

EMINENT DOMAIN

INTRODUCTION

Eminent domain is the inherent power of a state to take or damage private property for a public use. In Illinois, it is subject to the constitutional limitation that, “Private property shall not be taken or damaged for public use without just compensation as provided by law.” Ill. Const. Art. 1, §15 (1970). Illinois has, by legislation, delegated similar powers to governmental units, public bodies and public service corporations.

There are two statutory procedures available to take private property for public use.¹ One is set forth in Article 7 of the Illinois Code of Civil Procedure, 735 ILCS 5/7-101 to 7-129 (1994). The other is set forth as part of local improvement procedures in connection with special assessments. Illinois Municipal Code, 65 ILCS 5/9-2-14 to 9-2-37 (1994). The rules of procedure and evidence under the two Acts differ.

Procedure Under Article 7

Under the provisions of Article 7, suit is commenced by the filing of a complaint setting forth the plaintiff's right to exercise the power, legally describing the property to be taken, the nature of the interest to be taken, and naming the parties of record. The complaint may also describe property not taken but which might be damaged as a result of the taking. The complaint must also state the purpose of the public use, its necessity, and that the compensation cannot be agreed upon, or that the owners are incapable of consenting, or are non-residents (&7-102).

All persons having an interest of record in the property or possessory rights are proper defendants. Thus, it may be desirable to investigate the rights of occupants, since questions may arise as to the taking or damaging of leaseholds that are not recorded.

The complaint is not to be answered and defendants are not defaulted. However, the complaint may be attacked by a motion to dismiss or traverse, to test the legal sufficiency of the proceeding in advance of trial. The motion may question the plaintiff's right to exercise the power of eminent domain, the propriety of the proposed use, its necessity, and whether a bona fide attempt to agree on compensation has been made. *See Lake County Forest Preserve Dist. v. First Nat. Bank*, 154 Ill.App.3d 45, 506 N.E.2d 424, 106 Ill.Dec. 717 (2d Dist.1987).

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Under limited circumstances governmental land use decisions may constitute a “taking.” (*See First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987); *cf. MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 106 S.Ct. 2561, 91 L.Ed.2d 285 (1986); *Foster & Kleiser v. City of Chicago*, 146 Ill.App.3d 928, 497 N.E.2d 459, 100 Ill.Dec. 481 (1st Dist.1986); *Suhadolnik v. City of Springfield*, 184 Ill.App.3d 155, 540 N.E.2d 895, 133 Ill.Dec. 29 (4th Dist.1989); *Mahoney Grease Service, Inc. v. City of Joliet*, 85 Ill.App.3d 578, 406 N.E.2d 911, 40 Ill.Dec. 708 (3d Dist.1980).) In such cases the landowner affected, rather than the governmental unit, is the plaintiff, and therefore this is known as “inverse condemnation.” The instructions in this series have been drafted to cover the usual eminent domain proceedings brought by the governmental unit.

Any person not made a party may become such by filing an intervening petition, setting forth that the petitioner is the owner of or has an interest in the property which will be taken or damaged by the proposed work (§7-124). While the statute refers only to a “person not made a party,” the cases and legislative history indicate that a party defendant may also file a petition (now a counterclaim) asserting that property not described in the complaint will be damaged by the taking of the described property. *See Department of Conservation v. Franzen*, 43 Ill.App.3d 374, 381; 356 N.E.2d 1245, 1248; 1 Ill.Dec. 912, 915 (1976); *Johnson v. Freeport & M.R.R. Co.*, 111 Ill. 413, 416, 417 (1884).

As far as a jury trial is concerned, the 1870 Constitution (Art. 2, §13) provided, in pertinent part (emphasis added):

Private property shall not be taken or damaged for public use without just compensation. Such compensation, *when not made by the state* shall be ascertained by a jury, as shall be prescribed by law.

In *Department of Public Works & Bldgs. v. Kirkendall*, 415 Ill. 214, 112 N.E.2d 611 (1953), the Illinois Supreme Court was faced with the issue of whether there is a right to a jury trial in a condemnation proceeding where the compensation is to be paid by the State. The court concluded that where the sovereign state exercises its right of eminent domain, the right to a jury trial is not guaranteed by common law or the constitution nor is it required by any statute. The court also specifically said it was not holding or inferring that a jury trial would be prohibited, merely that there was no right “unless and until the General Assembly acts upon the subject.” 415 Ill. at 223, 112 N.E.2d at 615.

The 1970 Illinois Constitution amended article 2, §13 of the 1870 constitution by eliminating the phrase “when not made by the state” and providing that:

Private property shall not be taken or damaged for public use without just compensation as provided by law. Such compensation shall be determined by a jury as provided by law.

Illinois Constitution of 1970, article 1, §15.

The eminent domain provisions of the Code of Civil Procedure (735 ILCS 5/7-101 et seq. (1994)), however, make a distinction between cases in which compensation is made by the state and cases in which the compensation is not made by the state. Section 7-101 provides, in relevant part (emphasis added):

Private property shall not be taken or damaged for public use without just compensation, and in all cases in which compensation is *not* made by the state in its corporate capacity . . . such compensation *shall* be ascertained by a jury, as hereinafter prescribed. *Where compensation is so made by the state* ... any party upon application *may* have a trial by jury to ascertain the just compensation to be paid.

Quick Take

There is a special procedure concerning the taking of property by certain public bodies and for certain purposes specified in the statute (*see* 735 ILCS 5/7-103 (1994)) in which there is a preliminary hearing by the court without a jury. In that hearing the court determines an amount as preliminary just compensation. If it has not done so previously, the court passes upon the plaintiff's authority to condemn, its proper exercise of that authority, and whether the property to be taken is subject to the power of eminent domain. If the plaintiff deposits with the court the amount fixed as preliminary just compensation, the court then enters an order vesting title in the plaintiff. The preliminary just compensation deposited in court by the state may be withdrawn by the defendants, subject to a condition of reimbursement of any excess in the event that the final award of just compensation is less than the preliminary award (735 ILCS 5/7-106, 7-109, 7-123 (1994)). If the final award is greater than the preliminary compensation deposited, the condemning party must deposit the balance (§7-123) plus interest under certain circumstances (*see* §7-108 and *Department of Transp. v. Rasmussen*, 108 Ill.App.3d 615, 439 N.E.2d 48, 64 Ill.Dec. 119 (1982); *Waukegan Port Dist. v. Kyritsis*, 128 Ill.App.3d 751, 471 N.E.2d 217, 83 Ill.Dec. 918 (1984)).

