Agreement. In sum and substance, the Franchise Agreement allows CSX to cross City streets for rail purposes, but no other.[89] With respect to said agreement, the lower court held as follows:

> With respect to non-rail purposes, such use of the Fremont corridor is limited, if not effectively blocked for our purposes, by the Franchise Agreement of 1907...Non-rail uses are not so authorized, and there had been no such use as of the taking or at any time prior thereto...No evidence was submitted to demonstrate any credible prospective non-rail uses, for example, whether any planning had begun to negotiate same and seek the necessary approvals.[90]

This interpretation was in error.

First, the lower court ignored the fact that the undisputed highest and best use of these parcels was as a part of a railroad corridor. Even to assume that the lower court's interpretation of the Franchise Agreement was correct, as a part of a railroad corridor, these parcels had value.

Second, as for non-rail purposes the parcels at issue, Parcels 130-A, 193-F, 194-J and 195-H, are not within the bed of any City street[91] and as such, the Franchise Agreement did not apply. CSX was free to use the land as it pleased and in fact, the Franchise Agreement specifically stated that it "shall not limit the right of the Railroad Company in the use of the lands owned or which shall be owned by it."[92]

Accordingly, in addition to rail purposes these parcels or portions thereof could have also been leased to third parties for accessory uses. Indeed, CSX entered into numerous leases along its corridor in the Fremont Line.[93] As of the date of title vesting, there were eleven such land leases.[94] These leases were typical yearly leases, with escalations and termination provisions in case CSX needed to use the property for railroad purposes.[95] In one instance, the leased property was improved with a building.[96]

Furthermore, Charles Rex testified that based on his experience, it is reasonably probable that permission would be granted to cross City streets for non-rail purposes,

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[89] R. 1167-1168, 1432-1433, 2853
[90] R. 13
[91] R. 1483-1485; 1489-1491; 1495-1497; 1501-1503
[92] R. 1167-1168, 1432-1433, 2853
[93] R. 697-698, 2253-2434
[94] R. 228, 2253-2434
[95] R. 583-584

despite the Franchise Agreement.[97] Mr. Rex has been involved in valuing and analyzing thousands of occupancy agreements for property within a corridor and in his experience such permission is not unreasonably withheld.[98] Indeed, within the City of New York, there are vast numbers of New York City streets subject to franchises for power, cable, telephone and gas.[99] Not only did the State fail to present any evidence to contradict the above, subsequent to the condemnation a portion of the Subject Property even contains a pipeline.[100]

In light of the above, the lower court's further comment that "no evidence was submitted to demonstrate any credible prospective non-rail usages, for example, whether any planning had begun to negotiate same and seek the necessary approvals"[101] is belied by the facts. Moreover, it is also contrary to the applicable law, as value is not based on whether not there were any specific leases in the process of negotiation or approvals in place but rather the uses to which the property could have been put and what was reasonably probable.[102]

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[96] R. 574-575
[97] R. 236-239, 697
[98] R. 239
[99] R. 236, 239
[100] R. 393-395, 689, 693-695, 2435
[101] R. 13
[102] The value for condemnation purposes is based on the reasonably probable highest and best use. *See, e.g., Boom Company v. Patterson,* 98 US 403 (1878); *Matter of Town of Islip,* 49 NY2d 354 (1980); *Matter of City of New York (Broadway Cary Corp.),* 34 NY2d 535 (1974), *Matter of City of New York (Shorefront High School),* 25 NY2d 146 (1969), *Masten v State of New York,*

Therefore, the lower court's decision should be reversed.

(c) The Appropriation Precluded all Accessory Uses for the Subject Parcels

The Easement Restatement Agreement, which was executed to correct the State's error in transecting the rail line, granted the State the right to operate the BQE Expressway and permitted CSX the right to maintain the relocated part of the rail line uninterrupted.[103] However, it additionally bound CSX as follows:

> no change or alignment of the railroad facilities shall be made, or additional facilities constructed, which will interfere with the operation of the highway, its bridges or other highway facilities of the State of New York presently existing or have been constructed as a part of the reconstruction of the Brooklyn Queens Expressway Project.[104]

Even a fence could constitute a "facility of the State of New York"[105] and the State is the sole arbitrator of what constitutes "interference with the operation of the highway, its bridges or other highway facilities." In fact, the State could simply preclude CSX from constructing a fence, so that the State could construct a fence of its own.

