

Agenda

Advisory Committee on Model Civil Jury Instructions

November 8, 2010
4:00 to 6:00 p.m.

Administrative Office of the Courts
Scott M. Matheson Courthouse
450 South State Street
Judicial Council Room, Suite N31

Welcome and approval of minutes	Tab 1	John Young
Eminent Domain	Tab 2	Perrin Love
Premises Liability	Tab 3	Peter Summerill

Committee Web Page: <http://www.utcourts.gov/committees/muji/>

Published Instructions: <http://www.utcourts.gov/resources/muji/>

Meeting Schedule: Matheson Courthouse, 4:00 to 6:00 p.m.

December 13, 2010
January 10, 2011 (Education Room)
February 14, 2011
March 14, 2011
April 11, 2011
May 9, 2011 (Education Room)
June 13, 2011
September 12, 2011
October 11, 2011 (Tuesday)
November 14, 2011
December 12, 2011

Tab 1

MINUTES

Advisory Committee on Model Civil Jury Instructions

September 13, 2010

4:00 p.m.

Present: John L. Young (chair), Juli Blanch, Francis J. Carney, Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, John R. Lund, Stephen B. Nebeker, Timothy M. Shea, Paul M. Simmons, Peter W. Summerill, Diane Abegglen (the new appellate court administrator), and Perrin Love (chair of the Eminent Domain subcommittee)

Excused: Honorable William W. Barrett, Jr., and David E. West

1. *Eminent Domain Instructions*. The committee continued its review of the eminent domain instructions.

a. *CV1609. Verdict based on testimony of witnesses*. This instruction was previously approved but was revised to incorporate former CV1609, Owner testifying. “[T]estimony]” was deleted from the last sentence. The committee approved the instruction as modified.

b. *CV1610. Viewing of property*. Mr. Young suggested deleting the instruction because judges rarely allow the jury to view the property. Mr. Love noted that it has been allowed in Utah and thought the instruction accurately stated the law. Mr. Young asked whether the subject should be covered in a generic instruction for all property damage cases. Mr. Lund asked whether including the instruction would lead to more requests to view the property. Mr. Love noted that the Attorney General’s Office felt strongly about including it. The committee approved the instruction.

Dr. Di Paolo joined the meeting.

c. *CV1605. Fair market value*. The instruction defines “fair market value” in terms of what a “prudent and willing” buyer and seller would agree on. CV2010, the comparable instruction in the tort section, leaves out “prudent and.” The committee discussed whether to delete the phrase from CV1605. Messrs. Lund and Love thought the phrase was useful to show that the standard is an objective one and to eliminate the eccentric who would be willing to pay (or would ask for) much more than the property is worth. Dr. Di Paolo thought it was a legal question; she did not know how lay jurors would understand or react to “prudent.” Mr. Love noted that FIRREA uses “prudent” in its definition of “fair market value,” but the Property Act does not. He also noted that the Attorney General’s Office felt strongly about keeping it in the definition. The committee approved CV1605 as written. Mr. Love suggested that other instructions defining “fair market value” be consistent.

d. *CV1616. Severance damages.* Mr. Young suggested that the instruction first set out the parties' claims. Mr. Carney asked whether the instruction presented a jury question or whether it was a matter of the court controlling the evidence that comes in. He also thought the instructions could benefit from examples. Mr. Lund suggested revising the beginning of the instruction to read: "In this case only a portion of the owner's property has been taken. In addition to the fair market value of the property taken, you must determine severance damages to the property that remains." Dr. Di Paolo questioned the use of the term "the taking" and suggested "the condemnation" instead. Ms. Blanch and Mr. Summerill suggested defining "the taking." Dr. Di Paolo suggested "the action on the property which was taken." The committee revised the second sentence of the first paragraph to read: "Severance damages' means any loss of fair market value to the remaining property caused by the taking and/or by the proposed construction of [describe public improvement] on the property taken." The committee also deleted "as part of the entire property" from the second paragraph. The committee approved the instruction as revised.