Trial

There are some special rules regarding the admissibility of evidence (*see* 735 ILCS 5/7-119 (1994)), but in general, the rules of evidence are the same as in other cases. The testimony consists mainly of opinions of persons having knowledge of values and proof of voluntary sales of similar property. The condemning body has the burden of introducing evidence as to the value of property taken. That evidence may be controverted by witnesses called for the defense. The defendants have the burden of proving that their property which is not taken will be damaged and have the further burden of introducing evidence as to the nature and extent of that damage. The burden of proceeding with the evidence and the right to open and close may shift under certain circumstances. *Department of Business & Economic Development v. Brummel*, 52 Ill.2d 538, 288 N.E.2d 392 (1972); *Department of Business & Economic Development v. Baumann*, 56 Ill.2d 382, 386-387, 308 N.E.2d 580, 582 (1974); *Department of Public Works & Bldgs. v. Roehrig*, 45 Ill.App.3d 189, 359 N.E.2d 752, 3 Ill.Dec. 893 (1976). Under §7-121, all evidence of value and the determination by the jury of just compensation must be made as of the date on which the complaint was filed. However, the property owners have the right to establish the amount of any depreciation in the value of their property which was proximately caused by the public improvement for which their property was taken. *City of Rock Island v. Moline National Bank*, 54 Ill.App.3d 853, 368 N.E.2d 1113, 11 Ill.Dec. 505 (1977). And in *Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 104 S.Ct. 2187, 81 L.Ed.2d 1 (1984), the Supreme Court said that if the owner of the property is given substantially less than the market value of his property at the time of the "taking" by the government, the fifth amendment is violated. Therefore, if an owner's property appreciates substantially between the time the complaint is filed and the time that payment is tendered, it is arguable that §7-121 may be subject to qualification or exception. There are presently no Illinois appellate decisions considering the effect of the *Kirby* decision on Illinois condemnation law and practices.

Either party has the right to have the jury view the premises (§7-118). This is true even though there has been a substantial alteration of the premises between the date of filing the petition and the time of the jury view. *Department of Public Works & Bldgs. v. Remmerie*, 29

Ill.2d 40, 192 N.E.2d 877 (1963). The view of the premises is in the nature of evidence and may be considered by the jury in their deliberations. *City of Chicago v. Chicago Title & Trust Co.*, 331 Ill. 322, 163 N.E. 17 (1928); *Rock Island & P. Ry. Co. v. Leisy Brewing Co.*, 174 Ill. 547, 51 N.E. 572 (1898). A verdict above the maximum or less than the minimum fixed by testimony will not be sustained. *Central Illinois Public Service Co. v. Rider*, 12 Ill.2d 326, 329; 146 N.E.2d 48, 50 (1957). The question of a petitioner's right to acquire property is one with which the jury has no concern, and it is improper to call the jury's attention to the fact that the land is being taken against the owner's will. *Waukegan Park Dist. v. First Nat. Bank*, 22 Ill.2d 238, 174 N.E.2d 824 (1961).

When the issue of apportionment is given to the jury in a proceeding involving a landlord and tenant, "it is the duty of the jury to first fix the fair cash market value of the entire property as between the petitioner and all the defendants, and then to divide the same according to the respective rights of the defendants." *Lambert v. Giffin*, 257 Ill. 152, 158; 100 N.E. 496, 499 (1913); *see also Chicago B. & Q. R. Co. v. F. Reisch & Bros.*, 247 Ill. 350, 353; 93 N.E. 383, 385 (1910); *City of Rockford v. Robert Hallen, Inc.*, 51 Ill.App.3d 22, 25-26; 366 N.E.2d 977, 979; 9 Ill.Dec. 466, 468 (2d Dist.1977).

Whether the jury trial right extends to separate apportionment proceedings under 735 ILCS 5/7-123, 7-126, and 7-127, is unclear. Such separate, post-deposit apportionment proceedings are allowable because "[t]he statute does not make it mandatory that the jury shall apportion the award." *Commercial Delivery Service v. Medema*, 7 Ill.App.2d 419, 423; 129 N.E.2d 579, 580 (1st Dist.1955). No court has expressly ruled on the right to jury trial in such an apportionment proceeding. In *Chicago & N.W. Ry. Co. v. Miller*, 251 Ill. 58, 66; 95 N.E. 1027, 1030 (1911), the court found that two tenants of land taken by the railroad for a passenger station had a right to a jury trial on the assessment and awarding of damages due them from the owner of the fee. The court stated: "[s]uch a trial is a matter of right in a case of this kind." However, the right found by the supreme court to exist for the tenants was in the procedural context of the initial condemnation proceeding, not in a separate apportionment proceeding.

Local Improvement Proceedings

A local improvement proceeding is instituted by the adoption of an ordinance which provides for the taking or damaging of property for a specific improvement. A petition is filed in the name of the municipality to ascertain the just compensation for the property taken or damaged, the property to be benefited by the improvement, and the amount of those benefits. Commissioners are designated to prepare a report of the assessment of the cost of the improvement (735 ILCS 5/9-2-16 and 9-2-18 (1994)).

Questions concerning the value of property taken, the damage, and the benefits are heard by a jury. The commissioners' report is prima facie evidence of the correctness of the amounts assessed.

The court, in its discretion, may allow the jury to view the premises. 65 ILCS 5/9-2-29 (1994). However, the view is not evidence. *City of Chicago v. Koff*, 341 Ill. 520, 173 N.E. 666 (1930); *Rich v. Chicago*, 187 Ill. 396, 58 N.E. 306 (1900); *Chicago v. Van Schaack Bros. Chemical Works*, 330 Ill. 264, 161 N.E. 486 (1928).

Instructions

The following instructions have been drafted for use under the eminent domain provisions of article 7 of the Code of Civil Procedure.

The instructions may be used in a local improvement proceeding where appropriate although they will have to be modified. For example, the local improvement proceedings still are commenced by a “petition” rather than by a “complaint” as in eminent domain proceedings. In the instructions the party filing the complaint is referred to as “plaintiff” rather than “petitioner” or “condemnor.”

300.01 Cautionary Instructions—Evidence to Be Considered

Evidence consists of testimony of the witnesses, exhibits admitted by the court and your view of the property.

Notes on Use

This instruction should be used in place of the third sentence of paragraph [3], IPI 1.01. It adds the element of the jury's view of the property.

Do not use this instruction in a proceeding under the Local Improvement Act.