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11 AD2d 370 (3d Dept 1960)
[103] R. 1645-1654
[104] R. 1647
[105] R. 706

As discussed in the analogous case of *Kravec v. State*, this broad power provided the State with a "virtual veto" over any potential uses by CSX or third parties:

> The easement is defined in exceedingly broad terms and the reservation clause in no way diminishes the sweep of those terms. The reservation clause does permit Claimants to use the property provided such use does not interfere with "the exercise of the easement rights." This condition of noninterference, however, gives the State a virtual veto over any use the Claimants may wish to make use of their property because only the State knows or can predict what size structures or impairments it may erect under the easement or how it will use the easement and whether an activity by the Claimants will interfere or not. Furthermore, the limitation of the reservation clause necessarily leaves it to the State to say whether the use the owners wishes to make of the property interferes with this easement.[106]

Parcels 130-A, 193-F, 194-J and 195-H therefore cannot be leased to a third-party as a result of the Easement Restatement Agreement and the State's "virtual veto."

In light of the above, the lower court's decision should be reversed and CSX should be awarded just compensation in the amount of $724,470 for Parcels 130-A, 193-F, 194-J and 195-H.

[106] *Kravec v State*, 40 NY2d 1060,1061 (1976)

III. The Lower Court Inadvertently Failed to Value the Property "Before and After"

For a partial appropriation, proper methodology is to value the Subject Property "before" and "after" the taking.[107] This method was used by both appraisers in the instant matter.[108] The lower court, however, failed to value the Subject Property "before" and "after."[109]

The State has not raised this issue on appeal, nor does CSX now. As CSX did not make any claim for severance or consequential damages, the lower court's error had no impact upon the final determination of value. CSX simply points it out for the sake of clarity.

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[107] *See, e.g., Matter of City of New York (Civitano)*, 39 NY2d 453, 456 (1976); *Diocese of Buffalo v. State*, 24 NY2d 320, 330 (1969); *Coldiron Fuel Center v. State*, 8 AD3d 779, 780 (3d Dept 2004); *Chemical Corp. v Town of East Hampton*, 298 AD2d 419, 420 (2d Dept 2002)
[108] R. 1392 *et seq.*, 2503 *et seq.*
[109] R. 7-20, generally

ARGUMENT IN OPPOSITION TO THE STATE'S APPEAL

The State's appeal is without support in either the law or the facts.

It is axiomatic that the State's proposed use of the Cost Approach is applicable only as a last resort, when all other methods are unavailable and there is a complete lack of comparable sales. However, the State's claim is belied by the evidence at trial in which CSX presented 14 comparable corridor sales and the State had over 75 comparable corridor sales to choose from. Moreover, there is no evidence to support a Cost Approach, as the State lacked any value for either the cost of the railroad improvements or the cost of assembling the corridor.

Similarly, the State has no support for its claim that the Subject Property should be valued at a mere 15% of the ATF value. As many of the Subject Parcels now lie within the bed of the Brooklyn-Queens Expressway or are burdened with permanent retaining walls, the claim that CSX lost a mere 15% of the property's value lacks all credibility. Nor did the State properly consider the applicable uses of the property prior to the appropriation.

Accordingly, the State's appeal should be denied in its entirety.

I. There Was No Basis to Use the Cost Approach

There was no justification or permissible rationale to employ the Cost Approach as the method of valuation.

(a) The Subject Property Was Not A Specialty

There is little debate that the Cost Approach is the least favored method of valuation.[110] At trial, even the State's appraiser characterized the Cost Approach as a methodology to be used only as a "a last resort."[111] While the "last resort" description was correct, the facts do not justify its use here.