e. *CV1617. Reasonable cost of repair or restoration as measure of severance damages.* Mr. Love noted that CV 1616 can be given without CV1617, but CV1617 should not be given without CV1616. Mr. Love also said that the jury needs to know the fair market value of the property to decide severance damages using the cost of repair because repair is only appropriate if the property can be restored to its former value. Dr. Di Paolo thought the instruction was hard to understand. Mr. Ferguson asked whether "as part of the whole" was necessary in the first sentence. Mr. Shea suggested deleting "repair or." Mr. Love noted a distinction between "repair" and "restore": "repair" applies to buildings and structures, whereas "restore" applies to the land. Mr. Lund suggested revising the instruction to say "[repair] [restore]," with the court selecting the word that best applies in the particular case. He also suggested using "[taking] [construction of public improvement]." Ms. Blanch asked what happens if the jury finds that the remaining property can be repaired or restored to its pre-taking fair market value but the cost of doing so is greater than the diminution in fair market value. Mr. Love said that in that case the jury should award severance damages under CV1616. He noted that CV1617 was based on CV2009. He thought the instructions should be consistent. Dr. Di Paolo thought that the last paragraph was confusing in that it says that the measure of damages includes the cost of repair even though the property cannot be fully repaired. Mr. Young suggested separating the instruction into two separate instructions--one where it is possible to repair or restore the property to its pre-taking value, and one where it is not. Mr. Lund noted that it is possible to repair the property without returning it to its fair market value. Mr. Love suggested adding the word "substantially" before "repair or restore," but was not sure if the law would

support the addition. Mr. Young suggested revising the instruction to read, "The measure of damages is the lesser of" Mr. Summerill suggested providing a flow chart. Mr. Young suggested using the first two paragraphs of CV2009 or simply cross-referencing CV2009 and citing to condemnation cases as authority. Mr. Shea suggested adding, "If you find that the remaining property can be fully repaired or restored, then the damages are the reasonable cost of repair or restoration." Mr. Ferguson suggested saying, "The measure of damages is (1) the fair market value of the property taken, plus (2) severance damages, plus (3) the cost of [repair] [restoration]." Mr. Summerill suggested something along the following lines:

Please determine the cost of returning the property to fair market value through repair or restoration. If you find that the property cannot be fully returned to fair market value, then determine:

1. The cost of returning the property as close as possible to fair market value, and
2. The difference between the fair market value of the property before the taking and after the [repair] [restoration].

Mr. Young asked whether the jury is entitled to know the effect of its determination. Mr. Lund thought the instruction eliminates the idea of severance damages as diminution in fair market value and elevates the cost of repair or restoration ahead of diminution in fair market value. He questioned whether the instruction accurately stated the law. Mr. Love thought the instruction was inconsistent with CV1616 in that it seems to say that severance damage is the cost of repair. Messrs. Lund and Shea suggested saying, "The measure of severance damages is the reasonable cost to [repair] [restore] the remaining property and the difference between the fair market value of the remaining property before the taking and the fair market value after the taking." Mr. Lund suggested adding, "Restoration should substantially restore the value." Mr. Young noted that CV2009 does not say that, and he did not know of any Utah case saying that one is entitled to the cost of restoration to substantially restore the property and the difference in fair market value. He thought the law may be that one is only entitled to severance damages (as determined under CV1616) if one cannot fully restore the property. Mr. Young suggested using the second and third paragraphs of CV2009 and substituting "taking" for "injury." Mr. Lund suggested ending CV1617 after the first paragraph.

The committee decided that it needs more research on what the law is regarding repair or restoration costs as a measure of severance damages.

f. *CV1619. Vested right of access.* Mr. Love noted that Mr. Shea had questioned the necessity of this instruction. The subcommittee split over whether it was necessary but agreed that it accurately stated the law. The committee approved the instruction.

Mr. Love will provide references for the instruction.

g. *CV1621. Apportionment of just compensation among multiple interests.* At Mr. Love's suggestion, the committee deleted "if any" from the second paragraph. It also deleted "as a whole" at the end of the instruction. The committee approved the instruction as modified.

2. *Schedule.*

a. *Premises Liability.* At the next meeting, the committee will consider premises liability instructions. Mr. Summerill volunteered to draft the instructions based on the instructions given in a recent trial he had.

b. *Design Professional Liability.* After premises liability, the committee will consider design professional liability. Craig Mariger chairs the subcommittee for design professional liability. Mr. Young offered to help with the instructions. He will call Mr. Mariger.

c. *Accountant Liability.* The committee has decided against doing a set of accountant liability instructions.

3. *Causation Instructions Revisited.* Mr. Carney noted that he has had second thoughts about including foreseeability as an element of causation, based on an arbitration where the defendant argued that 56 chiropractic visits were not "caused" by the defendant's negligence because they were not reasonably foreseeable. Mr. Carney thought this was a misuse of the causation instruction.

