

8101 EMINENT DOMAIN: FAIR MARKET VALUE (PARTIAL TAKING)

Question 1 of the Special Verdict asks "What was the fair market value of the entire property on (date of evaluation)?"

In answering this question, consider only the price for which the entire property would have sold on (date of evaluation) by an owner then willing, but not forced, to sell, to a buyer who was then willing and able, but not forced, to buy. Fair market value is not what the entire property would sell for at a forced sale or at a sale made under unusual or extraordinary circumstances, or what might be paid by a particular buyer who might be willing to pay an excessive price for his or her special purpose. In determining fair market value, you should not consider sentimental value to the owner or his or her unwillingness to sell the entire property.

You should consider the use to which the entire property was put by the owner, or any other use to which it was reasonably adaptable. You may base your determination on the most advantageous use or highest and best use shown to exist, either on (date of evaluation) or in the reasonably foreseeable near future after (date of evaluation). The terms "most advantageous use" and "highest and best use" have the same meaning. The highest and best use, or the most advantageous use, of the entire property is the use to which the entire property could legally, physically and economically be put on (date of evaluation) or in the reasonably foreseeable near future after (date of evaluation).

If you consider future uses, they must be so reasonably probable as to affect fair market value on (date of evaluation). They must not be merely possible uses based upon

speculation, theory or conjecture. You should consider every element that establishes the fair market value of the entire property.

Question 2 of the Special Verdict asks "What was the fair market value of the remaining property immediately after the partial taking on (date of evaluation) as if the public project was completed by (date of evaluation)?"

In answering this question, consider only the price for which the remaining property, with the public project completed, would have sold on (date of evaluation) by an owner then willing, but not forced to sell, to a buyer who was then willing and able, but not forced to buy. However, fair market value is not what the remaining property would sell for at a forced sale or at a sale made under unusual or extraordinary circumstances, or what might be paid by a particular buyer who might be willing to pay an excessive price for his or her special purpose. In determining fair market value, you should not consider sentimental value to the owner or his or her unwillingness to sell the remaining property.

You should consider the use to which the remaining property was put by the owner, or any other use to which it was reasonably adaptable. You may base your determination on the most advantageous use or highest and best use thus shown to exist, either on (date of evaluation) or in the reasonably foreseeable near future after (date of evaluation). The terms "most advantageous use" and "highest and best use" have the same meaning. The highest and best use, or the most advantageous use, of the remaining property is such use to which the remaining property could legally, physically and economically be put on (date of evaluation) or in the reasonably foreseeable near future after (date of evaluation). If you consider future uses, they must be so reasonably probable as to affect fair market value on (date of evaluation). They must not be merely possible uses based upon speculation, theory or

conjecture. You should consider every element that establishes the fair market value of the remaining property.

SPECIAL VERDICT

Question 1: What was the fair market value of the entire property on (date of evaluation)? \$ _____

Question 2: What was the fair market value of the remaining property immediately after the partial taking on (date of evaluation) as if the public project was completed by (date of evaluation)? \$ _____

COMMENT

This instruction and comment were approved in 2006. The comment was revised in 2009 and 2011.

Wis. Stat. § 32.09(6).

The definition of "fair market value" is taken from Arents v. ANR Pipeline Company, 2005 WI App. 61, 281 Wis. 2d 173, 189, 696 N.W. 2d 194 (Ct. App. 2005).

Date of Evaluation. Under s.32.09(1), the value of the subject property in eminent domain valuation litigation is to be determined as of the date of evaluation. Schey Enterprises, Inc. v. State, 52 Wis.2d 361, 190 N.W.2d 149 (1971). For a taking under Wis. Stat. § 32.05, the date of evaluation is the date the award is recorded in the register of deeds office, which is also the date of taking. For a taking under Wis. Stat. § 32.06, the date of evaluation is the date of filing the lis pendens.

Value. The principle that the trier of fact is to consider every element which would be considered by the buyer and the seller in the marketplace in setting the price for the subject property on the date of evaluation is found in Ken-Crete Products Company v. State Highway Commission, 24 Wis.2d 355, 359-360, 129 N.W.2d 130 (1964), Herro v. Department of Natural Resources, 67 Wis.2d 407, 420, 227 N.W.2d 456 (1974) and Clarmar Realty Company, Inc. v. Redevelopment Authority of the City of Milwaukee, 129 Wis. 2d 81, 91, 383 N.W.2d 890 (1986); see also 260 North 12th Street, LLC v. State of Wisconsin Dep't of Transportation, 2011 WI 103, ___ Wis.2d ___, ___ N.W.2d ___ in which the court held that evidence of contamination and related remediation costs is admissible in eminent domain cases for valuing the property.

To determine appropriate compensation for the partial taking of property, the jury must determine the fair market value of the entire property on the date of evaluation and the fair market value of the remaining property on the date of evaluation, assuming completion of the public project. Calaway v. Brown County, 202 Wis. 2d 736, 553 N.W. 2d 809 (Ct. App. 1996).

Unit Rule. In a total taking, fair market value must be determined using the "unit rule." Green Bay Broadcasting v. Redevelopment Authority, 116 Wis.2d 1, 342 N.W.2d 27 (1983); see also Hoekstra v. Guardian Pipeline, 2006 WI App 245, 298 Wis.2d 165, 726 N.W.2d 648.

For additional discussion of the unit rule, see Comment, Wis JI-Civil 8100.