Under New York condemnation law, courts have repeatedly held that the idiosyncratic Cost Approach is only to be used if there is no discernable market for that particular type of property.[112] For example, the Cost Approach may be proper when valuing a church, as there is no ready market for the sale of churches. Accordingly, as well stated by one court:

> Generally the cost approach is a method of last resort, when the other accepted methods are not available or useable, and

[110] *Saratoga Harness Racing, Inc. v. Williams*, 91 NY2d 639, 643-644 (1998); *In Re County of Suffolk v. C.J. Van Bourgardien*, 47 NY2d 507 (1979)
[111] R. 906
[112] *Saratoga Harness Racing, Inc.*, 91 NY2d at 643-644; *C.J. Van Bourgardien*, 47 NY2d 507; *Great Atlantic & Pac. Tea Co., Inc. v. Kiernan*, 42 N.Y.2d 236 (1977); *Nicolay v. State*, 38 AD2d 611 (3d Dep't 1971); *In re Lincoln Square Slum Clearance Project*, 15 AD2d 153, 171, aff'd 16 NY2d 497 (1961)

> this reluctance to use said approach is largely because of the subjective nature of the estimates that must be made to account for depreciation. Prior cases have found failures in this regard to result in overvaluation but...overvaluation is a symptom of said underlying problem and not the cause for the limited use of this method. Construction costs can be underestimated as well as overestimated, and an excessive concern to fully account for all possible species of depreciation and obsolescence can result in an overestimate of these elements of said approach, especially in light of the large subjective components thereof. Even in the seminal cases recognizing said cost maximum rule, it has been held that the Court is not required to accept a cost approach if there are reasons for rejecting same.[113]

Thus, "the cost approach is an inappropriate method of estimating the market value of real property where the property does not qualify as a specialty and another method is available."[114]

Beyond this general prohibition, in the case of railroad corridors specifically the cost approach is disfavored. As stated in an article relied on and cited to by the State's appraiser, "*The Continuing Evolution of Corridor Appraising: Back to Basics*," by Charles Seymour:

> (1) the cost approach and income approach do not work; (2) only the sales comparison approach can be used...(4) the

[113] *Frontier Park v. Town of Babylon*, 184 Misc2d. 354, 364, 707 NYS2d 808, 815 (Sup.Ct. Nass. Cty 2000)

[114] *Niagara Falls Urban Renewal Agency v. Gorge Terminal Realty Co.*, 92 AD2d 719 (4th Dept 1983)

> across-the-fence x corridor factor methodology seems appropriate...(7) the resulting estimate of corridor value appears to be consistent with market actions.[115]

In the instant matter, there was a ready market of comparable corridor sales. CSX presented 14 comparable corridor sales,[116] all of which were verified by its appraiser, Charles Rex.[117] It is noteworthy that these 14 sales represented only those that transpired prior to the date of title vesting and that which Mr. Rex was able to verify pursuant to his exacting standards.[118] Overall, Mr. Rex had approximately 100 corridor sales in his files.[119]

Similarly, the State's appraiser, Mr. James MacCrate, had over 75 corridor sales available to him.[120] Among them, he had two sales from New Jersey[121] and sales scattered throughout New York State.[122] Mr. MacCrate also admitted that he had approximately 943 pages of information regarding corridor sales,[123] and multiple spreadsheets which detailed the Corridor Factors for these 75 sales.[124]

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[115] R. 2029 (emphasis added)
[116] R. 249, 1392
[117] R. 246, 249, 258, 1213-1214, 1564 *et seq.*
[118] R. 249, 1593 *et seq.*
[119] R. 250
[120] R. 1056
[121] R. 1056, 1063
[122] R. 1063-1064
[123] R. 1127

In the end, the State chose not to use its 75 corridor sales based on a bewildering parade of contradictory excuses.[125] However, the State's appraiser's unilateral decision

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[124] R. 1066, 1125, 1127-1130, 1135

