

EMINENT DOMAIN--ISSUE OF JUST COMPENSATION--TAKING OF AN EASEMENT BY PRIVATE OR LOCAL PUBLIC CONDEMNORS--FAIR MARKET VALUE OF PROPERTY TAKEN. (G.S. Chapter 40A).

*NOTE WELL: Use this instruction only where an easement is taken, the evidence relates to the fair market value of the easement taken and there is no evidence as to the value of the owner's property before and after the taking. These proceedings involve only private or local public condemners pursuant to Chapter 40A of the North Carolina General Statutes.*

The issue reads:

"What is the amount of just compensation the [plaintiff(s)] [defendant(s)] [is] [are] entitled to recover from the [plaintiff] [defendant] for the taking of the easement on the [plaintiff('s)(s')] [defendant('s)s')] property?"

On this issue the burden of proof is on the [plaintiff(s)] [defendant(s)]<sup>1</sup>. This means that the [plaintiff(s)] [defendant(s)] must prove, by the greater weight of the evidence, the amount of just compensation owed by the [plaintiff] [defendant] for the taking of the easement.

In this case, the [plaintiff] [defendant] has not taken all of the [plaintiff('s)(s')] [defendant('s)(s')] property. It has taken an easement or right-of-way over the [plaintiff('s)(s')] [defendant('s)(s')] property. Where an easement is taken for (*state purpose*), the landowner does not give up all the title to his land.<sup>2</sup>

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

<sup>2</sup>Where the easement is a temporary construction or drainage easement, the jury should be instructed, additionally,

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The landowner retains a right to continue to use his land in ways that do not interfere with (*name condemnor's*) free exercise of the easement acquired.<sup>3</sup> The measure of just compensation to which the [plaintiff(s)] [defendant(s)] [is] [are] entitled is the fair market value of the easement at the time of the taking.<sup>4</sup>

Fair market value for an easement is the amount which would be agreed upon as a fair price for an easement 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 easement as of the time of the taking--that is (*state date of taking*)--and not as of the present day or any other time.<sup>5</sup> In arriving at the fair market value, you should, in light of all the evidence, consider not only

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"and the landowner will have his land restored to him after the temporary easement expires."

*See Colonial Pipeline v. Weaver*, 310 N.C. 93, 107, 310 S.E.2d 338, 346 (1984); *City of Fayetteville v. M.M. Fowler, Inc.*; 122 N.C. App. 478, 480, 470 S.E.2d 343, 345 *review denied*, 344 N.C. 435 (1996).

<sup>3</sup>The jury can be additionally instructed as to the respective rights of the landowner and condemnor with regard to the easement. *See North Asheboro-Central Falls Sanitary Dist. v. Canoy*, 252 N.C. 749, 753, 114 S.E.2d 577, 581 (1960).

<sup>4</sup>See G.S. § 40A-64(b)(ii).

<sup>5</sup>The point in time when property is "valued" in a condemnation action is the "date of taking." *Metropolitan Sewerage Dist. of Buncombe County v. Trueblood*, 64 N.C. App. 690, 693-94, 308 S.E.2d 340, 342 (1983), *cert. denied*, 311 N.C. 402, 319 S.E.2d 272 (1984).

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the use of the property at the time of the taking,<sup>6</sup> 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.<sup>7</sup> 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.<sup>8</sup>

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<sup>6</sup>Occurrences or events that may affect the value of the property subsequent to the taking are not to be considered in determining compensation. *Metropolitan Sewerage Dist. of Buncombe County 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 the actual taking inadmissible).

<sup>7</sup>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. Co. 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).

<sup>8</sup>In *Board of Transp. v. Jones*, 297 N.C. 436, 438-439, 255 S.E.2d 185, 187 (1979), decided under G.S. § 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); *Department of Transp. v. Burnham*, 61 N.C. App. 629, 634, 301 S.E.2d 535, 538 (1983); *Board 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 *Department of Transp. v. Fleming*, 112 N.C. App. 580, 583, 436 S.E.2d 407, 409 (1993), expert witness was not allowed to state opinion regarding the value of land when the 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. Cf. *City of Statesville v. Replacement May 2006*

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You should not consider purely imaginative or speculative uses and values.

(The fair market value of the property taken does not include any [increase] [decrease] in value before (*state date of taking*) caused by [the proposed (*state improvement or project*) for which the property was taken] [the reasonable likelihood that the property would be acquired for (*state proposed improvement or project*)] [the condemnation proceeding in which the property was taken].)<sup>9</sup>

(In determining the fair market value of the property, you may consider any decrease in value before the date of the taking caused by physical deterioration of the property within the reasonable control of the landowner and by his unjustified neglect.)<sup>10</sup>

(If the [plaintiff(s)] [defendant(s)] [is] [are] allowed to remove [timber] [a building] [(*state other permanent improvement*)] from the property, the value of the [timber] [building] [(*state other permanent improvement*)] shall not be included in the

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*Cloaninger*, 106 N.C. App. 10, 16, 415 S.E.2d 111, 115 (1992) (expert allowed to base opinion of value on the income from a dairy farm business conducted on the property condemned). The Court of Appeals stated in *Department 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 Authority v. King*, 75 N.C. App. 121, 123, 330 S.E.2d 618, 619 (1985).

<sup>9</sup>G.S. § 40A-65(a). Where the project is expanded before completion or changed to require the taking of additional property, see G.S. § 40A-65(b).

<sup>10</sup>G.S. § 40A-65(c).

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compensation you award. However, the cost of the removal of the [timber] [building] [(state other permanent improvement)] shall be added to the compensation.)<sup>11</sup>

Your verdict must not include any amount for interest.<sup>12</sup> 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 [plaintiff(s)] [defendant(s)] [has] [have] the burden of proof, if you find, by the greater weight of the evidence, the fair market value of the easement at the time of the taking--that is (state date of taking)--then you will answer this issue by writing that amount in dollars and cents in the blank space provided.

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<sup>11</sup>G.S. § 40A-64(c).

<sup>12</sup>The landowner may withdraw the amount deposited with the Court as an estimate of just compensation. Thus, the Court is only required to add interest on 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. G.S. §§ 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. G.S. §§ 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. Board of Transp.*, 317 N.C. 254, 259, 345 S.E.2d 355, 358 (1986).

