

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

NOTE WELL: Use this instruction only for proceedings involving private or local public condemners pursuant to Chapter 40A of the North Carolina General Statutes.

A sample verdict sheet appears at the end of these instructions. It is necessary that the verdict sheet be prepared in advance and that copies be given to jurors at the beginning of the charge.

N.C.G.S. § 40A-64(b) provides that the measure of just compensation for a partial taking is "the greater of either (i) the amount by which the fair market value of the entire tract immediately before the taking exceeds the fair market value of the remainder immediately after the taking; or (ii) the fair market value of the property taken." In most cases it will only be necessary to instruct the jury on one of these measures of just compensation, and the proper instruction will be either N.C.P.I.--Civil 835.20A or N.C.P.I.--Civil 835.22A. However, if it is necessary to have the jury calculate the damages under both methods¹ and then select the greater of the two figures, the following instruction should be used.

Your verdict in this case will take the form of an answer to the issue. That issue appears on the verdict sheet which has been given to you, and you will answer that issue by writing your verdict in the space provided on the verdict sheet.

The issue reads:

¹In partial takings under Chapter 40A, if the value of the remainder is more valuable than the entire property before the taking (because of offset of benefits), compensation to the owner cannot be less than "the fair market value of the property taken" under the "greater of" rule. G.S. § 40A-64(b)(ii). Thus, unlike a Chapter 136 condemnation, under Chapter 40A there can be no zero awards regardless of the amount of the offsetting benefits since the measure of damages in partial takings is the greater of (1) the difference between the before-and-after fair market values of the property taken, or (2) the fair market value of the property taken.

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"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?"

To assist you in arriving at your verdict, the verdict sheet contains two preliminary questions which you must answer before you will be able to answer the issue in the case. There is a space provided for your answer to each of the preliminary questions.

On this issue the burden of proof is on the [plaintiff(s)] [defendant(s)].² 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 for (*state purpose*) across the [plaintiff('s)(s')] [defendant('s)(s')] property. Where an easement is taken for (*state purpose*), the landowner does not give up all the

²On this issue, the burden of proof will always be on the property owner, whether in the capacity of plaintiff or defendant.

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title to his land.³ The landowner retains a right to continue to use his land in ways that do not interfere with (state name of *condemnor's*) free exercise of the easement acquired.⁴

When an easement over a person's property is taken, that person is entitled to receive the greater of either the fair market value of the portion of the land taken, or the difference between the fair market value of the entire property immediately before the taking and the fair market value of the property subject to the easement immediately after the taking.⁵ In other words, there are two

³Where the easement is a temporary construction or drainage easement, the jury should be instructed, additionally, "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).

⁴The jury can be additionally instructed as to the respective rights of the landowner and condemnor of the easement. See *North Asheboro-Central Falls Sanitary Dist. v. Danoy*, 252 N.C. 749, 114 S.E.2d 577 (1960).

⁵See G.S. § 40A-64(b). 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. State Highway Comm'n*, 247 N.C. 671, 676, 102 S.E.2d 229, 233 (1958); *Gallimore v. State Highway Comm'n*, 241 N.C. 350, 354, 85 S.E.2d 392, 396 (1954).

The rule for measure of damages for part 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 him and the value of the easement is virtually the value of the land it embraces. See *Duke Power*

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different methods for computing the amount of the [plaintiff('s)(s')] [defendant('s)(s')] just compensation, and the [plaintiff(s)] [defendant(s)] [is] [are] entitled to receive the greater of the two amounts. Therefore, in order to answer the one issue in this case, there are two preliminary questions you must answer.

The first preliminary question reads: "What was the fair market value of the easement across the the [plaintiff('s)(s')] [defendant('s)(s')] property taken by the [plaintiff] [defendant] at the time of the taking?"

On this first preliminary question the burden of proof is on the [plaintiff(s)] [defendant(s)]. This means that the [plaintiff(s)] [defendant(s)] must prove, by the greater weight of the evidence, the fair market value of the easement across the [plaintiff('s)(s')] [defendant('s)(s')] property taken by the [plaintiff] [defendant] at the time of the taking.

Fair market value is the amount which would be agreed upon as a fair price for an easement by an owner who wishes to sell, but is

Co. v. Rogers, 271 N.C. 318, 321, 156 S.E.2d 244, 247 (1967); *State Highway Comm'n v. Black*, 239 N.C. 198, 203, 79 S.E.2d 778, 783 (1953).