[125] At trial, the State's appraiser presented 5 contradictory excuses as to why he did not rely on his 75 corridor sales. Each contradicted not only each other, but other evidence presented at trial. For example:

> (1) in the State's appraisal report, it stated that "the difficulty with a direct sales comparison of corridor sales is the limited availability of active rail corridor sales." (R.2815) This claim is belied by the State's 75 corridor sales, 943 pages of information and multiple spreadsheets. Moreover, the State's appraiser testified that his staff was "participating in the collection of information on corridors of sales nationwide at my request." (R. 1139-1140)
>
> (2) the State's appraiser also claimed that "sales that are available are difficult to analyze because of the lack of available details concerning description of terms, conditions, physical characteristics and purchase price." (R. 2815-2816) Again, this was contradicted by the State's 943 pages of information and multiple spreadsheets. In addition, the State's appraiser admitted that he called more than "seventy five people...that were involved in the transactions...In order to gain a proper understanding of the methodology and procedures that were being followed in the valuation of corridors...I believe I stated that I used an e-mail list and a list of attendees at Sacramento for the meeting held by the Appraisal Institute, the Washington D.C. meeting...it could have included utility companies, it could have included the Bureau of Land Management, it could have included the railroad companies – which it did, it could have included the Department of Transportation—which it did in many, many states. So there were many, many different people that we called." (R. 1061-1062)
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> (3) The State's appraiser also claimed that corridor sales were too complex for him to understand. (R. 904) Yet the State's appraiser previously admitted that he had already analyzed the corridor sales. (R. 1065-1067, 1125, 1125, 1128-1130, 1135, 2587) The State's appraiser also testified that he had numerous individuals at his disposal to help him interpret the corridor sales, including an appraiser who worked on the valuation of Conrail and another appraiser who has experience in corridor valuations. (R. 1067)
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> (4) The State alleged that its 75 corridor sales were not comparable. (R. 1131-1132) Claimed for the first time at trial, this contradicts all of the other work that the State's appraiser did with respect to the corridor sales, *i.e.*, why would he analyze over 75 corridor sales, create multiple spreadsheets, contact numerous parties and rely on other appraisers with an expertise in corridor sales, all for sales were not comparable

to ignore those sales out of inexperience[126] or otherwise does not negate the fact that there was a large market of comparable corridor sales on which to rely.

In light of the above, the State cannot claim that the Subject rail corridor was so unique and seldom sold as to lack a market.

The State's dismissal of CSX's comparable corridor sales because they were outside of New York State is equally unavailing.[127]

As discussed in greater detail in support of CSX's appeal, *supra*, the purpose of the comparable corridor sales is to quantify the importance of the corridor.[128] Whether the corridor is located in New York or Des Moines the Corridor Factor simply reflects, for example, that a frequently used passenger line is more valuable than a rarely used industrial line. Location has nothing to do with the Corridor Factor. Rather, the value

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to start with.

(5) the State claimed that it could not rely on corridor sales without scrutinizing the buyers and sellers and each party's appraiser. (R. 1069-1070) However, it is the appraiser's job to use the data in order to determine a value for the Subject Property, not to substitute his judgment for that of the market participants and change the values and factors that the market participants had already agreed upon.

[126] The State's appraiser admitted that he had never before valued an active rail corridor. (R. 1055-1056)
[127] State's Brief, at p. 12
[128] R. 153, 230, 1419

of the location itself is reflected by the ATF value.[129]

While the State truncated the quote in its own Brief, the Court of Appeals decision in *Matter of Great Atl. & Pac. Tea Co. v. Keirnan* is instructive:

> While it is generally true that comparable sales should not be too remote in location from the subject property, we have previously stated that "Receiving evidence of sales of property beyond the immediate vicinity of the subject property is a matter resting in the sound discretion of the trial judge." Whether evidence should be received of comparable sales which are some distance away from the subject property depends, of course, on the nature and character of the property involved. It would not be proper, for example, to look beyond New York City in valuing an office building located therein because such a building would obviously have a local market. Here, however, there is no local market for appellant's facility but the record is clear, and the Trial Judge so found, that there was a broad regional market for this type of industrial plant. Under these circumstances, we think that it was not error to depart from the ordinary rule with respect to location of comparables and, thus, the trial court properly relied upon the out-of-State comparable sales utilized by appellant's appraiser in determining the value of the property by the market value approach. The ordinary or general rule should not blind us to the fact that the ultimate purpose of valuation, whether in eminent domain or tax certiorari proceedings, is to arrive at a fair and realistic value of the property involved.[130]

