

**9.10 CONDEMNATION - GENERALLY** (Approved 4/96)

***CAUTION***

Every parcel of real estate is unique. So too, every jury charge in a condemnation case should be unique. The model charge cannot substitute for the careful formulation of a charge appropriate to the specific issues presented at trial. Cases, statutes, rules, and texts must be read. A useful source of the relevant authorities is *Buonocore, New Jersey Practice, Skills & Methods, Vol. 21, Chapter 41 (West)*. The primary value of the model charge is to suggest language which the Committee believes will be understandable to a jury. The judge must carefully choose which portions of the charge apply to the case being tried. Furthermore, the judge must recognize that in a condemnation trial the basic issue is the amount of just compensation which the owner is to receive for the property taken and the concept of burden of proof has no place in this inquiry. *Paterson Redev. Agency v. Bienstock*, 123 N.J. Super. 457 (App. Div. 1973). The judge must also recognize that not all damages suffered by a property owner are compensable and explain the issues to the jury in terms of the evidence presented. In this complex field, the judge has a heavy responsibility of relating general principles to the case at hand. Often the issues presented will be more complicated and diverse than those reflected in the model charge. The judge must fashion the charge accordingly.

**A. Introduction**

*[Insert name of condemning authority here]* has the power to take private property and put it to a public use through legal procedures called “condemnation.” You may have heard the phrase commonly used in the context of some health or sanitary code violation. That is not the way we are using it here. The present usage refers to the power of the government to take private property for a public use. As used here, “condemnation” or “eminent domain” does not mean that a building is shut down because of a failure to meet standards, but refers instead to the exercise of the

government's power to take the property in question.

In this case *[insert name of condemning authority here]* has taken *[insert brief description of property or property interests taken here]*<sup>1</sup> belonging to *[Insert name of property owner(s) here]*<sup>2</sup> for the purpose of *[insert description of purpose here]*.

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<sup>1</sup>In the usual condemnation case, the property description is drawn from the complaint. *See State v. Orenstein*, 124 N.J. Super. 295, 298 (App. Div. 1973): "The only issue to be determined by the commissioners and by the fact-finder in event of appeal is the lump sum compensation to be paid by the condemnor . . .", quoting from *State v. New Jersey Zinc Co.*, 40 N.J. 560 (1963) "If there are any issues to be decided other than that of value and damages - - be they a challenge to the plaintiff's right to exercise the power of eminent domain or claim that the condemnor is in fact taking more property and rights than those described in the complaint - - those issues must be presented to and decided by the court before it enters judgment appointing condemnation commissioners." Inverse condemnation actions are initiated by the landowner rather than the condemning agency. However, since the landowner seeks an order directing defendants to institute condemnation proceedings, the litigation thereafter follows the course described in *Orenstein, supra*. Trial by jury is not available in an action to initiate condemnation proceedings, which is treated as an action in lieu of prerogative writ. *O'Neill v. State Highway Dept.*, 77 N.J. Super. 262, 271 (App. Div. 1962, Goldmann, J., dissenting), *rev'd per curiam* for reasons expressed in dissent, 40 N.J. 326. *See State v. Orenstein, supra*, at 301 and authorities cited therein.

<sup>2</sup>Under the "unit" or "single value" rule applied in New Jersey, a single lump sum is awarded to compensate for the *property* taken, not for the sum of the various interests in the property. *See N.J. Sports and Exposition Auth. v. Borough of East Rutherford*, 137 N.J. Super. 271, 279-81 (App. Div. 1975) and authorities cited therein. Therefore, the jury should not concern itself with the exact nature of the interests asserted by multiple claimants. *State v. N.J. Zinc Co.*, 40 N.J. 560, 574 (1963); *N.J. Highway Auth. v. J & F Holding Co.*, 40 N.J. Super. 309, 314 (App. Div. 1956). The lump sum award is divided among the various claimants in a subsequent allocation proceeding (R. 4:73-9(b)), which is conducted as a summary proceeding under R. 4:67.

While tenants thus may not seek a separate lump sum award in the condemnation proceeding, they may submit separate proofs concerning the value of their condemned property. "Such participation would be subject to the trial judge's control over participation by counsel to preserve order and avoid repetitious proofs." *N.J. Sports & Exposition Auth. v. Borough of East Rutherford, supra*, at 284-85.