4. *Next Meeting.* The next meeting will be Tuesday, October 12, 2010, at 4:00 p.m. (Monday, October 11, being Columbus Day).

The meeting concluded at 6:00 p.m.

Tab 2

Eminent Domain

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(1) CV1601. Eminent Domain Committee Notes

These instructions are intended to apply when a condemning authority exercises power of eminent domain pursuant to the Utah Eminent Domain Code, Utah Code Ann. Section 78B-6-501 *et seq.* The instructions are not intended to apply, without substantial modification, to inverse, regulatory or other takings claims under Article I, Section 22 of the Utah Constitution or the Fifth Amendment of the United State Constitution.

The Committee has attempted to organize these instructions in the order that a jury likely would consider them. The Committee found that there was often no logical progression to the MUJI I instructions.

Several MUJI I instructions have been combined with other instructions, or eliminated altogether. Of particular note, the Committee eliminated MUJI 16.3 (Comparable Sales) and 16.14 (Reconstruction Cost, Less Depreciation). The Committee considered these instructions to unfairly highlight certain factors in determining fair market value to the exclusion of other factors. The Committee considered that the matters addressed in these instructions should be addressed by the testimony of witnesses and the arguments of counsel.

(2) CV1602. Condemnation proceedings.

[Name of condemnor] has the right to take private property for public use, but must pay just compensation to [name of property owner]. [Describe public improvement] is a public use. You will determine the just compensation to be awarded to [name of property owner].

References

Utah Const. Article. I, Section 22.

Utah Code Section 78B-6-511.

State v. Ward, 189 P.2d 113 (Utah 1948).

MUJI 1

16.1, 16.4, 16.5

Committee Notes

Approved

(3) CV1603. Definition of just compensation.

Alternative 1:

Just compensation is the fair market value of the property taken, on [valuation date].

Alternative 2:

Just compensation is:

(1) the fair market value of the property taken, and

(2) severance damages, if any, to [name of property owner]'s remaining property caused by the taking.

You should determine these two amounts separately, on [valuation date], and add them together to determine just compensation.

References

Utah Code Section 78B-6-511.

City of Hildale v. Cooke, 2001 UT 56, 28 P.3d 697.

UDOT v. Jones, 694 P.2d 1031 (Utah 1984).

Utah State Rd. Comm'n v. Friberg, 687 P.2d 821 (Utah 1984).

Committee Notes

Alternative 1 should be given when the owner's entire property is taken. Alternative 2 should be given when part of the owner's property is taken and severance damages are in issue. If Alternative 2 is used, the judge should instruct the jury on the definition of "severance damages." See http://www.utcourts.gov/resources/muji/inc_list.asp?action=showRule&id=16#1616>Instruction CV1616, Severance damages.

MUJI 1

16.5

Approved

(4) CV1604. Burden of proof.

[Name of property owner] has the burden to prove the fair market value of the property taken [and the amount of severance damages, if any, to the remaining property].

[[Name of condemnor] has the burden to prove the fair market value of special benefits, if any, to the remaining property.]

References

Utah Code Section 78B-6-511(4).

City of Hildale v. Cooke, 2001 UT 56, 28 P.3d 697.

Utah State Rd. Comm'n v. Friberg, 687 P.2d 821 (Utah 1984).

Utah State Rd. Comm'n. v. Williams, 452 P.2d 548 (Utah 1969).

Utah State Rd. Comm'n. v. Taggart, 19 Utah 2d 247, 430 P.2d 167 (1967).

Utah State Rd. Comm'n. v. Hansen, 14 Utah 2d 305, 383 P.2d 917 (1963).

Committee Notes

The bracketed part of the instruction relating to severance damages should be given only in partial taking cases in which severance damages are in issue. The bracketed part of the instruction relating to special benefits should be given only in partial taking cases in which special benefits are in issue. If the condemnor contends that a property owner had a duty to mitigate severance damages, an additional instruction as to that burden of proof may be given. See generally, Utah State Rd. Comm'n. v. Williams, 452 P.2d 548 (Utah 1969).

MUJI 1

16.6

Approved

(5) CV1605. Fair market value.

Fair market value of the property is the highest price that a prudent and willing buyer would pay to a prudent and willing seller in an open market assuming that:

- (1) there is no pressure on either one to buy or sell; and
 - (2) the buyer and the seller know all of the facts about the property.
- You are to determine fair market value of the property on [valuation date].