Accordingly, based on the purpose for which the comparable corridor sales are

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[129] R. 153, 243, 463, 1419

[130] *Matter of Great Atl. & Pac. Tea Co.*, 42 NY2d at 242

used, it was appropriate and reasonable to use sales outside of the immediate New York City area.

In light of the above, the State has no support for its claim that the Cost Approach was required.

(b) The State Has No Evidence To Support a Cost Approach

Assuming that a Cost Approach was required, the cost of assembling a rail corridor has three components: (1) the cost of the land; (2) the cost of the improvements (*i.e.*, the rail line, the ballast, the railroad ties, the bridges, etc); and, (3) the cost of assembling the corridor. In arguing for the Cost Approach, the State omits the fact that it presented no evidence to support its claimed method of valuation.

With respect to the cost of the improvements, the relocation of the BQE Expressway necessitated the relocation of the CSX rail line. This required the reconstruction of several bridges, as the BQE Bridge, the 34th Avenue Bridge and 35th Avenue Bridge were torn down and one new, long bridge was built in a new place.[131] The bridge that carried CSX's rail line over Northern Boulevard also had to be

[131] R. 114-118, 191

relocated and rebuilt.[132] Obviously, the relocation of the bridges also required the relocation of the rail line[133] and to keep the rail line operational during this construction process, a second temporary rail line was also constructed.[134] The relocated rail line, in turn, necessitated new retaining walls.[135]

Unfortunately for the State, all of its calculations regarding the above costs were incorrect. As admitted at trial by counsel for the State:

> The actual expense calculations were misreported.[136]

> ...what had happened was that the experts requested from the DOT a calculation of the bridge costs. And the calculation was provided. That is what was included in the reports of the appraisers. It was only upon receipt of the rebuttal appraisal that we realized that the identifiers in the reports were incorrect and that it was not giving all the bridge costs that had been asked for...Mr. Rex, in his rebuttal appraisal correctly points out that one of the bridges for which we were given costs was not altered. Mr. Rex also correctly points out that the bin number we identified in our reports as having costs was not changed in the course of the report.[137]

Two of the State's expert witnesses made similar admissions. Mr. Bruce Savik, P.E., who was responsible for obtaining the cost calculations from the State, admitted

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[132] R. 114, 117-118
[133] R. 119-121, 197
[134] R. 136, 146-147
[135] R. 121-122, 819, 1946-1950
[136] R. 752

that the bridge costs were erroneous.[138] He also admitted that with respect to the retaining walls, the costs that he used were not the actual costs but merely the bid price.[139]

State's expert Mr. Kenneth Young likewise admitted that, "through Mr. Rex's review in the rebuttal, we found out that some of the bridge computations had been mixed up, had been misapplied. So we had some errors in our calculations and in the bridge costs."[140] Further, Mr. Young admitted to multiple other errors: portions of the value regarding the rail line were incorrect, as he improperly valued "130 weight" rail instead of "140 weight" rail;[141] portions of his valuation regarding the rail ties was incorrect;[142] and, portions of his value for the ballast were incorrect.[143]

Among the State's numerous other errors in computing the alleged cost of the improvements were:

a) valuing the 32nd Avenue Bridge as reconstructed, when it was not reconstructed[144]
b) the claimed construction cost for the BQE

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[137] R. 756-757
[138] R. 813-814
[139] R. 810
[140] R. 856, 868
[141] R. 868
[142] *Id.*
[143] R. 870
[144] R. 119, 203-204, 1918-1921