The United States Constitution and the New Jersey Constitution both guarantee that private property cannot be taken for a public use without just compensation.<sup>3</sup> [Insert name of condemning authority here] and [Insert name of property owner(s) here] cannot agree on the amount of money the owner should receive for the property. It will be up to you to decide what is fair and just compensation in this case.<sup>4</sup>

**B. Definition of Fair Market Value**

The property owner is entitled to just compensation as a matter of constitutional right. Just compensation is the amount of money which will make the property owner whole.<sup>5</sup> The objective of a condemnation award is to indemnify the owner for the loss of his or her property.<sup>6</sup> Just compensation implies full indemnity to the property owner. There is no precise and inflexible rule for the assessment of just compensation.<sup>7</sup>

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<sup>3</sup>U.S. Const., Amends. V, XIV; N.J. Const. (1947), Art. I, Par. 20.

<sup>4</sup>*N.J.S.A. 20:3-29; Jersey City Redevelopment Agency v. Kugler*, 58 N.J. 374, 377-79 (1958); *Port of New York Auth. v. Howell*, 59 N.J. Super. 343, 347 (Law Div. 1960), *aff'd* 68 N.J. Super. 559 (App. Div. 1961).

<sup>5</sup>N.J. Const. (1947), Art. 20, Par. 1; *Borough of Rockaway v. D'Onofrio*, 186 N.J. Super. 344 (App. Div. 1982).

<sup>6</sup>*State by Highway Commissioner v. Gallant*, 42 N.J. 583 (1964); *State v. Rohrer, Inc.*, 80 N.J. 462 (1979).

<sup>7</sup>*Jersey City Redevelopment Agency v. Kugler*, 58 N.J. 374, 383-84 (1971).

“Just compensation” is usually measured by the fair market value of the property<sup>8</sup> on the date of taking,<sup>9</sup> in this case [*Insert date of taking here*]. The fair market value of a property is the amount that a willing buyer and a willing seller would agree upon through arms length voluntary negotiations.<sup>10</sup> Fair market value is the value that would be assigned to the acquired property by knowledgeable parties freely negotiating for its sale based on all surrounding circumstances at the time of taking.<sup>11</sup>

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<sup>8</sup>The unusual character of certain properties may deprive them of a market. For such properties, the reproduction cost less depreciation measure of just compensation may be appropriate.

<sup>9</sup>*State v. Cooper Alloy Corp.*, 136 N.J. Super. 560, 567 (App.Div. 1975). Determination of the date of taking is a question of law for the trial court, not a question for the trier of fact. *N.J. Sports & Exposition Auth. v. Giant Realty Assoc.*, 143 N.J. Super. 343, 346 (Law Div. 1976). Contra: *Housing Auth. of Hoboken v. Segal*, 107 N.J. Super. 565, 568 (Law Div. 1969), *aff'd as modified* 112 N.J. Super. 359 (App. Div. 1970).

Calculation of the date of taking is governed by *N.J.S.A. 20:3-30*. See also *Jersey City Redevelopment Agency v. Kugler*, 58 N.J. 374 (1971). For date of declaration of blight as the date of taking, see *N.J.S.A. 40:55-21.10*; *Washington Market Enterprises, Inc. v. City of Trenton*, 68 N.J. 107, 123-24 (1975). See generally 4 Nichols, *Eminent Domain*, 12.23, p. 72 (rev. 3d ed. 1975).

<sup>10</sup>*City of Trenton v. Lenzner*, 16 N.J. 465, 476 (1954), *cert. den.* 348 U.S. 872, 75 S.Ct. 534, 99 L.Ed. 757 (1955); *State v. Nordstrom*, 54 N.J. 50, 53 (1969), see 4 Nichols, *Eminent Domain*, 12.32, p. 134 (rev. 3d ed. 1975). This is intended as an “objective” test. The actual property owner's sentimental attachment to the property and other subjective factors are not relevant. See e.g., *Port of N.Y. Auth. v. Howell*, 58 N.J. Super. 559, 565 (App. Div. 1961).