References

- Utah Code Section 78B-6-511.
City of Hildale v. Cooke, 2001 UT 56, 28 P.3d 697.
Redevp. Agency of SLC v. Mitsui Invest., Inc., 522 P.2d 1370 (Utah 1974).
Utah State Rd. Comm'n v. Wood, 452 P.2d 872 (1969).
State v. Noble, 305 P.2d 495 (Utah 1957).
Sigurd v. State, 142 P.2d 154 (Utah 1943).

Committee Notes

Approved

(6) CV1606. Fair market value of easement.

[Name of condemnor] has taken the right to use part of [name of property owner]'s property for a specific purpose. That right is called an "easement." After an easement has been taken, [name of property owner] can use the property within the easement for any purpose that does not unreasonably interfere with the easement.

You must determine the fair market value of the easement taken on [valuation date]. In determining fair market value, you must consider how [name of property owner] can use [his] property within the easement.

[You must also determine whether the easement causes severance damages to [name of property owner]'s remaining property, and the amount of those damages, if any.]

References

- City of Hildale v. Cooke, 2001 UT 56, 28 P.3d 697.
Wykoff v. Barton, 646 P.2d 756 (Utah 1982).
Provo City Corp. v. Knudsen, 558 P.2d 1332 (Utah 1977).
North Union Canal Co. v. Newell, 550 P.2d 178 (Utah 1976).

Committee Notes

This instruction should be modified, or an additional instruction given, if there is a dispute about the scope of the easement or the uses remaining to the property owner after the easement is taken, to explain the scope and respective uses under the

easement. The bracketed part of the instruction relating to severance damages should be given only in partial taking cases in which severance damages are in issue.

This instruction addresses the taking of a permanent easement. This instruction should be modified, or an additional instruction given, if a temporary easement is in issue.

Approved

(7) CV1607. Highest and best use.

You must determine fair market value based on the property's highest and best use. Highest and best use is not necessarily the actual use of the property on [valuation date]. The highest and best use includes any potential use that is reasonably probable and that results in the property's highest value . A potential use is reasonably probable if:

- (1) the property is physically suited or adaptable to the potential use;
- (2) the property is legally available for the potential use, or if there is a reasonable probability that any legal restriction or barrier will be removed or modified; and
- (3) there is enough demand for the use in the marketplace to influence the fair market value of the property.

Highest and best use does not include a use that is remote or speculative.

References

City of Hildale v. Cooke, 2001 UT 56, 28 P.3d 697.

Utah State Rd. Comm'n v. Jones, 24 Utah 2d 154, 467 P.2d 420 (1970).

Utah State Rd. Comm'n v. Jacobs, 16 Utah 2d 167, 397 P.2d 463 (1964).

State v. Tedesco, 4 Utah 2d 248, 291 P.2d 1028 (1956).

Committee Notes

The Committee modified the former MUJI 16.17 to eliminate the enumeration of seven factors that the jury may consider. The Committee believes that those seven factors may or may not be relevant in any particular case, and that there may be other relevant factors. The jury ought to be free to consider any factor that a willing buyer and a willing seller would take into account in determining highest and best use.

Approved

(8) CV1608. Reasonable probability of change in zoning or land use restriction.

In determining the property's highest and best use, you may consider potential changes in zoning [and/or land use] restrictions if you find that, on [valuation date]:

- (1) there was a reasonable probability of a change; and
- (2) a prudent and willing buyer and seller would consider the probability of a change in agreeing on a purchase price for the property.

You must disregard potential changes in zoning [and/or land use] restrictions that are remote or speculative.

References

City of Hildale v. Cooke, 2001 UT 56, 28 P.3d 697.

Utah State Rd. Comm'n. v. Jacobs, 16 Utah 2d 167, 397 P.2d 463 (Utah 1964).

Approved

(9) CV1609. Verdict based on testimony of witnesses.

You must determine the fair market value of the property taken, [and any severance damages to the remaining property], based solely on the testimony of the witnesses who have given their opinion. You may consider other evidence only to help you understand and weigh the testimony of the witnesses.

If the witnesses disagreed with one another, you should weigh each opinion against the other[s], based upon the reasons given for each opinion, the facts and other things that each witness relied upon, and each witnesses' qualifications.

