
835.12 EMINENT DOMAIN—ISSUE OF JUST COMPENSATION—PARTIAL TAKING BY DEPARTMENT OF TRANSPORTATION OR BY MUNICIPALITY FOR HIGHWAY PURPOSES.

> *NOTE WELL: This instruction should only be given when less than the entire tract is taken and the condemnor is the Department of Transportation exercising its right of eminent domain pursuant to Chapter 136 of the General Statutes or a municipality acquiring rights-of-way for the state highway system pursuant to N.C. Gen. Stat. § 136-66.3(c) and N.C. Gen. Stat. § 40A-3(b)(1).*

The (*state number)* issue reads:

"What is the amount of just compensation the landowner is entitled to recover from the [plaintiff] [defendant] for the taking of the landowner's property?"

On this issue the burden of proof is on the landowner.[1] This means that the landowner must prove, by the greater weight of the evidence, the amount of just compensation owed by the [plaintiff] [defendant] for the taking of the landowner's property.

In this case, the [plaintiff] [defendant] has not taken all of the landowner's property. It has taken (*state size of property taken, e.g., five acres*) out of a (*state size of entire tract, e.g., 15 acres*) tract.

The measure of just compensation where a part of a tract is taken is the difference between the fair market value of the entire tract immediately before the taking and the fair market value of the remainder of the tract immediately after the taking.[2]

Fair market value is the amount which would be agreed upon as a fair price by an owner who wishes to sell, but is not compelled to do so, and a buyer who wishes to buy, but is not compelled to do so.

You must find the fair market value of the property immediately before the time of the taking and the fair market value of the remainder immediately after the taking - that is (*state date of taking*) - and not as of the present day or any other time.[3] In arriving at the fair market value of the property immediately before the taking, you should, in light of all the evidence, consider not only the use of the property at that time,[4] but also all the uses to which it was then reasonably adaptable, including what you find to be the highest and best use or uses.[5] Likewise, in arriving at the fair market value of the remainder immediately after the taking you should, in light of all the evidence, consider not only the use of the property at that time, but also all of the uses to which it was then reasonably adaptable, including what you find to be the highest and best use or uses.

Further, in arriving at the fair market value of the remainder immediately after the taking, you should consider the property as it [was] [will be] at the conclusion of the project.[6] You should consider these factors in the same way in which they would be considered by a willing buyer and a willing seller in arriving at a fair price.[7] You should not consider purely imaginative or speculative uses and values.

Your verdict must not include any amount for interest.[8] Any interest as the law allows will be added by the court to your verdict.

I instruct you that your verdict on this issue must be based upon the evidence and the rules of law I have given you. You are not required to accept the amount suggested by the parties or their attorneys.

Finally, as to this issue on which the landowner has the burden of proof, if you find, by the greater weight of the evidence, the difference in the fair market value of the entire tract immediately before the date of taking and the fair market value of the remainder of the tract immediately after the taking, then you will answer this issue by writing that amount in the blank space provided. However, if you find that the value of the remainder immediately after the taking is the same as the value of the entire tract immediately before the date of the taking, then it would be your duty to answer this issue by writing "zero" in the blank space provided.

NOTE WELL: If the condemnor introduces evidence of general or special benefits for purposes of offset, this instruction should be followed by N.C.P.I. 835.12A.

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1. On this issue, the burden of proof will always be on the property owner, whether in the capacity of plaintiff or defendant.

2. N.C. Gen. Stat. § 136-112. *See also Kirkman v. State Highway Comm'n*, 257 N.C. 428, 433, 126 S.E.2d 107, 111 (1962); *Barnes v. State Highway Comm'n*, 250 N.C. 378, 387, 109 S.E.2d 219, 227(1959); *DeBruhl v. Highway Comm'n*, 247 N.C. 671, 676, 102 S.E.2d 229, 233 (1958); *Gallimore v. Highway Comm'n*, 241 N.C. 350, 354, 85 S.E.2d 392, 396 (1954).

The rule for measure of damages for partial taking of a fee is also the rule ordinarily applicable to the assessment of damages in condemnations by railroad, highway and other rights-of-way in which the bare fee remaining in the landowner, for all practical purposes, has no value to the landowner and the value of the easement is virtually the value of the land it embraces. *See Duke Power Co. v. Rogers*, 271 N.C. 318, 321, 156 S.E.2d 244, 247 (1967); *Highway Comm'n v. Black*, 239 N.C. 198, 203, 79 S.E.2d 778, 783 (1953).

Additionally, in partial-taking cases, damages to the remainder are determined as of the date the improvement for which the taking was made causes the injury. *Dep't of Transp. v. Bragg*, 308 N.C. 367, 370, 302 S.E.2d 227, 229 (1983); *see also Western Carolina Power Co. v. Hayes*, 193 N.C. 104, 107, 136 S.E. 353, 354 (1927); *Bd. of Transp. v. Brown*, 34 N.C.

App. 266, 268, 237 S.E.2d 854, 855 (1977); *aff'd per curiam*, 296 N.C. 250, 249 S.E.2d 803 (1978); N.C. Gen. Stat. § 40A-63.

3. The point in time when property is "valued" in a condemnation action is the date of taking. *Metro. Sewerage Dist. of Buncombe Cty. v. Trueblood*, 64 N.C. App. 690, 693-94, 308 S.E.2d 340, 342, *cert. denied*, 311 N.C. 402, 319 S.E.2d 272 (1983).

4. Occurrences or events that may affect the value of the property subsequent to the taking are not to be considered in determining compensation. *Metro. Sewerage Dist. of Buncombe Cty. v. Trueblood*, 64 N.C. App. 690, 694, 308 S.E.2d 340, 342, *cert. denied*, 311 N.C. 402, 319 S.E.2d 272 (1983) (photographs of damage occurring after actual taking inadmissible).

5. In valuing property taken for public use, the jury is to take into consideration "not merely the condition it is in at the time and the use to which it is then applied by the owner," but must consider "all of the capabilities of the property, and all of the uses to which it may be applied, or for which it is adapted, which affect its value in the market." *Nantahala Power Light Co. v. Moss*, 220 N.C. 200, 205, 17 S.E.2d 10, 13 (1941), and cases cited therein. "The particular use to which the land is applied at the time of the taking is not the test of value, but its availability for any valuable or beneficial uses to which it would likely be put by men of ordinary prudence should be taken into account." *Carolina & Y. R.R. v. Armfield*, 167 N.C. 464, 466, 83 S.E. 809, 810 (1914); *Barnes v. State Highway Comm'n*, 250 N.C. 378, 387-88, 109 S.E.2d 219, 227 (1959).

6. *Dep't of Transp. v. Bragg*, 308 N.C. 367, 371, 302 S.E.2d 227, 230 (1983).

7. In *Bd. of Transp. v. Jones*, 297 N.C. 436, 438-439, 255 S.E.2d 185, 187 (1979), decided under N.C. Gen. Stat. § 136-112, the Supreme Court ruled that the statute established the exclusive measure of damages but does not restrict expert real estate appraisal witnesses "to any particular method of determining the fair market value of property either before or after condemnation." *See generally State Highway Comm'n v. Conrad*, 263 N.C. 394, 399, 139 S.E.2d 553, 557 (1965) (expert witnesses given wide latitude regarding permissible bases for opinions on value); *Dep't of Transp. v. Burnham*, 61 N.C. App. 629, 634, 301 S.E.2d 535, 538 (1983); *Bd. of Transp. v. Jones*, 297 N.C. 436, 438, 255 S.E.2d 185, 187 (1979); *In Re Lee*, 69 N.C. App. 277, 287, 317 S.E.2d 75, 80 (1984) (expert allowed to base his opinion as to value on hearsay information). In *Dep't of Transp. v. Fleming*, 112 N.C. App. 580, 583, 436 S.E.2d 407, 409 (1993), the expert witness was not allowed to state opinion regarding value of land when opinion was based entirely on the net income of defendant's plumbing business. The Court held that loss of profits of a business conducted on the property taken is not an element of recoverable damages in a condemnation. However, *cf. City of Statesville v. Cloaninger*, 106 N.C. App. 10, 16, 415 S.E.2d 111, 115 (1992) expert allowed to base his opinion of value on the income from a dairy farm business conducted on the property condemned. The Court of Appeals stated in *Dep't of Transp. v. Fleming*, 112 N.C. App. at 584, 436 S.E.2d at 410: "It is a well recognized exception that the income derived from a farm may be considered in determining the value of the property. This is so because the income from a farm is directly attributable to the land itself." Accordingly, the rental

value of property is competent upon the question of the fair market value of property on the date of taking. *Raleigh-Durham Airport Auth. v. King*, 75 N.C. App. 121, 123, 330 S.E.2d 618, 619 (1985).

The trial judge should analyze whether a witness is qualified to offer an opinion as to fair market value under Rule 702 of the North Carolina Rules of Evidence. *North Carolina Dep't of Transp. v. Mission Battleground Park, DST*, 370 N.C. 477, 485, 810 S.E.2d 217, 223 (2018). The limitations on the activities of licensed real estate brokers under N.C. Gen. Stat. § 93A-83 are not applicable to the determination of whether a licensed broker may prepare an expert report and testify in a civil proceeding. *Id.* at 481-83, 810 S.E.2d at 221-22.

8. Because the landowner may withdraw the amount deposited with the Court as an estimate of just compensation, the Court is required to add interest only to the amount awarded to the landowner in excess of the sum deposited. The interest is computed on the time period from the date of taking to the date of judgment. N.C. Gen. Stat. §§ 136-113 and 40A-53. No interest accrues on the amount deposited because the landowner has the right to withdraw and use that money without prejudice to the landowner's right to seek additional just compensation. N.C. Gen. Stat. §§ 136-113 and 40A-53 provide for the trial judge to add interest at 8% and 6% respectively per annum on the amount awarded as compensation from the date of taking to the date of judgment. *But see Lea Co. v. Bd. of Transp.*, 317 N.C. 254, 259, 345 S.E.2d 355, 358 (1986).