<sup>11</sup>*State by Com'r of Transp. v. Caoili*, 135 N.J. 252, 260 (1994) quoting *State v. Silver*, 92 N.J. 507, 514 (1983). “Knowledgeable parties” are individuals who are aware of all relevant information at the time of valuation whether or not such information is easily available. *State by the Com'r of Transp. v. Shein*, 283 N.J. Super. 588 (App. Div. 1995). Fair market value must be based upon the actual physical condition of the property on the date of valuation. This assumes the parties are fully knowledgeable concerning the physical condition of condemned property as of the date of valuation whether or not they are actually aware or could reasonably have become aware of the condition. *Ibid.*

*[Insert appropriate example, such as: Imagine that the owner had put the property in question up for sale. A buyer expressed interest and they both agreed upon a price on the date of taking. During the negotiations, the owner would have pointed out all the features that enhance the value of the property. The buyer, on the other hand, would have pointed out things that diminish its value. Only after discussing all these factors, and taking the time to consider them carefully, would the buyer and the owner finally agree upon a price? That figure would be the property's fair market value, the amount you have to determine by your verdict.]*

**C. Expert Testimony**

No one will ever know for sure what the price would have been if a sale really had taken place on the date of taking. Your job is to determine what the price *probably* would have been.

To help you do this, each side has presented factors and arguments that they believe would influence the price.<sup>12</sup> To support their arguments and help you understand the factors they consider important, each side has presented experts whose explanations and opinions may help you.<sup>13</sup>

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<sup>12</sup>*Village of South Orange v. Alden Corp.*, 71 N.J. 362, 368 (1976).

<sup>13</sup>Qualifications of experts concerning comparable sales are set forth in *N.J.S.A. 2A:83-1*.

**[Where appropriate add: The court has also appointed (insert name of court-appointed expert) to appraise the property.]<sup>14</sup>**

The testimony of experts is offered for your consideration. Their function is only to aid and assist you, not to impose a set value upon you. Their opinions are only deductions from the evidence. *You* must decide the market value of the property after comparing and considering all the evidence, using the expert opinions if, and only if, you find those opinions helpful in your thinking about value.<sup>15</sup>

In evaluating an expert's testimony, you may consider his or her skill, training, experience, and general credibility as a witness. You should also consider whether he or she has a solid factual basis to support his or her opinion.<sup>16</sup>

**[Where appropriate add: These considerations apply to all the expert witnesses, including (insert name of court-appointed expert). Just because he or she was appointed by the court does not mean that his or her opinions are entitled to any more or less weight than the opinions of any other experts. You must judge his or her credibility for yourselves.]<sup>17</sup>**

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<sup>14</sup>*Township of Wayne v. Cassatly*, 137 N.J. Super. 464, 467 (App. Div. 1975) (*per curiam*). “(W)here it appears that the trier of the facts will be confronted with extraordinarily disparate opinions as to valuation, and a timely motion for the appointment of an independent expert is made, the trial court should seriously weigh the possible advantage of an impartial expert.” *Township of Wayne v. Kosoff*, 73 N.J. 8, 14 (1977).

<sup>15</sup>*Port of N.Y. Auth. v. Howell*, 59 N.J. Super. 343, 349 (Law Div. 1960), *aff'd* 68 N.J. Super. 559 (App. Div. 1961).

<sup>16</sup>*See County of Ocean v. Landolfo*, 132, N.J. Super. 523 (App. Div. 1975).

<sup>17</sup>*Township of Wayne v. Kosoff*, 73 N.J. 8, 15 (1977).

You may decide that one expert's opinion of fair market value is correct and reject the other(s). Or you may conclude that none of them are entirely correct. In that case you can come up with another figure for the fair market value of the property; however, you must reach your conclusions on the basis of the evidence.<sup>18</sup>

**D. Viewing**

We know you are not experts and we did not show you the property expecting that you would come up with its fair market value on the date of taking just by looking at it. We showed you the property so that you could better understand the testimony and other evidence presented to you in the courtroom.<sup>19</sup> You should not consider the viewing of the property for any other purpose.<sup>20</sup>

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<sup>18</sup>See generally *State v. Vacation Lands, Inc.*, 92 N.J. Super. 546, 551-2 (App. Div. 1970), *aff'd* 58 N.J. 372 (1971); *State v. Interpace Corp.*, 130 N.J. Super. 322 (App. Div. 1974).

<sup>19</sup>R. 4:73-7.

<sup>20</sup>*State v. Gorga*, 54 N.J. Super. 528 (App. Div. 1959).