Comment

At the request of either party to a condemnation suit, the jury shall go upon the land sought to be taken or damaged and examine it. 65 ILCS 5/9-2-29 (1994); 735 ILCS 5/7-118 (1994). The jury's view of the property is in the nature of evidence (*Union Electric Power Co. v. Sauget*, 1 Ill.2d 125, 132; 115 N.E.2d 246, 250 (1953); *Cook County v. North Shore Electric Co.*, 390 Ill. 147, 151; 60 N.E.2d 855, 856 (1945); *South Park Commissioners v. Ayer*, 237 Ill. 211, 221; 86 N.E. 704, 708 (1908); *Forest Preserve Dist. v. Kelley*, 69 Ill.App.3d 309, 317; 387 N.E.2d 368, 375; 25 Ill.Dec. 712, 719 (2d Dist.1979)), and is to be considered by the jury with the evidence in arriving at a verdict fixing the amount of compensation. *City of Chicago v. Callender*, 396 Ill. 371, 380; 71 N.E.2d 643, 648 (1947); *Forest Preserve Dist. v. Eckhoff*, 372 Ill. 391, 395-396; 24 N.E.2d 52, 55 (1939); *South Park Commissioners v. Ayer*, 237 Ill. at 211, 221; 86 N.E. at 708.

300.02 Jurors' Use of Their Own Knowledge of Land Values

The committee recommends that no instruction be given which states that jurors may rely upon their own knowledge of land values.

Comment

The jurors may weigh the evidence and judge the credibility of the witnesses on the basis of their observations and experiences in life. That rule is covered sufficiently by IPI 2.01 and IPI 1.04. Jurors may not ignore or go outside the evidence in determining land values. *See* IPI 300.61.

300.03 Expert Witness

The committee recommends that no instruction be given which comments on the weight of expert testimony.

Comment

Instructions concerning the weight to be given expert testimony are disapproved in the Comment to IPI 4.09 (former IPI 2.10), and the same principles apply in eminent domain cases. A new issue that arises in the area of eminent domain involves the Illinois courts' adoption of Rules 703 and 705 of the Federal Rules of Evidence in *Wilson v. Clark*, 84 Ill.2d 186, 417 N.E.2d 1322, 49 Ill.Dec. 308 (1981), *cert. denied*, 454 U.S. 836, 102 S.Ct. 140, 70 L.Ed.2d 117 (1981), and in *Department of Transp. v. Beeson*, 137 Ill.App.3d 908, 485 N.E.2d 511, 92 Ill.Dec. 700 (2d.Dist.1985). Evidence of sales of comparable property is admissible (*see* Comment to IPI 300.40), and thus can be relied upon by an expert witness in giving and supporting his opinion. As a result of the adoption of Rules 703 and 705, an expert witness is now also permitted to testify to, and rely upon, comparable sales *not admitted into evidence* as a basis for his or her opinion of value. *Department of Transportation v. Beeson, supra; City of Chicago v. Anthony*, 136 Ill.2d 169, 554 N.E.2d 1381, 144 Ill.Dec. 93 (1990).

The opposite party is entitled to a limiting instruction advising the jury to consider the underlying statements of comparable sales only to evaluate the basis of the expert's opinion, not as substantive evidence. *People v. Anderson*, 113 Ill.2d 1, 495 N.E.2d 485, 99 Ill.Dec. 104 (1986); *Department of Transp. v. Amoco Oil Co.*, 174 Ill.App.3d 479, 528 N.E.2d 1018, 124 Ill.Dec. 127 (2d Dist.1988). A limiting instruction should be given by the court at the time the evidence is introduced. When the jury is instructed, only Cautionary Instruction 1.01[7] should be used to remind the jury of the limited purpose of the testimony. If a limiting instruction other than IPI 1.01[7] is again given during jury instructions, it would be duplicative.

For an extensive discussion as to what underlying facts or data an expert can testify to in support of his opinion, *see City of Chicago v. Anthony, supra*.

300.04 Witnesses' Magnification or Minimization of Property Values

The committee recommends that no instruction be given which tells the jury that they may ignore testimony which exaggerates or minimizes the value of the property.

Comment

While instructions on this point have been given and held not to be error, *e.g.* *Forest Preserve Dist. v. Krol*, 12 Ill.2d 139, 145 N.E.2d 599 (1957); *Jackson County v. Wayman*, 369 Ill. 123, 125; 15 N.E.2d 854, 855 (1938), it is the opinion of the committee that this type of instruction constitutes an argument on the evidence. IPI 1.01 [4] (former IPI 2.01) adequately covers the subject of credibility of witnesses.

300.05 Testimony of Owner

The committee recommends that no instruction be given which singles out the testimony of the owner.

Comment

The tests which are set forth in IPI 1.01 (former IPI 2.01) for weighing the testimony of witnesses are applicable to the witnesses of a party. The reasons for not singling out the testimony of a party are given in the comment of IPI 4.06 (former IPI 2.05).

**300.10 Issues Made by Complaint—Fee Interest Taken
—No Damage to Remainder Claimed**

This is a proceeding in which the plaintiff, e.g., Department of Transportation of the State of Illinois, has filed a complaint to take certain property of the defendant by exercising the power of eminent domain. Eminent domain is the power given by law to a [public body] [public service company] to take private property for a public use. The constitution of the State of Illinois provides that private property shall not be taken or damaged for public use without just compensation.

You are to decide the amount of just compensation to be paid the defendant for the property which [will be] [has been] taken.

You must not concern yourselves with the right of plaintiff to take the property or the need for the property or the wisdom of locating the proposed public use on defendant's property.

Notes on Use

The past tense should be used when the property has been taken under the “Quick Take” provisions of the Eminent Domain Act, 735 ILCS 5/7-103.

Comment

Where no damage to remainder is claimed, the jury will consider and decide only the question as to what amount is just compensation to the defendant for the property which has been taken from him. Issues as to the power of the petitioner to take, or whether the taking is for a public use, are preliminary questions of law to be decided by the court. *City of Chicago v. Pridmore*, 12 Ill.2d 447, 451-452; 147 N.E.2d 54, 57 (1957); *St. Clair County Housing Authority v. Quirin*, 379 Ill. 52, 57; 39 N.E.2d 363, 365 (1942); *Department of Public Works & Bldgs. v. Lewis*, 344 Ill. 253, 260; 176 N.E. 345, 348 (1931); *Sanitary Dist. v. Johnson*, 343 Ill. 11, 16; 174 N.E. 862, 864 (1931); *Department of Public Works & Bldgs. v. Wilson & Co.*, 62 Ill.2d 131, 141-142, 145; 340 N.E.2d 12, 17, 19 (1975); *Department of Transp. v. Association of Franciscan Fathers*, 93 Ill.App.3d 1141, 1145-1148; 418 N.E.2d 36, 39-41; 49 Ill.Dec. 392, 395-397 (2d Dist.1981); *Department of Transp. v. Janssen*, 34 Ill.App.3d 244, 252; 339 N.E.2d 359, 365 (2d Dist.1975).

