N.C.P.I.-Civil. 835.15
EMINENT DOMAIN-ISSUE OF JUST COMPENSATION - TOTAL TAKING BY PRIVATE OR LOCAL PUBLIC CONDEMNORS.
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835.15 EMINENT DOMAIN - ISSUE OF JUST COMPENSATION - TOTAL TAKING BY PRIVATE OR LOCAL PUBLIC CONDEMNORS.

> *NOTE WELL: Use this instruction only for proceedings involving a total taking by a private or local public condemnor pursuant to Chapter 40A of the North Carolina General Statutes.*[1]

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 [plaintiff('s)(s')] [defendant('s)(s') property?"

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 [plaintiff('s)(s')] [defendant('s)(s')] property.

In this case, the [plaintiff] [defendant] has taken all of the [plaintiff('s)(s')] [defendant('s)(s')] property. The measure of just compensation to which the [plaintiff(s)] [defendant(s)] [is] [are] entitled is the fair market value of the property as of the time of the taking.[3]

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 as of the time of the taking- that is as of (*state date of taking*)- and not as of the present day or any other time.[4] 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,[5] 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.[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. (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].)[8]

(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.)[9]

(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.)[10]

Your verdict must not include any amount for interest.[11] 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 property at the time of the taking, then you will answer this issue by writing that amount in dollars and cents in the blank space provided.

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1. *See Town of Hillsborough v. Crabtree*, 143 N.C. App. 707, 711, 547 S.E.2d 139, 141 (2001), *disc. rev. denied*, 354 N.C. 75, 553 S.E.2d 213 (2001) (where, prior to condemnation proceeding, landowner had subdivided 150 acre tract into 14 lots and had accomplished numerous improvements and developments to the property, this should be considered a taking of 14 separate tracts of land instead of a single tract in determining just compensation. *Cf. Barnes v. N.C. State Highway Comm'n.*, 250 N.C. 378, 383-84, 109 S.E.2d 219, 225 (1959) (it is improper to show number and value of lots as separated parcels in an imaginary subdivision where property is undeveloped).

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

3. *See* N.C. Gen. Stat. § 40A-64(a). *See also State Highway Comm'n v. Greensboro Board of Educ.*, 265 N.C. 35, 41, 143 S.E.2d 87, 92 (1965); *Redevelopment Comm'n v. Security Nat'l Bank*, 252 N.C. 595, 603, 114 S.E.2d 688, 694 (1960); *DeBruhl v. State Highway Comm'n*, 247 N.C. 671, 675 102 S.E.2d 229, 232 (1958); *Gallimore v. State Highway Comm'n*, 241 N.C. 350, 353-54, 85 S.E.2d 392, 395 (1955).

4. 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).

5. 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 (1983), *cert. denied*, 311 N.C. 402, 319 S.E.2d 272 (1984) (photographs of damage occurring after the actual taking inadmissible).

6. 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).

7. *In Board 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); *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), the expert witness was not allowed to state an 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. However, *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).

8. N.C. Gen. Stat. § 40A-65(a). Where the project is expanded before completion or changed to require the taking of additional property, *see* N.C. Gen. Stat. § 40A-65(b).

9. N.C. Gen. Stat. § 40A-65(c).

10. N.C. Gen. Stat. § 40A-64(c).

11. 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. 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).