Expressway Bridge was actually its demolition cost[145]

c) the claimed construction cost for the 34th Avenue Bridge was actually its demolition cost[146]
d) the claimed constriction cost for the 35th Avenue Bridge was actually its demolition cost[147]
e) valuing the BQE, 34th Avenue and 35th Avenue bridges in the "after" as 3 bridges, when it was only one, long bridge[148]
f) valuing the Northern Boulevard Bridge as 114 feet long, when it was 315 feet long[149]
g) failing to determine the "real cost new" of the BQE Bridge[150]
h) using a reproduction cost new for the individual bridges in the "after" that greatly exceeded the reproduction cost new of those same bridges in the "before"[151]
i) determining physical depreciation "before" without ever having seen the Subject Property prior to 2008[152] by which time the old improvements had already been demolished[153]
j) valuing 130 pound rail line instead of 141 pound rail line[154]
k) incorrectly valuing the 130 pound rail line[155]
l) incorrectly determining the age of the cross-ties[156]
m) incorrectly determining the age of the ballast[157]

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[145] R. 1932-1936
[146] R. 1927-1931
[147] R. 1937-1941
[148] R. 1903, 3268
[149] R. 1922
[150] R. 3150 *et seq*, 3268 *et seq*
[151] R. 3150 *et seq*, 3268 *et seq*, 3338
[152] R. 850-852
[153] R. 852, 864-865; *see* State's Exhibit H, filed as part of the Record on Appeal with Clerk's Office
[154] R. 1910
[155] R. 1907-1910
[156] R. 1910-1913
[157] R. 1914

n) incorrectly valuing earthwork in the "after" that was appropriated by the State[158]

Moreover, many of the other alleged cost estimates by the State's appraiser were simply unsupported "naked opinions,"[159] compounded by the fact that its appraisers did not even see the Subject Parcels until 2008, eight years after the appropriation and after all the remedial work to relocate the bridges, rail line and retaining walls had already been done.[160]

In addition to the lack of any value for the improvements, the State also failed to determine the cost of assemblage.

If one were to create a corridor, there would be a certain cost associated with assembling all of the property. When assembling a corridor: the properties must be surveyed, the properties must be appraised, there are costs involved in the purchase of real estate, people must be hired to negotiate the sales, there may be legal fees and court costs, damages may be owed to the former owners, and properties may need to be condemned.[161]

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[158] R. 1914
[159] R. 847, 865-866; *see, e.g., Getty Oil v. State of New York*, 33 AD2d 705 (3d Dept., 1969); *Brown v. State of New York*, 52 AD2d 1679 (4th Dept., 1976)
[160] R. 852, 864-865
[161] R. 302-303, 684-685

According to CSX's appraiser, state Department of Transportation studies from across the country have shown that when constructing a corridor, the assemblage factor is 4x to 10x the ATF value.[162] For example, Mr. Rex testified that he did a study of a sixty to seventy mile pipeline in California where the assemblage factor was 9.6x the ATF value.[163]

While the State agreed with the concept of an assemblage factor, it failed to determine it. As with the Corridor Factor, at trial the State presented numerous contradictory excuses as to why no assemblage factor was applied.[164]

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[162] R. 245

[163] *Id.*

[164] The State proffered three contradictory excuses:

> (1) According to the State, an assemblage factor was not used was simply because it would be the same "before" and "after." (R. 1083-1084, 2587, 2848) However, this explanation is a clearly incorrect. If one were to assume that the ATF value of the condemned land was $100,000 "before" and $100,000 "after": with an assemblage factor of 1, the damages would be $100,000; and with an assemblage factor of 3, the damages would be $300,000. The State's appraiser later disavowed this rationale at trial claiming that the statements in his report were "worded poorly" and that "english [was] never his strongest language." (R. 1084, 1087)
>
> (2) The State contended in order to properly use an assemblage factor, there must be an economic incentive to build the corridor and that there was no such economic incentive in the underlying matter. (R. 922-925, 984, 1073) Yet, the State presented no proof that the corridor was financially infeasible. Moreover, in both the State's report and at trial it contended that the highest and best, and financially feasible, use of the property was as a rail corridor. (R. 1076, 2552, 2811) Indeed, the State's appraiser stated that "for the purposes of this analysis, we have assumed the operation of the railroad is profitable." (R. 910, 1078, 2812-2813, 2553-2554)