**300.11 Issues Made by Complaint and Counterclaim—
Fee Interest Taken—Fact of Damage to
Remainder Contested**

This is a proceeding in which the plaintiff, e.g., Department of Transportation of the State of Illinois, has filed a complaint to take certain property of the defendant by exercising the power of eminent domain. Eminent domain is the power given by law to a [public body] [public service company] to take private property for a public use. The constitution of the State of Illinois provides that private property shall not be taken or damaged for public use without just compensation.

The defendant has filed a counterclaim claiming that the remainder [will be] [has been] damaged by the taking. Plaintiff denies that there [will be] [has been] any damage to the remainder.

You are to decide the following questions:

First, what is the amount of just compensation to be paid the defendant for the property which [will be] [has been] taken.

Second, [will] [has] the remainder [be] [been] damaged by the taking and, if so, then,

Third, what is the amount of money which will reasonably and fairly compensate the defendant for that damage.

You must not concern yourselves with the right of plaintiff to take the property of the defendant or the need for the property or the wisdom of locating the proposed public use on defendant's property.

Notes on Use

The past tense should be used when the property has been taken under the “Quick Take” provisions of the Eminent Domain Act, 735 ILCS 5/7-103.

IPI 300.31 should be used with this instruction.

Comment

When the defendant files a counterclaim claiming damage to the remainder and the plaintiff contests the existence of any such damage, three issues are presented to the jury: (1) the amount of compensation which the defendant is entitled to recover for the property taken; (2) whether the remainder has been damaged by the taking; and, if so, (3) the extent of the damage to the remainder. *Department of Public Works & Bldgs. v. Lewis*, 344 Ill. 253, 260; 176 N.E. 345, 348 (1931); *Sanitary Dist. v. Johnson*, 343 Ill. 11, 16, 174 N.E. 862, 864 (1931); *Department of Transp. v. Association of Franciscan Fathers*, 93 Ill.App.3d 1141, 1148; 418 N.E.2d 36, 41; 49 Ill.Dec. 392, 397 (2d Dist.1981); *Department of Transp. v. Catholic Diocese of Belleville*, 63 Ill.App.3d 683, 691; 379 N.E.2d 1343, 1349; 20 Ill.Dec. 275, 281 (5th Dist.1978).

This instruction was approved in *Oak Brook Park Dist. v. Oak Brook Development Co.*, 170 Ill.App.3d 221, 524 N.E.2d 213, 120 Ill.Dec. 448 (2d Dist.1988) (error to refuse instruction when plaintiff denied damage to the remainder).

**300.12 Issues Made by Complaint and Counterclaim—
Fee Interest Taken—Fact of Damage to
Remainder Admitted—Amount Contested**

This is a proceeding in which the plaintiff, e.g., Department of Transportation of the State of Illinois, has filed a complaint to take certain property of the defendant by exercising the power of eminent domain. Eminent domain is the power given by law to a [public body] [public service company] to take private property for a public use. The constitution of the State of Illinois provides that private property shall not be taken or damaged for public use without just compensation.

The defendant has filed a counterclaim that the remainder [will be] [has been] damaged by the taking. Plaintiff denies damage in the amount claimed.

You are to decide the following questions:

First, what is the amount of just compensation to be paid the defendant for the property which [will be] [has been] taken.

Second, what is the amount of money which will reasonably and fairly compensate the defendant for damage to the remainder.

You must not concern yourselves with the right of plaintiff to take the property of the defendant or the need for the property or the wisdom of locating the proposed public use on defendant's property.

Notes on Use

The past tense should be used when the property has been taken under the “Quick Take” provisions of the Eminent Domain Act, 735 ILCS 5/7-103 (1994).

If the plaintiff denies damages to the remainder, IPI 300.11, not 300.12, is the proper instruction. *Oak Brook Park Dist. v. Oak Brook Development Co.*, 170 Ill.App.3d 221, 524 N.E.2d 213, 120 Ill.Dec. 448 (2d Dist.1988).

Comment

When the defendant files a counterclaim claiming damages to the remainder and plaintiff admits the existence of damage but contests the amount of that damage there are two issues: (1) the amount of compensation which the defendant is entitled to recover for the property taken, and (2) the amount of money which the defendant is entitled to recover for damage to the remainder. *Department of Public Works & Bldgs. v. Lewis*, 344 Ill. 253, 260; 176 N.E. 345, 348 (1931); *Sanitary Dist. v. Johnson*, 343 Ill. 11, 16; 174 N.E. 862, 864 (1931); *Department of Transp. v. Association of Franciscan Fathers*, 93 Ill.App.3d 1141, 1148; 418 N.E.2d 36, 41; 49 Ill.Dec. 392, 397 (2d Dist.1981); *Department of Transp. v. Catholic Diocese of Belleville*, 63 Ill.App.3d 683, 691; 379 N.E.2d 1343, 1349; 20 Ill.Dec. 275, 281 (5th Dist.1978).

**300.13 Issues Made By Complaint Which Also
Describes Remainder—Fee Interest Taken—
Fact of Damage to Remainder
Contested—No Counterclaim Filed**

This is a proceeding in which the plaintiff, e.g., Department of Transportation of the State of Illinois, has filed a complaint to take certain property of the defendant by exercising the power of eminent domain. Eminent domain is the power given by law to a [public body] [public service company] to take private property for a public use. The constitution of the State of Illinois provides that private property shall not be taken or damaged for public use without just compensation.

You are to decide the following questions:

First, what is the amount of just compensation to be paid the defendant for the property which [will be] [has been] taken.

Second, [will] [has] the remainder [be] [been] damaged by the taking and, if so, then,

Third, what is the amount of money which will reasonably and fairly compensate the defendant for that damage.

You must not concern yourselves with the right of plaintiff to take the property of the defendant or the need for the property or the wisdom of locating the proposed public use on defendant's property.

Notes on Use

This instruction should be used in cases where the plaintiff, while not admitting the existence of damage to the remainder, nonetheless describes the remainder as well as the part taken, thereby eliminating the necessity of filing a counterclaim.

The past tense should be used when the property has been taken under the “Quick Take” provisions of the Eminent Domain Act, 735 ILCS 5/7-103 (1994).

IPI 300.31 should be used with this instruction.

**300.14 Issues Made by Complaint Which Also
Describes Remainder—Fee Interest Taken—
Fact of Damage to Remainder Admitted—
Amount Contested—No Counterclaim Filed**

This is a proceeding in which the plaintiff, e.g., Department of Transportation of the State of Illinois, has filed a complaint to take certain property of the defendant by exercising the power of eminent domain. Eminent domain is the power given by law to a [public body] [public service company] to take private property for a public use. The constitution of the State of Illinois provides that private property shall not be taken or damaged for public use without just compensation.

You are to decide the following questions:

First, what is the amount of just compensation to be paid the defendant for the property which [will be] [has been] taken.