[[Name of property owner] has given [his] opinion of the fair market value of the property. In weighing this opinion, you may consider [name of property owner]'s self-interest, familiarity with the property, and experience and qualifications to testify about fair market value.]

Your verdict must be within the range of fair market values offered by the witnesses.

References

City of Hildale v. Cooke, 2001 UT 56, 28 P.3d 697.

UDOT v. Jones, 694 P.2d 1031 (Utah 1984).

Williams v. Oldroyd, 581 P.2d 561 (Utah 1978).

Utah State Rd. Comm'n v. Johnson, 550 P.2d 216 (Utah 1976).

Utah State Rd. Comm'n. v. Steele Ranch, 533 P.2d 888 (Utah 1975).

Utah State Rd. Comm'n. v. Hopkins, 506 P.2d 57 (Utah 1973).

Utah State Rd. Comm'n v. Silliman, 448 P.2d 347 (Utah 1968).

Utah State Rd. Comm'n. v. Taggart, 430 P.2d 167 (Utah 1967).

Weber Basin Water Conserv. Dist. v. Skeen, 328 P.2d 730 (Utah 1958).

Committee Notes

The bracketed part of the first paragraph relating to severance damages should be given only in partial taking cases in which severance damages are in issue.

The last paragraph should be given if the Court determines there is a proper foundation for owner testimony about the value or highest and best use. See, e.g., UDOT v. Jones, 649 P.2d 1031 (Utah 1984); Utah State Road Comm'n v. Johnson, 550 P.2d 216 (Utah 1976).

MUJI 1st

16.2

Approved

(10) CV1610. Viewing of property.

You may consider your viewing of the property only to help you evaluate the evidence you have seen and heard in the courtroom. Your viewing of the property is not itself evidence of fair market value, and you may use it only to help you gain a better understanding of the testimony.

References

Weber Basin Water Conservancy Dist. v. Moore, 272 P.2d 176 (Utah 1954).

MUJI 1

16.18

Approved.

(11) CV1611. Project influence.

In determining the fair market value of the property, you must disregard any increase or decrease in value before [valuation date] caused by [describe public improvement] or by the likelihood that the property would be acquired for [describe public improvement.]

References

Utah Code Section 57-12-13(3).

Board of County Comm'rs of Tooele County v. Ferrebee, 844 P.2d 308 (Utah 1992).

Redevelopment Agency v. Grutter, 734 P.2d 434 (Utah 1986).

United States v. Reynolds, 397 U.S. 14 (1970).

Committee Notes

This instruction should be given when any increase or decrease in value before the taking is caused by the public improvement for which the property is being condemned, is in issue. The instruction should be modified, or an additional instruction given, when an increase or decrease in property value is outside the original "scope of the project," see generally, Redevelopment Agency v. Grutter, 734 P.2d 434 (Utah 1986), United States v. Reynolds, 397 U.S. 14 (1970).

MUJI 1st

Approved

(12) CV1612. Value of undeveloped land.

In determining the fair market value of the property, you may consider whether the property is suitable for development or subdivision, but you must not value the property as if the property had been developed or subdivided.

References

Torsen v. Johnson, 745 P2d 1243 (Utah 1987).

State v. Tedesco, 4 Utah 2d 248, 291 P.2d 1028 (1956).

Committee Notes

This instruction should be given when the property taken is undeveloped land, suitable for development, but no tangible steps have been taken for development. The propriety of the instruction, and the precise wording of the instruction, may vary when certain steps or actions have been taken to subdivide the property, but subdivision has not been completed. See generally, 4 Nichols on Eminent Domain § 12B.14.

Approved

(13) CV1613. Value of improved property.

In determining the fair market value of the property, you must value the land and the improvements as a whole. You must not value the land and improvements separately and then add them together.

References

Utah State Rd. Comm'n v. Brown, 531 P.2d 1294 (Utah 1975).

Utah State Rd. Comm'n v. Papanikolas, 427 P.2d 749 (Utah 1967).

Committee Notes

This instruction should be given when the condemned property is improved.

This instruction may be modified, or an additional instruction given, in a partial taking action, when the loss of improvements is claimed as severance damage.

Approved

(14) CV1614. Business injury or loss of profits.

Alternative 1:

In determining the fair market value of the property, you must disregard any loss of income or profits to the [describe business conducted on the property] caused by the taking. The business is not part of the property, and any loss of business income or profit does not affect the fair market value of the property.