Lastly, it is also noteworthy that the State's purpose at trial in presenting its flawed Cost Approach was so that it could attempt to deduct the alleged benefits of the project (*i.e.*, the reconstructed rail line) from direct damages. Such was clearly improper as violative of the rule of law within *Chiesa vs. State*[165] and recognized as such by the lower court.[166] Moreover, the reconstructed rail line was only required as a result of the State's appropriation. We are not aware of any case in the State of New York which holds that because a reconstruction is required to cure the effects of a taking, such constitutes a benefit because it is new and what was taken was older. It defies both justice and common sense. How can you build other than new? One cannot build a used replacement.

In light of the above, the State cannot support its claim that the Cost Approach should have been applied by the lower court.

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(3) The State claimed that an assemblage factor was not necessary because the corridor was already assembled. (R.1081-1082) This is illogical. If the State is using the Cost Approach, it must account for the fact that there is a cost to assemble the corridor.

[165] *Chiesa v. State*, 36 NY2d 21 (1974)

[166] R. 8-9

II. An 85% Reduction in the ATF Value is Unsupported and Improper

The State argues that the lower court overvalued the Subject Property and that this Court should modify the award and reduce the just compensation to a mere 15% of the ATF value. This argument is unsupported.

(a) The State's Appropriation Resulted in Significant Damages

Parcels 121, 122, 123, 124, 125, 126, 127, 128, 129 and 205 are almost entirely within the roadway of the expanded BQE Expressway.[167] How the State can claim that CSX only lost 15% of the value of these properties is beyond all rational explanation. Short of CSX being permitted to erect a "CSX Tollbooth" in the middle of the BQE, CSX has lost all value for these parcels.

Similarly, Parcels 130, 193, 194 and 195 were needed for the construction of new retaining walls in order to maintain the rail line's right of way.[168] No practical use can be made of property that is burdened with an immovable retaining wall and again, there is no support for the State's claim that these properties only lost 15% of

[167] R. 1267, 1890-1896, 2435 *et seq.*, 2480 *et seq.*; *see* CSX's Exhibit 7, filed as a CD-ROM with the Clerk's Office as part of the Record on Appeal
[168] R.808, 811, 819, 1846 *et seq.*, 1896-1901, 1943-1944

their value.[169]

The remaining parcels are those that are subject to an Easement Restatement Agreement. However, the State fails to adequately consider both the uses that are permitted by the State and the limitations that are placed on CSX.

In sum and substance, the Easement Restatement Agreement granted the State the right to operate the BQE Expressway and CSX the right to operate its railroad.[170] However, the Easement Restatement Agreement also limited CSX's use of these parcels insofar as the State's "virtual veto" (as more fully discussed above, *supra*) precluded any accessory uses of these properties.

Prior to the date of title vesting, numerous sections of property within the corridor were leased to third parties.[171] These leases were typical yearly leases, with escalations and termination provisions in case the CSX needed to use the property for railroad purposes.[172] In one instance, the leased property was improved with a

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[169] Contrary to the State's Brief, the State contended at trial that these properties only lost 5% of their value, not 15%. (R. 2848-2850)
[170] R. 319, 1645-1654
[171] R. 574-576, 583-589, 2253 *et seq.*
[172] R. 583-584

building.[173]

No such third party uses are possible after the taking and accordingly, resulted in significant damages to CSX.