Second, what is the amount of money which will reasonably and fairly compensate the defendant for damage to the remainder.

You must not concern yourselves with the right of plaintiff to take the property of the defendant or the need for the property or the wisdom of locating the proposed public use on defendant's property.

Notes on Use

The past tense should be used when the property has been taken under the “Quick Take” provisions of the Eminent Domain Act, 735 ILCS 5/7-103 (1994).

Comment

See Comment to IPI 300.12.

**300.15 Issues Made By Complaint—Easement Strip—
Underground Pipeline or able—No
Damage to Remainder Claimed**

This is a proceeding in which the plaintiff, e.g., Public Gas Company, has filed a complaint to acquire a perpetual easement to operate and maintain a e.g., pipeline across the property of the defendant, by exercising the power of eminent domain. Eminent domain is the power given by law to a [public body] [public service company] to take private property for a public use. The constitution of the State of Illinois provides that private property shall not be taken or damaged for public use without just compensation.

You are to decide the amount of money which will reasonably and fairly compensate the defendant for the damage within the easement strip caused by the presence of the easement.

You must not concern yourselves with the right of plaintiff to acquire the easement, the need for the easement, or the wisdom of locating the e.g., pipeline on defendant's property.

Notes on Use

For overhead electric transmission line cases *see* IPI 300.18 through IPI 300.22.

Where there is competent evidence that the easement has caused no damage, this instruction should be modified to raise the issue of whether the owner is entitled to any compensation. *Midwestern Gas Transmission Co. v. Mason*, 31 Ill.2d 340, 343; 201 N.E.2d 379, 381 (1964).

**300.16 Issues Made by Complaint and Counterclaim—
Easement Strip—Underground Pipeline or
Cable—Fact of Damage to Remainder
Contested**

This is a proceeding in which the plaintiff, e.g., Public Gas Company, has filed a complaint to acquire a perpetual easement to operate and maintain a e.g., pipeline across the property of the defendant, by exercising the power of eminent domain. Eminent domain is the power given by law to a [public body] [public service company] to take private property for a public use. The constitution of the State of Illinois provides that private property shall not be taken or damaged for public use without just compensation.

The defendant has filed a counterclaim claiming that property outside the easement strip will be damaged by the taking. Plaintiff denies that the property outside the easement strip will be damaged.

You are to decide the following questions:

First, what is the amount of money which will reasonably and fairly compensate the defendant for the damage within the easement strip caused by the presence of the easement.

Second, will the property outside the easement strip be damaged by the presence of the easement and, if so, then,

Third, what is the amount of money which will reasonably and fairly compensate the defendant for that damage.

You must not concern yourselves with the right of plaintiff to acquire the easement, the need for the easement or the wisdom of locating the e.g., pipeline on the defendant's property.

Notes on Use

IPI 300.32 should be used with this instruction.

**300.17 Issues Made by Complaint and Counterclaim—
Easement Taken—Fact of Damage to
Remainder Admitted—Amount Contested**

This is a proceeding in which the plaintiff, e.g., Public Gas Company, has filed a complaint to acquire a perpetual easement to operate and maintain a e.g., pipeline across the property of the defendant, by exercising the power of eminent domain. Eminent domain is the power given by law to a [public body] [public service company] to take private property for a public use. The constitution of the State of Illinois provides that private property shall not be taken or damaged for public use without just compensation.

The defendant has filed a counterclaim claiming that property outside the easement strip will be damaged by the taking. Plaintiff denies damage in the amount claimed.

You are to decide the following questions:

First, what is the amount of money which will reasonably and fairly compensate the defendant for the damage within the easement strip caused by the presence of the easement.

Second, what is the amount of money which will reasonably and fairly compensate the defendant for damage to the property outside the easement strip.

You must not concern yourselves with the right of plaintiff to acquire the easement, the need for the easement or the wisdom of locating the e.g., pipeline on defendant's property.

**300.18 Issues Made by Complaint—Overhead Electric
Transmission Line—Fact of Damage to
Easement Strip Admitted—Amount
Contested—No Damage to Remainder
Claimed**

This is a proceeding in which the plaintiff, e.g., Public Electric Company, has filed a complaint to acquire a perpetual easement to construct, operate and maintain an electric transmission line across the property of the defendant by exercising the power of eminent domain. Eminent domain is the power given by law to a [public body] [public service company] to take private property for a public use. The constitution of the State of Illinois provides that private property shall not be taken or damaged for public use without just compensation.

You are to decide the following questions:

First, what is the amount of just compensation to be paid the defendant for that part of [defendant, his, her, its] property which is occupied by the structures supporting the transmission line.

Second, what is the amount of money which will reasonably and fairly compensate the defendant for the damage to that part of the easement strip which is not occupied by the structures.

Notes on Use

Use IPI 300.56 with this instruction. For underground wire cases, use IPI 300.15, 300.16 or 300.17.

Comment

In eminent domain suits involving the erection of overhead electrical transmission lines, the following issues may have to be determined by the jury: (1) the value of the land actually occupied by the structures supporting the power line; (2) whether the land inside the easement strip which is not occupied by the structures will depreciate in value and, if it will, (3) the amount of that depreciation; (4) whether the remainder of the tract outside the easement strip will be damaged; if so, (5) the amount of that damage. *Central Illinois Public Service Co. v. Montgomery*, 81 Ill.App.2d 289, 225 N.E.2d 412 (5th Dist.1967) (abstract decision); *Central Ill. Public Service Co. v. Lee*, 409 Ill. 19, 23; 98 N.E.2d 746, 749 (1951); *Illinois Power & Light Corp. v. Barnett*, 338 Ill. 499, 505; 170 N.E. 717, 720 (1930); *Illinois Power & Light Corp. v. Parks*, 322 Ill. 313, 319; 153 N.E. 483, 486 (1926). In order that an alleged element of damage is properly considered in determining the extent of the damage suffered, the damage must be direct and proximate, and not such as is merely possible or conceivable by the imagination. *Illinois Power & Light Corp. v. Peterson*, 322 Ill. 342, 349; 153 N.E. 577, 579 (1926); *Central Illinois Public Service Co. v. Montgomery, supra*.

IPI 300.18 through 300.22 undertake to assist the practitioner in drafting an issues instruction tailored to a number of different circumstances which may arise in a case involving the erection of overhead transmission lines. For example, if there is no damage to the remainder claimed, IPI 300.18 or IPI 300.19 will be appropriate. IPI 300.18 would be used if damage to the

easement strip is admitted, but the amount of damages is contested. Similarly, IPI 300.19 would be used if both damages to the easement strip and amount are contested. Likewise, IPI 300.20, 300.21 or 300.22 would be appropriate when damage to the remainder is claimed.