Alternative 2:

One or more of the witnesses has testified to the fair market value of the property using the [describe income approach to value, or capitalized income valuation method]. You may consider this testimony in determining the fair market value of the property. You may not, however, award [name of property owner] a separate amount for loss of income or profits to the [business conducted on the property] caused by the taking. The business is not part of the property, and any loss of business income or profit does not affect the fair market value of the property.

References

Utah State Rd. Comm'n. v. Ouzonjian, 491 P.2d 1093 (Utah 1971).

State v. Noble, 305 P.2d 495 (Utah 1957).

State v. Tedesco, 291 P.2d 1028 (Utah 1956).

Committee Notes

The Committee believes that these alternative instructions should be given to avoid any confusion when an appraiser determines the fair market value of property by capitalizing income. Alternative 1 should be given when no witness capitalizes income on the property to determine fair market value; Alternative 2 should be given when one or more witnesses capitalize income.

Approved

(15) CV1615. Interest and moving expenses.

You must not award any amount for interest, moving expenses or costs of these proceedings. These amounts will be determined separately by me according to the law.

References

Utah Code Section 78B-6-510(5).

State Road Comm'n v. Brown, 531 P.2d 1294 (Utah 1975).

Redevelopment Agency v. Barrutia, 526 P.2d 47 (Utah 1974).

MUJI 1

16.12

Approved

(16) CV1616. Severance damages.

[Name of condemnor] has taken only part of [name of property owner]'s property. In addition to determining the fair market value of the property taken, you must determine whether there have been any severance damages to the remaining property.

Severance damages means any loss of fair market value to the remaining property caused by the taking [and/or by the proposed construction of [describe public improvement] on the property taken].

The measure of severance damages is the difference between the fair market value of the remaining property before the taking and the fair market value of the remaining property after the taking.

Severance damages must be reasonably certain and not remote or speculative.

References

Utah Code Section 78B-6-511(2).

Ivers v. UDOT, 2007 UT 19, 154 P.3d 802.

UDOT v. Harvey Real Estate, 2002 UT 107, 57 P.3d 1088.

City of Hildale v. Cooke, 28 P.3d 697, 2001 UT 56.

Carpet Barn v. State, 786 P.2d 770 (Utah 1990).

UDOT v. D'Ambrosio, 743 P.2d 1220 (Utah 1987).

State v. Williams, 22 Utah 2d 301, 452 P.2d 548 (Utah 1969).

Committee Notes

This instruction should be given only if (1) there is a partial taking and (2) the property owner claims severance damages to the remaining property.

Ordinarily, construction has been completed before trial, and the jury considers whether the public improvement as constructed causes severance damage. The word “proposed” in brackets should be included in the instruction in the trial when construction has yet to be completed.

Ordinarily, there is no difference between the amount of severance damages caused by the taking or caused by construction of the improvement. The bracketed part of the instruction should be given in the instance in which there are claimed severance damages caused by construction in addition to those caused by the taking.

This instruction should be modified, or an additional instruction given, if a property owner alleges severance damages caused by construction of the public improvement outside the owner’s condemned property. In Ivers v. UDOT, 2007 UT 19, 154 P.3d 802, the Utah Supreme Court held that a property owner could recover severance damages for loss of view caused by construction of the improvement outside the owner’s condemned property if “the condemnation and use of the condemned land is essential to the project.” 2007 UT 19, ¶ 22. The Committee is uncertain as to whether Ivers applies to any alleged severance damages other than loss of view, and therefore believes that any instruction for severance damages caused by construction of the improvement outside the owner’s property should be tailored to the facts and circumstances of a particular case.

As appropriate, this instruction may be modified, or an additional instruction given, to clarify that an owner is not entitled to severance damages from a non-compensable loss, such as a loss of visibility from the public highway. See, e.g, Ivers, supra, ¶ 15.

Approved

(17) CV1617. Reasonable cost of repair or restoration as measure of severance damages.

If you find that

(1) ~~the fair market value of~~ the remaining property can be fully [repaired] or [restored] to its fair market value, ~~as part of the whole,~~ before the taking, and

(2) the reasonable cost to fully [repair] or [restore] the remaining property is less than the difference between its fair market value before and after the taking,

then the measure of severance damage is the reasonable cost to [repair] or [restore] the remaining property.

If you find that the remaining property cannot be fully [repaired] ~~or~~ [restored] to its fair market value before the taking, then the measure of severance damage is the reasonable cost to [repair] [restore] the remaining property plus the difference between the fair market value of the remaining property before the taking and the fair market value after [repair] ~~or~~ [restoration], ~~plus the reasonable cost to repair or restore the remaining property.~~

CV1617. Reasonable cost of cure as measure of severance damages.

Severance damages may be cured or reduced by restoring the remaining property [to its fair market value before the taking], if the reasonable cost to restore the property is less than the amount of severance damages.

If you find that severance damages will be wholly cured, then you must award [name of property owner] the lesser of (1) the reasonable cost to cure, or (2) the full amount of severance damages, but not both.

If you find that severance damages will be reduced but not wholly cured, you must award [name of property owner] the lesser of (1) the reasonable cost to reduce severance damages, plus remaining severance damages, or (2) the full amount of severance damages, but not both.

[Name of the party asserting cost to cure as the measure of severance damages] has the burden to prove that the cure is feasible, reasonably certain, and not speculative or remote.

References

UDOT v. Rayco Corp., 599 P.2d 481 (Utah 1979)

State v. Fox, 515 P.2d 450 (Utah 1973)

State v. Ward, 189 P.2d 113 (Utah 1948)

Thorsen v. Johnson, 745 P.2d 1243 (Utah 1987).

Pehrson v. Saderup, 28 Utah 2d 77, 498 P.2d 648 (1972).

Ault v. Dubois, 739 P.2d 1117 (Utah App. 1987).

Committee Notes:

This instruction should be given if one of the parties contends that the cost to repair or restore the remaining property is less than the severance damage to the remaining property in the absence of repair or restoration. The Committee based this instruction on CV 2009, Economic Damages. Injury to Real Property.

This instruction should be given if a party contends that severance damages can be cured by restoring the property to its fair market value before the taking. The Committee is unaware of any Utah law holding that the cost to cure is a proper measure, if the severance damages can be reduced but not wholly cured through restoration.

(18) CV1618. Access.

[Name of condemnor] may regulate access to and from the public roads to promote the general welfare, but must provide [name of property owner] with reasonable access to [his] property. Access may be reasonable even though it is not the most direct or convenient access. The right of reasonable access does not include a right to access at a specific location on the property, or from a specific road or intersection, or in a specific direction.

If you find that [name of property owner] does not have reasonable access to [his] remaining property after the taking, then you must consider this change in access in determining severance damages. If you find that [name of property owner] has reasonable access after the taking, then you must disregard this change in access in determining severance damages.

References

Utah Code Section 72-7-103.

State v. Harvey Real Estate, 2002 UT 107, 57 P.3d 1088.

State Rd. Comm'n. v. Utah Sand & Gravel, 454 P.2d 292 (Utah 1969).

State Rd. Comm'n., v. Utah Sugar Co., 22 Utah 2d 77, 448 P.2d 901 (Utah 1968).

Hampton v. State, 445 P.2d 708 (Utah 1968).

Utah Road Comm'n v. Hansen, 14 Utah 2d 305, 383 P.2d 917 (Utah 1963).

Springville Banking Co. v. Burton, 349 P.2d 157 (Utah 1960).

Committee Notes

This instruction should be given only when a property owner claims that a partial taking has deprived the owner of reasonable access to the remaining property after the taking, when the access was derived from the fact that the property abutted a public street or right of way. This instruction should be modified when a specific easement, access point, or right of way has been taken or closed in connection with a partial taking. For example, if a property owner has a legally established access point, right of way, or easement, derived from a contract, deed, or prior governmental grant, that access point would be a property right and the taking of that access point must be considered in determining severance damages, whether or not the owner still had reasonable access without the access point. See generally, Hampton v. State, 445 P.2d 708 (Utah 1968).

Approved

(19) CV1619. Vested right of access.

[Describe right of access] is a property right. [Name of condemnor] has taken the [identify right of access] for a public use. The [identify right of access] must be considered in determining the fair market value of the property taken, [and severance damages to the remaining property].

Approved

(20) CV1620. Special benefits.

If you find that the taking caused severance damages, then you must determine whether the taking and the construction of [describe public improvement] create a special benefit that increases the fair market value of the remaining property.

A benefit is special if it results directly from the taking or the [proposed] construction of the [describe public improvement] on the property taken, and is not shared by the general public.

Special benefits must be reasonably certain and not remote or speculative.