Whether there is any substantial difference in the easement condemned and a fee simple estate depends upon the nature and extent of the easement acquired. Each case must stand on its exact facts. *Carolina Power and Light Co. v. Clark*, 243 N.C. 577, 582, 91 S.E.2d 569, 572 (1956).

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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 as of the time of the taking--that is (*state date of taking*)--and not as of the present day or any other time.⁶ In arriving at the fair market value, you should, in light of all the evidence, consider not only the use of the property at the time of the taking,⁷ 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.⁸ You should consider these

⁶The 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).

⁷Occurrences 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).

⁸In 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.

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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.⁹

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*))

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).

⁹In *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 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), the 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. 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).

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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].)¹⁰

(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.)¹¹

(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 compensation you award. However, the cost of the removal of the [timber] [building] [(*state other permanent improvement*)] shall be added to the compensation.)¹²

¹⁰G.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).

¹¹G.S. § 40A-64(c).

¹²G.S. § 40A-65(c).

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Your answer to this first preliminary question must not include any amount for interest.¹³ Any interest as the law allows will be added by the court to your verdict.

I instruct you that your verdict on this first preliminary question 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.

So, as to this first preliminary question 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 taken at the time of the taking, then you will answer this first preliminary question by writing that amount in dollars and cents in the blank space provided for preliminary question 1.

¹³The 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).

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Members of the jury, after you have answered the first preliminary question, you must then answer the second preliminary question.

The second preliminary question reads: "What was the difference between the fair market value of the entire property immediately before the taking and the fair market value of the remainder immediately after the taking--that is, immediately after it was made subject to the easement?"

On this second question the burden of proof is on the [plaintiff(s)] [defendant(s)].¹⁴ This means that the [plaintiff(s)] [defendant(s)] must prove, by the greater weight of the evidence, the difference between the fair market value of the entire property immediately before the taking and the fair market value of the remainder immediately after the taking--that is, immediately after it was made subject to the easement.

The rules which I have previously given you with respect to measuring the fair market value of property also apply to this second question. Remember, the fair market value of any property is

¹⁴On this issue, the burden of proof will always be on the property owner, whether in the capacity of plaintiff or defendant.

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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 immediately before the time of 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.¹⁵ In arriving at the fair market value of the property immediately before the taking,¹⁶ 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.¹⁷ Likewise, in arriving at the value of the property immediately after it was made subject to the easement, you should, in light of all of 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

¹⁵See *supra* fn. 5.

¹⁶See *supra* fn. 6.

¹⁷See *supra* fn. 7.

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should consider the property as it [was] [will be] at the conclusion of the project.¹⁸ 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.¹⁹ 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].)²⁰

(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.)²¹

¹⁸*Department of Transp. v. Bragg*, 308 N.C. 367, 371, 302 S.E.2d 227, 230 (1983).

¹⁹*See supra* fn. 8.

²⁰*See supra* fn. 9.

²¹*See supra* fn. 10.

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(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 compensation you award. However, the cost of removal of the [timber] [building] [*state other permanent improvement*]) shall be added to the compensation.)²²

(In determining the fair market value of the remaining property immediately after the time of the taking, you must take into account decreases in value to the property after (*state date of valuation*) caused by (*state proposed project*) (including any work performed under an agreement between the parties)²³. Any such decreases in value shall reflect the time that will pass before the damage caused by the improvement or project will be actually realized.)²⁴

(Use if the condemnor introduces²⁵ evidence of general or special benefits for purposes of offset:²⁶ You may also consider

²²See *supra* fn. 11.

²³G.S. § 40A-66(a).

²⁴G.S. § 40A-66(b).

²⁵G.S. § 40A-66(a). *Board Transp. v. Rand*, 299 N.C. 476, 480, 263 S.E.2d 565, 568 (1980) and its predecessors state that the burden of proving the existence and the amount of offset from general or special benefits is on the condemnor. It would be anomalous, however, to separate the jury's calculation

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whether and the extent to which the remainder has benefited from (*state project*). Benefits can be either general or special.²⁷ General benefits are those which arise from the fulfillment of the public object which justified the taking. They are those benefits arising to the vicinity which result from the enjoyment of the facilities provided by the new public work and from the increased general prosperity resulting from such enjoyment. Special benefits

of "just compensation" into two issues. The Pattern Jury Instruction Committee believes that the Supreme Court's reference to "burden of proof" was intended to mean the "burden of production." Accordingly, this optional language should be used where the condemnor produces competent evidence of offsetting general or special benefits.

²⁶Failure to instruct on general or specific benefits can be reversible error. *Board of Transp. v. Rand*, 299 N.C. at 483, 263 S.E.2d at 570. See also *Charlotte v. Recreation Comm'n*, 278 N.C. 26, 31, 178 S.E.2d 601, 607 (1970); *Kirkman v. State Highway Comm'n*, 257 N.C. 428, 433, 126 S.E.2d 107, 111 (1962); *DeBruhl v. State Highway Comm'n*, 247 N.C. 671, 686, 102 S.E.2d 229, 240 (1958); *State Highway Comm'n v. Mode*, 2 N.C. App. 464, 472, 163 S.E.2d 429, 434 (1968).

²⁷The distinction between general and special benefits is not entirely clear. However, the general rule is that special benefits are those arising from the peculiar relation of the land to the public improvement, while general benefits are those arising to the vicinity in general.

Both general and special benefits may arise from a proposed use. Thus, if a new highway is constructed, the benefit to a particular lot by being protected from surface water, or by being left in a desirable size or shape, or by fronting upon a desirable street, is a special benefit. The increase in values for business use of property in the neighborhood on account of traffic on the highways and the increased facility of communication is a general benefit, not peculiar to a particular lot.

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are increases in the value of the remaining land which are peculiar to the owner's property and not shared in common with other landowners in the vicinity. They arise from the relationship of the particular land in question to the public improvement, and may result from physical changes in the land, from proximity to the new project, or in various other ways. Remote, uncertain or speculative benefits are not to be considered. The value of any such benefit shall reflect the time that will pass before the benefit caused by the improvement or project will be actually realized.)²⁸

Your answer to this second preliminary question must not include any amount for interest.²⁹ Any interest as the law allows will be added by the court to your verdict.

I instruct you that your verdict on this second preliminary question 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.

So, as to this second preliminary question on which the [plaintiff(s)] [defendant(s)] [has] [have] the burden of proof, if you find, by the greater weight of the evidence, the difference in

²⁸G.S. §40A-66(b).

²⁹See *supra* fn. 9.

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the fair market value of the [plaintiff('s)(s')] [defendant('s)(s')] entire property immediately before the taking and the fair market value of the property subject to the easement immediately after the taking, then you will answer this second preliminary question by writing that amount in dollars and cents in the blank space provided for preliminary question 2. (However, if you find that the value of the property subject to the easement immediately after the taking is the same as, or greater than, 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.)³⁰

So, finally, after answering the first and second preliminary questions, it is your duty to award the [plaintiff(s)] [defendant(s)] the greater of your answer to the first preliminary question or the second preliminary question in the blank space provided for your answer to this issue.

³⁰Give only if the condemnor has introduced competent evidence of offset by reason of general or special benefits.

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APPENDIX--SAMPLE VERDICT SHEET

STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE

COUNTY OF

SUPERIOR COURT DIVISION

No.

Plaintiff)

)

V E R D I C T

vs.)

)

)

Defendant)

First answer the two preliminary questions in Part I.
Then answer the issue in Part II.

I. Preliminary questions:

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1. What was the fair market value of the portion of the [plaintiff('s)(s')] [defendant('s)(s')] property taken by the [plaintiff] [defendant] at the time of the taking?

Answer: \$ _____.

2. What was the difference between the fair market value of the [plaintiff('s)(s')] [defendant('s)(s')] entire property immediately before the taking and the fair market value of the remainder immediately after the taking?

Answer: \$ _____.

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II. Issue: "What is the amount of just compensation the [plaintiff(s)] [defendant(s)] [is] [are] entitled to recover from (*name condemnor*) for the taking of the easement on the [plaintiff('s)(s')] [defendant('s)(s')] property?"

Verdict: \$ _____. (Fill in the larger dollar amount from Part I's two preliminary questions.)

This is the _____ day of _____, _____.

Foreperson of the Jury