**300.19 Issues Made by Complaint—Overhead Electric
Transmission Line—Fact of Damage to
Easement Strip Contested—No Damage
to Remainder Claimed**

This is a proceeding in which the plaintiff, e.g., Public Electric Company, has filed a complaint to take a perpetual easement to construct, operate and maintain an electric transmission line across the property of the defendant by exercising the power of eminent domain. Eminent domain is the power given by law to a [public body] [public service company] to take private property for a public use. The constitution of the State of Illinois provides that private property shall not be taken or damaged for public use without just compensation.

You are to decide the following questions:

First, what is the amount of just compensation to be paid the defendant for that part of [defendant, his, her, its] property which is occupied by the structures supporting the transmission line.

Second, will there be damage to the part of the easement strip not occupied by the structures and, if so, then,

Third, what is the amount of money which will reasonably and fairly compensate the defendant for the damage to that part of the easement strip not occupied by the structures.

You must not concern yourselves with the right of plaintiff to acquire the easement, the need for the easement, or the wisdom of locating the transmission line on defendant's property.

Notes on Use

Use IPI 300.55 with this instruction.

Comment

See Note on Use and Comment to IPI 300.18.

**300.20 Issues Made by Complaint--Overhead Electric
Transmission Line--Fact of Damage to
Easement Strip and Remainder Admitted—
Amount Contested**

This is a proceeding in which the plaintiff, e.g., Public Electric Company, has filed a complaint to acquire a perpetual easement to construct, operate and maintain an electric transmission line across the property of the defendant by exercising the power of eminent domain. Eminent domain is the power given by law to a [public body] [public service company] to take private property for a public use. The constitution of the State of Illinois provides that private property shall not be taken or damaged for public use without just compensation.

Plaintiff admits that the easement strip will be damaged and also admits that the property outside the easement strip will be damaged. The amount of damages is contested.

You are to decide the following questions:

First, what is the amount of just compensation to be paid the defendant for that part of [defendant, his, her, its] property which is occupied by the structures supporting the transmission line.

Second, what is the amount of money which will reasonably and fairly compensate the defendant for the damage to the part of the easement strip not occupied by the structures.

Third, what is the amount of money which will reasonably and fairly compensate the defendant for the damage to his property outside the easement strip caused by the presence of the transmission line and structures and the use of the easement.

You must not concern yourselves with the right of plaintiff to acquire the easement, the need for the easement, or the wisdom of locating the transmission line on defendant's property.

Notes on Use

Use IPI 300.56 and 300.58 with this instruction.

Comment

See Notes on Use and Comment to IPI 300.18.

**300.21 Issues Made by Complaint--Overhead Electric
Transmission Line--Fact of Damage to
Easement Strip Admitted--Amount
Contested--Fact of Damage to Remainder
Contested**

This is a proceeding in which the plaintiff, e.g., Public Electric Company, has filed a complaint to acquire a perpetual easement to construct, operate and maintain an electric transmission line across the property of the defendant by exercising the power of eminent domain. Eminent domain is the power given by law to a [public body] [public service company] to take private property for a public use. The constitution of the State of Illinois provides that private property shall not be taken or damaged for public use without just compensation.

Plaintiff admits that the easement strip will be damaged but contests the amount of that damage.

The defendant has filed a counterclaim claiming that property outside the easement strip will be damaged. Plaintiff denies that the property outside the easement strip will be damaged.

You are to decide the following questions:

First, what is the amount of just compensation to be paid the defendant for that part of [defendant, his, her, its] property which is occupied by the structures supporting the transmission line.

Second, what is the amount of money which will reasonably and fairly compensate the defendant for the damage to the part of the easement strip not occupied by the structures.

Third, will the property outside the easement strip be damaged by the presence of the transmission line and structures and the use of the easement, and, if so, then,

Fourth, what is the amount of money which will reasonably and fairly compensate the defendant for the damage to the property outside the easement strip.

You must not concern yourselves with the right of plaintiff to acquire the easement, the need for the easement, or the wisdom of locating the transmission line on defendant's property.

Notes on Use

IPI 300.32, 300.56 and 300.57 should be used with this instruction.

Comment

See Comment to IPI 300.18.

**300.22 Issues Made by Complaint--Overhead Electric
Transmission Line--Damage Claimed to
Easement Strip and Remainder--Both
Contested**

This is a proceeding in which the plaintiff, e.g., Public Electric Company, has filed a complaint to acquire a perpetual easement to construct, operate and maintain an electric transmission line across the property of the defendant by exercising the power of eminent domain. Eminent domain is the power given by law to a [public body] [public service company] to take private property for a public use. The constitution of the State of Illinois provides that private property shall not be taken or damaged for public use without just compensation.

The defendant claims that the easement strip will be damaged and has also filed a counterclaim claiming that his property outside the easement strip will be damaged. The plaintiff denies that there will be any damage to the easement strip or to the property outside the easement strip.

You are to decide the following questions:

First, what is the amount of just compensation to be paid the defendant for that part of [defendant, his, her, its] property which is occupied by the structures supporting the transmission line.

Second, will there be damage to the part of the easement strip not occupied by the structures and, if so, then,

Third, what is the amount of money which will reasonably and fairly compensate the defendant for the damage to the part of the easement strip not occupied by the structures.

Fourth, will the property of the defendant outside the easement strip be damaged by the presence of the transmission lines, structures and the use of the easement, and, if so, then,

Fifth, what is the amount of money which will reasonably and fairly compensate the defendant for the damage to the property of the defendant outside the easement strip.

You must not concern yourselves with the right of plaintiff to acquire the easement, the need for the easement, or the wisdom of locating the transmission line on defendant's property.

Notes on Use

IPI 300.32, 300.55 and 300.57 should be used with this instruction.

Comment

See Comment to IPI 300.18.

**300.23 Issues Made by Complaint of Tenant—Total
Taking of Fee Interest—Total Taking of
Leasehold Interest**

This is a proceeding in which the plaintiff, [e.g., Department of Transportation of the State of Illinois], has filed a complaint to take certain property of the defendant by exercising the power of eminent domain. Eminent domain is the power given by law to a [public body] [public service company] to take private property for a public use. The constitution of the State of Illinois provides that private property shall not be taken or damaged for public use without just compensation.

The defendant, [landlord's name], is the owner of the property and is the landlord. The defendant, [tenant's name], is the tenant.

The tenant has filed a counterclaim asking that the value of [his, her, its] leasehold interest in the property be determined.

You are to decide the following questions:

First, what is the total amount of just compensation to be paid for the entire property.

Second, what part of that total is the fair rental value of the leasehold.

You must not concern yourselves with the right of plaintiff to take the property or the need for the property or the wisdom of locating the proposed public use on the property.

Comment

In the case of a dispute between a landlord and tenant who has filed for a separate award, the parties have the right to have a determination made as to their respective shares in the compensation awarded for the taking of the leased property. *Department of Public Works v. Bohne*, 415 Ill. 253, 113 N.E.2d 319 (1953).

When the issue of apportionment is given to the jury in a landlord-tenant dispute, “it is the duty of the jury to first fix the fair cash market value of the entire property as between the petitioner and all the defendants, and then to divide the same according to the respective rights of the defendants.” *Lambert v. Giffin*, 257 Ill. 152, 158; 100 N.E. 496, 499 (1912); *see also Chicago B. & Q. R. Co. v. F. Reisch & Bros.*, 247 Ill. 350, 93 N.E. 383, 385 (1910); *City of Rockford v. Robert Hallen, Inc.*, 51 Ill.App.3d 22, 25-26; 366 N.E.2d 977, 979; 9 Ill.Dec. 466, 468 (2d Dist.1977). Aside from the situation where a tenant requests a separate finding for the value of a leasehold at the trial on the issue of just compensation, the statute also provides a separate procedure for distribution of the award of compensation for the acquisition of fee title. 735 ILCS 5/7-123 (1994).

Whether the jury trial right extends to a *separate* apportionment proceeding under 735 ILCS 5/7-123, 5/7-126, and 5/7-127, is unclear. Such separate, post-deposit apportionment proceedings are allowable because “[t]he statute does not make it mandatory that the jury shall apportion the award.” *Commercial Delivery Service, Inc. v. Medema*, 7 Ill.App.2d 419, 129

N.E.2d 579 (1st Dist.1955). In *Chicago & N.W.R. Co. v. Miller*, 251 Ill. 58, 66; 95 N.E. 1027, 1030 (1911), the court found that two tenants of land taken by the railroad for a passenger station had a right to a jury trial on the assessment and awarding of damages due them from the owner of the fee. The court stated, “[s]uch a trial is a matter of right in a case of this kind.” However, the right found by the supreme court to exist for the tenants was in the procedural context of the initial condemnation proceeding, not in a separate apportionment proceeding.

**300.24 Issues Made by Complaint—Leasehold the
Only Interest Taken—Tenant's Right to
Compensation Contested**

This is a proceeding in which the plaintiff, [e.g., Department of Transportation of the State of Illinois], has filed a complaint to take certain property of the defendant by exercising the power of eminent domain. Eminent domain is the power given by law to a [public body] [public service company] to take private property for a public use. The constitution of the State of Illinois provides that private property shall not be taken or damaged for public use without just compensation.

You are to decide the amount of just compensation to be paid for the taking of the leasehold interest.

You must not concern yourselves with the right of plaintiff to take the leasehold interest or the need for the leasehold interest or the wisdom of locating the proposed public use on the leased property.

Comment

This instruction covers the situation where the only interest taken is the entire leasehold. For example, a state agency might condemn the leasehold interest in office space occupied by a particular tenant. In that event, the obligation of the tenant to pay rent is extinguished. The landlord would receive the present value of the reserved rent for the remainder of the term, and the tenant would only be entitled to any “bonus” value of his lease. *See* discussion in *Department of Public Works v. Metropolitan Life Ins. Co.*, 42 Ill.App.2d 378, 384-389, 192 N.E.2d 607, 610-613 (1st Dist.1963), and Comment to IPI 300.59.

300.30 Burden of Proof on Plaintiff

The committee recommends that no instruction be given on burden of proof on the plaintiff.

Comment

The burden upon the plaintiff-condemnor is to introduce evidence as to the value of the property which it seeks to take. *Chicago, B. & Q. R. Co. v. F. Reisch & Bros.*, 247 Ill. 350, 354, 93 N.E. 383, 385 (1910); *Illinois Power & Light Corp. v. Talbott*, 321 Ill. 538, 545; 152 N.E. 486, 488 (1926); *Cook County v. Holland*, 3 Ill.2d 36, 42; 119 N.E.2d 760, 763 (1954); *Department of Public Works & Bldgs. v. Finks*, 10 Ill.2d 15, 18; 139 N.E.2d 267, 269 (1956); *Department of Public Works & Bldgs. v. Dixon*, 37 Ill.2d 518, 520; 229 N.E.2d 679, 680 (1967); *Department of Transportation v. Schlechte*, 94 Ill.App.3d 187, 189; 418 N.E.2d 1000, 1001; 50 Ill.Dec. 6, 7 (5th Dist.1981); *Lake County Forest Preserve Dist. v. Kerrigan*, 58 Ill.App.3d 249, 252; 374 N.E.2d 27, 29; 15 Ill.Dec. 734, 737 (2d Dist.1978); *Department of Transportation v. Zabel*, 47 Ill.App.3d 1049, 1052; 362 N.E.2d 687, 690; 6 Ill.Dec. 52, 55 (3d Dist.1977). If the plaintiff fails to introduce any competent evidence of that value, the complaint will be dismissed. *Mauvaisterre Drainage & Levee Dist. v. Wabash R. Co.*, 299 Ill. 299, 317; 132 N.E. 559, 566; 22 A.L.R. 944 (1921); *Lake County Forest Preserve District v. Kerrigan*, 58 Ill.App.3d 249, 252; 374 N.E.2d 27, 29; 15 Ill.Dec. 734, 736 (2d Dist.1978); *Department of Public Works & Bldgs. v. Dixon*, 68 Ill.App.2d 106, 110; 215 N.E.2d 449, 451 (5th Dist.1966), *rev'd on other grounds*, 37 Ill.2d 518, 229 N.E.2d 679 (1967). Moreover, where the only competent evidence of value is undisputed, then the court may direct a verdict on that evidence. *Peoples Gas Light & Coke Co. v. Buckles*, 24 Ill.2d 520, 540; 182 N.E.2d 169, 180 (1962), *cert. denied*, 371 U.S. 185, 83 S.Ct. 266, 9 L.Ed.2d 227 (1962).

A condemnation proceeding differs from the ordinary civil action. The opinions of the condemnor's witnesses will ordinarily differ as to value, and the defendant's witness may not agree with each other. The result is that the jury is not presented with an issue on opposed propositions of fact. They are not confronted with the necessity of finding a value or no value, of accepting the highest figure testified to or the lowest. A verdict is valid provided it falls anywhere within the range of testimony. *See* the Comment to IPI 300.61. The true burden is one of introducing evidence, and the decision on whether it has been met is for the court, not the jury. *Lake County Forest Preserve Dist. v. Kerrigan*, 58 Ill.App.3d 249, 374 N.E.2d 27, 15 Ill.Dec. 734 (1978) (court quoted committee comment in support of its decision).