If you find that special benefits have increased the fair market value of the remaining property, you must subtract the amount of that benefit from any severance damages to the remaining property. If the special benefits are greater than the severance damages, then you must find that there are no severance damages. You cannot subtract the amount of any special benefit from the fair market value of the property taken.

References

Utah Code Section 78B-6-511(4).

Hempstead v. Salt Lake City, 32 Utah 261, 90 P. 397 (Utah 1907).

Kimball v. Salt Lake City, 32 Utah 253, 90 P. 395 (Utah 1907).

Committee Notes

This instruction should be given only if (1) there is a partial taking, (2) the property owner claims severance damages, and (3) the condemnor claims that the taking has created a special benefit to the remaining property.

Ordinarily, construction has been completed before trial, and the jury considers whether the public improvement as constructed creates special benefits. The word "proposed" in brackets should be included in the instruction in the rare trial when construction has yet to be completed.

Approved

(21) CV1621 Apportionment of just compensation among multiple interests.

The [identify property owner, lessee, easement owner and any other interest holder] all have an interest in the property, and are entitled to just compensation for the taking of their interest.

First you must determine the fair market value of the property taken [and severance damages to the remaining property]. Then you must divide that amount between/among the [property owner, tenant, easement owner and any other interest holder], according to the interest of each. The total amount of the compensation cannot be more than the fair market value of the property taken, [and severance damages to the remaining property].

References

Utah State Rd. Comm'n. v. Brown, 531 P.2d 1294 (Utah 1975).

Committee Notes

Approved

(22) CV1622. Apportionment of just compensation between owner and tenant.

To apportion the total amount of just compensation between the [name of property owner] and [name of lessee], you must determine the “bonus value” of [name of lessee]’s lease, if any. Bonus value is the difference between:

(1) the present value of the total rent that [name of lessee] would have paid under the lease from [insert date when lessee lost possession of the premises], until insert date that lease expires or end of term]

(2) the present value of the total fair market rent that a willing and informed lessee would pay to rent the premises between [date that lessees lost possession], and [[dte that lease expires or ends], and that a willing an informed owner would accept, on the open market.

[Name of lessee] is entitled to the bonus value of the lease as just compensation for the taking of the lease. [Name of property owner] is entitled to the remaining amount of the fair market value of the property taken, [and severance damages, if any,] as a whole.

References

Utah State Rd. Comm’n. v. Brown, 531 P.2d 1294 (Utah 1975).

Committee Notes

This instruction should be given after http://www.utcourts.gov/resources/muji/inc_list.asp?action=showRule&id=16#1621>Instruction CV1621, Apportionment of just compensation among multiple interests.

This instruction does not contemplate that the jury will itself undertake the appraisal of the leasehold by computing its value. Rather, the instruction is intended to guide the jury in assessing and utilizing expert testimony on the issue of leasehold valuation. The purpose of this instruction is therefore similar in purpose to the instruction on just compensation.

Many lease agreements contain provisions addressing the apportionment of compensation in the event of condemnation. This instruction would be appropriate only if the lessee’s right to condemnation compensation is not governed by the lease or other agreement.

Tab 3

Premises Liability

- (1) CV1101. Elements of claim for harm because of property condition. 1
- (2) CV1102. Duty of property owner. 1

(1) CV1101. Elements of claim for harm because of property condition.

[Name of plaintiff] claims that [he] was harmed because of the way [name of defendant] managed [his] property. To prove this claim, [name of plaintiff] must prove the following:

- (1) [name of defendant] was negligent in the use or maintenance of the property;
- (2) [name of plaintiff] was harmed; and
- (3) [name of defendant]'s negligence was a cause of [name of plaintiff]'s harm.

References

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(2) CV1102. Duty of property owner.

A person who controls property is negligent if they fail to use reasonable care to keep the property in a reasonably safe condition. A person who controls property must use reasonable care to discover any unsafe conditions and to repair, replace, or give adequate warning of anything that could be reasonably expected to harm others. In deciding whether [name of defendant] used reasonable care, you may consider, among other factors, the following:

- (1) the location of the property;
- (2) the likelihood that someone would come onto the property in the same manner as [name of plaintiff] did;
- (3) the likelihood of harm;
- (4) the probable seriousness of the harm;
- (5) whether [name of defendant] knew or should have known of the condition that created the risk of harm; and
- (6) whether [name of defendant] created the condition that created the risk of harm.

References

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11.3

Committee Notes