(b) The State Misinterpreted the Law of Just Compensation

The State argues as follows: "it is undisputed that the highest and best use for CSX's property is for operation of a commercial rail corridor. It is also undisputed that CSX's use of the rail corridor for this purpose is undiminished and unimpaired as a result of the taking. Any loss of land value to CSX as a result of the taking must therefore result from the possibility that it could have converted the land or some portion of it to some alternative or additional use."[174]

This position is in error. First, the State misunderstands the concept of just compensation. Just compensation is the fair market value of the property at the date of the taking,[175] and the fair market value is the price for which the property would sell if there was a willing buyer who was under no compulsion to buy and a willing seller

[173] R. 574-585
[174] State's Brief at pp. 15-16
[175] *Matter of Board of Water Supply of City of New York*, 277 NY 452 (1938); *County of Erie v Fridenberg*, 221 NY 389 (1917)

who was under no compulsion to sell.[176] The property must be valued on its highest and best use regardless of the actual use.[177]

Accordingly, as the highest and best use of the Subject Property was a transportation corridor, just compensation is calculated based upon the value of the property as a transportation corridor on the date of title vesting. To claim that just compensation equals the value of the property as if "it could have converted the land or some portion of it to some alternative or additional use," is entirely contrary to all law.

One could assume that the State was simply attempting to limit just compensation based upon the fact that the CSX railroad continued to operate. Should such be the case, the State is confusing direct and consequential damages. As discussed above, *supra*, simply because there are no consequential damages does not justify reducing CSX's direct damages by 85%. One cannot change the calculation of direct damages based upon whether or not there are consequential damages. The direct damages to CSX are based upon those property rights that were lost, not the fact that some property rights may remain.[178]

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[176] *Keator v. State of New York*, 23 NY 2d 337, 339 (1968)
[177] *In re Town of Islip Mascioli*, 49 NY2d 354, 360 (1980); *Keator v State of New York*, 23 NY2d 337 (1968)

Accordingly, the State's proposed 85% deduction is unsupported.

(c) The STB and Franchise Agreement Do Not Limit the Value of the Subject Properties

In support of its argument, the State claims that the use of the Subject Parcels is limited due to the Franchise Agreement and the restrictions placed upon the property by the Surface Transportation Board ("STB"). Both of these arguments are to no avail.

With respect to the Franchise Agreement, as discussed above, *supra*, the Agreement only applies to property that crosses City streets for a non-rail purpose. CSX was still free to use the land as part of its transportation corridor. CSX was also free to use the land outside of the City streets however it wished. In fact, the Franchise Agreement specifically stated that it "shall not limit the right of the Railroad Company in the use of the lands owned or which shall be owned by it."[179]

The Subject Properties were available for accessory third-party uses and indeed, CSX was party to a multitude of leases along its corridor in the Fremont Line.[180] Furthermore, Charles Rex testified that based on experience, to the extent that CSX leased the Subject Property for other lineal uses (such as a pipeline), it is reasonably

[178] *Boston Chamber of Commerce*, 217 US at 195
[179] R. 1432-1433, 1167-1168, 2853

probable that permission would be granted to cross City streets.[181] Accordingly, the Franchise Agreement does not justify an 85% reduction of the ATF value.

With respect to the STB, the State correctly noted that CSX could not have severed or discontinued its rail line without STB approval.[182] This, however, is irrelevant to the valuation. Both parties agreed that the highest and best use of the Subject Parcels was to continue them as a freight rail corridor.[183] Moreover, the potential accessory third party uses (leasing, a pipeline, etc.) are not governed by the STB so long as the rail line continues in operation. Nor was there any testimony or evidence that the STB's oversight had any impact on valuation at all.

In light of the above, there is no support for the State's claim that the ATF value should be reduced by 85%.

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[180] R. 697-698, 2253-2434
[181] R. 236-239, 697
[182] State's Brief, at pp. 4, 16-17
[183] R.232-234, 1531-1534, 2811

CONCLUSION

For all of the reasons set forth above, the lower court's decision should be reversed, the Subject Parcels should be valued using a Corridor Factor of 2.5, and Parcels 130-A, 193-F, 194-J and 195-H should be valued at $724,470. Furthermore, the State's appeal should be dismissed in its entirety, with costs, together with such other and further relief as may be appropriate.

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Respectfully Submitted,

By: _____

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