An analysis of the decisions stating that the plaintiff-condemnor has the burden of proving the value of the land actually taken, e.g., *Department of Public Works & Bldgs. v. Dixon*, 37 Ill.2d 518, 520; 229 N.E.2d 679, 680 (1967); *Department of Transportation v. Schlechte*, 94 Ill.App.3d 187, 189; 418 N.E.2d 1000,1001; 50 Ill.Dec. 6, 8 (5th Dist.1981); *Lake County Forest Preserve Dist. v. Kerrigan*, 58 Ill.App.3d 249, 252, 374 N.E.2d 27, 29; 15 Ill.Dec. 734, 737 (2d Dist.1978); *Department of Transportation v. Zabel*, 47 Ill.App.3d 1049, 1052; 362 N.E.2d 687, 690; 6 Ill.Dec. 52, 53 (3d Dist.1977), indicated to the prior committee that in using the term, "burden of proof," the courts meant only the duty to introduce competent evidence of value. No Illinois case places a burden upon the plaintiff-condemnor to persuade the jury that its evidence of market value is more probably true than not true or that a particular value must be proved by a preponderance or greater weight of the evidence. An Ohio court has specifically considered the problem and stated: "It has been established in Ohio that with reference to compensation for land

taken there is no burden of proof.” *In re Appropriation by the Director of Highways*, 201 N.E.2d 889, 120 Ohio App. 273 (1963).

However, the committee's initial evaluation has been subsequently questioned by the courts. In *Department of Public Works & Bldgs. v. Dixon*, 68 Ill.App.2d 106, 109-110; 215 N.E.2d 449, 450-451 (5th Dist.1966), *rev'd on other grounds*, 37 Ill.2d 518, 229 N.E.2d 679 (1967), the court noted that there was “considerable discussion” as to whether there is actually a burden of proof, as that term is ordinarily defined, in eminent domain proceedings. The court decided the case without deciding whether the burden was a burden of proof, “or as stated in IPI, the burden of introducing competent evidence”

And in *Department of Public Works & Bldgs. v. Tinsley*, 120 Ill.App.2d 95, 99; 256 N.E.2d 124, 126 (5th Dist.1970), the court cited language from the supreme court's decision in *Dixon* (37 Ill.2d 518, 229 N.E.2d 679 (1967)) and stated: “We are uncertain whether this indicates agreement with the Committee's Comments”

However, in *Department of Public Works & Bldgs. v. American Nat. Bank & Trust Co.*, 36 Ill.App.3d 439, 343 N.E.2d 686 (2d Dist.1976), the court concurred with the committee's recommendation not to give a burden of proof instruction.

**300.31 Burden of Proof—Fee Interest Taken—Fact of
Damage to Remainder Contested**

The defendant has the burden of proving that the taking of a portion of [defendant, his, her, its] property [will cause] [has caused] damage to the remainder of [his] property. This means that, considering all the evidence in the case, you must be persuaded that it is more probably true than not true that the remainder [will be] [has been] damaged by the taking.

Notes on Use

This instruction should be used only where there is a fact question as to whether the remainder is damaged at all. The instruction should not be used where damage is conceded and only the amount is contested.

The past tense should be used when the property has been taken under the “Quick Take” provisions of the Eminent Domain Act, 735 ILCS 5/7-103 (1994).

Comment

The burden upon the defendant is to come forward with competent evidence of the reduction in value of the remainder. *Trunkline Gas Co. v. O'Bryan*, 21 Ill.2d 95, 171 N.E.2d 45 (1960); *Department of Public Works & Bldgs. v. Bloomer*, 28 Ill.2d 267, 270, 191 N.E.2d 245, 248 (1963); *Commonwealth Edison Co. v. Danekas*, 104 Ill.App.3d 907, 911; 433 N.E.2d 736, 739; 60 Ill.Dec. 694, 698 (2d Dist.1982); *Department of Public Works v. Dixon*, 68 Ill.App.2d 106, 110; 215 N.E.2d 449, 451 (5th Dist.1966), *rev'd on other grounds*, 37 Ill.2d 518, 229 N.E.2d 679 (1967). Where there is a dispute as to whether the remainder has been damaged at all, the burden is then upon the defendant not only to introduce competent evidence of reduction in value, but also to persuade the jury that there has in fact been a reduction in value. *City of Chicago v. Provus*, 415 Ill. 618, 623, 114 N.E.2d 793, 795 (1953); *Commonwealth Edison Co. v. Danekas*, 104 Ill.App.3d 907, 911; 433 N.E.2d 736, 739; 60 Ill.Dec. 694, 698 (2d Dist.1982). However, there is no burden to establish any specific dollar amount of damage to the remainder.

Where there is no dispute that the remainder has been damaged, but the amount of the damage to the remainder is disputed, then the burden upon the defendant is only to come forward with evidence as to the amount of the damage and there will be no occasion to give this instruction. *See* Comment to IPI 300.30.

**300.32 Burden of Proof—Easement Taken—Fact of
Damage to Remainder Contested**

This defendant has the burden of proving that subjecting a portion of [his] property to the easement [will cause] [has caused] damage to the remainder of [his] property. This means that, considering all the evidence in the case, you must be persuaded that it is more probably true than not true that the remainder [will be] [has been] damaged.

Notes on Use

The past tense should be used when the property has been taken under the “Quick Take” provisions of the Eminent Domain Act, 735 ILCS 5/7-103 (1994).

Comment

See Comment to IPI 300.31.

300.40 Comparable Sales

The committee recommends that no instruction be given concerning comparable sales.

Comment

The value of condemned property may be established with evidence of sales of comparable property. *E.g.*, *Department of Conservation v. Dorner*, 192 Ill.App.3d 333, 548 N.E.2d 749, 139 Ill.Dec. 364 (1st Dist.1989).

Nonetheless, the committee recommends that no instruction be given that the jury may consider comparable sales. An instruction on this subject would single out a portion of the evidence, thus giving it improper emphasis. Instructions which emphasize particular items of evidence in condemnation cases are properly refused. *City of Chicago v. Provus*, 415 Ill. 618, 625; 114 N.E.2d 793, 796, 797 (1953); *Department of Public Works & Bldgs. v. Maddox*, 21 Ill.2d 489, 495, 173 N.E.2d 448, 451 (1961).

See also the Comment to IPI 300.03.

300.41 Averaging Land Values

The committee does not recommend any instruction on the subject of averaging land values.

Comment

Jurors may properly compute the average of land values each believes should be awarded to see “how nearly the average ... suit the views of different jurors.” *Groves & S.R.R. Co. v. Herman*, 206 Ill. 34, 37; 69 N.E. 36, 37 (1903). It is also proper for them to average the amounts testified to by the witnesses. *Peoria & R.I.R. Co. v. