

840.31 CARTWAY PROCEEDING - COMPENSATION.

The (*state number*) issue reads:

"What amount of compensation is the respondent entitled to recover from the petitioner for the cartway established for the petitioner's benefit?"

On this issue the burden of proof is on the respondent. This means that the respondent must prove, by the greater weight of the evidence, the amount of compensation<sup>1</sup> owed by the petitioner for the cartway established for the petitioner's benefit.

In this case, the petitioner has not taken all of the respondent's property. The petitioner has obtained an easement or right-of-way for (*name purpose*) across the respondent's property. Where a cartway is laid off for (*name purpose*), the landowner does not give up all title to *his* land. The landowner retains a right to continue to use *his* land in ways that do not interfere with the petitioner's free exercise of the cartway acquired.

The measure of compensation where a cartway is laid off for the benefit of a petitioner is the difference between the fair market value of the property immediately before the cartway is established and the fair market value of the property immediately after the cartway is established.

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 establishment of the cartway, and the fair market

value of the property immediately after the establishment of the cartway- that is (*give date*)- and not as of any other time. In arriving at the value of the property immediately before the establishment of the cartway, you should, in light of all the evidence, consider not only the use of the property at that time, 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. Likewise, in arriving at the fair market value of the property immediately after the establishment of the cartway, 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 property immediately after the establishment of the cartway, you should consider the property as it [was] [will be] once the petitioner finishes using the cartway for (*name purpose*).)

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

Finally, as to the (*state number*) issue on which the respondent has the burden of proof, if you find, by the greater weight of the evidence, the difference in the fair market value of the property immediately before the date of the establishment of the cartway and the fair market value of the property immediately after the establishment of the cartway, then you will answer this (*state number*) issue by writing that amount in the blank space provided.<sup>2</sup>

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1. N.C. Gen. Stat. § 136-69(b) provides that the respondent's damages shall be calculated as if the land being subjected to the cartway were the subject of a condemnation proceeding. Thus, this instruction is adapted from N.C.P.I.-Civil 835.22A and

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the statutory measure of just compensation set forth in Chapter 40A of the General Statutes. While not generally at issue in cartway proceedings, it is theoretically possible that the respondent could be entitled to additional consideration based on future damages to be caused by the petitioner's construction or use of the cartway. See by analogy N.C. Gen. Stat. § 40A-66(b). Likewise, the petitioner may be entitled to have the jury consider the offsetting effect of any pre-establishment decrease in value to the defendant's land caused by the petitioner's proposed use of his land or action to establish a cartway (by analogy to N.C. Gen. Stat. § 40A-65(a)), any decrease in value to the respondent's property caused by his unjustifiable neglect (by analogy to N.C. Gen. Stat. § 40A-65(c)), the net value realized by the respondent for salvage of trees or buildings in the path of the cartway (by analogy to N.C. Gen. Stat. § 40A-64(c)) or any general or special benefits to be realized by the respondent as a result of the cartway (by analogy to N.C. Gen. Stat. § 40A-66(a)). Because these circumstances are rarely presented in cartway proceedings, optional instructions are not set forth in this instruction. However, in the event the evidence supports giving an additional instruction on one of the aforementioned circumstances, the corresponding optional paragraph from N.C.P.I.-Civil 835.22A can be adapted and given.

2. Note that if the court adapts and gives the optional "general or special benefit" instruction from N.C.P.I.-Civil 835.22A (see note 1 above), the court should also add the following instruction to the mandate:

However, if you find that the value of the property subject to the cartway immediately after its establishment is the same as, or greater than, the value of the property before the date of its establishment, then it would be your duty to answer this issue by writing "zero" in the blank space provided.