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835.15a EMINENT DOMAIN—ISSUE OF JUST COMPENSATION—TAKING OF  
A TEMPORARY CONSTRUCTION OR DRAINAGE EASEMENT BY DEPARTMENT  
OF TRANSPORTATION OR BY MUNICIPALITY FOR HIGHWAY PURPOSES.

*NOTE WELL: This instruction should be given only when a temporary construction or drainage easement 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 issue reads:

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

On this issue the burden of proof is on the landowner.<sup>1</sup> 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 temporary easement.

In this case, the [plaintiff] [defendant] has not taken all of the landowner's property. It has taken a temporary easement or right-of-way for (*state purpose*) across the property and the landowner will have the land restored to [him] [her] after the temporary easement expires.<sup>2</sup> Where a temporary easement is taken for (*state purpose*), the landowner does not give up all the title to the land. The landowner retains a right to continue to use the land in ways that do not interfere with (*state name of condemnor's*) free exercise of the temporary easement acquired.<sup>3</sup>

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The measure of just compensation where the easement is a temporary [construction] [drainage] easement is the rental value of the land actually occupied, for the period of time the land is occupied.<sup>4</sup>

The condemnor is also liable for the damages flowing from the use of the temporary [construction] [drainage] easement. Such damages may include:

[the cost of removal of the landowner's improvements from the easement that are paid by the landowner]

[the cost of constructing an alternate entrance to the property]

[the changes made in the area resulting from the use of the easement that affect the value of the area in the easement or the value of the remaining property of the landowner]

[the removal of trees, crops or improvements from the area in the easement by the condemnor] [and]

[the length of the time the easement was used by the condemnor] [and]

*[state other additional elements of damages that are supported by the evidence].*

Such damages awarded by you may not include lost profits.<sup>5</sup>

Your verdict must not include any amount for interest.<sup>6</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.

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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 rental value of the land actually occupied during the period of time the land is occupied, together with any damages sustained by the property flowing from the use of the temporary [construction] [drainage] easement, as I have explained those elements to you, then you will answer this issue by writing that amount in the blank space provided. However, if you find that the land actually occupied had no rental value and that there were no damages flowing from the use of the temporary [construction] [drainage] easement, then it would be your duty to answer this issue by writing "zero" in the blank space provided.

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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. See *Colonial Pipeline v. Weaver*, 310 N.C. 93, 101, 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).

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

4. See *Town of Nags Head v. Richardson, et al.*, 260 N.C. App. 325, 343, 817 S.E.2d 874, 888 (2018) (citing 4 *Nichols on Eminent Domain* § 12E.01[4] (rev. 3d ed. (2006))), *aff'd per curiam*, 828 S.E.2d 154 (2019); see also *City of Charlotte v. Combs*, 216 N.C. App. 258, 261, 719 S.E.2d 59, 62 (2011) ("Generally, the measure of damages for a temporary taking is the 'rental value of the land actually occupied' by the condemnor.") (quoting *Leigh v. Garysburg Mfg. Co.*, 132 N.C. 167, 10, 43 S.E. 632, 633 (1903)); accord *Kimball Laundry Co. v. United States*, 3338 U.S. 1, 7, 69 S. Ct. 1434, 1438 (1949) ("[T]he proper measure of compensation" for a temporary taking "is the rental that probably could have been obtained.").

5. See *Dep't of Transp. v. Jay Butmataji, LLC*, 260 N.C. App. 516, 522, 818 S.E.2d 171, 176 (2018) (citing *Colonial Pipeline v. Weaver*, 310 N.C. 93, 107, 310 S.E.2d 338, 346 (1984)).

6. 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

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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. Board of Transp.*, 317 N.C. 254, 259, 345 S.E.2d 355, 358 (1986).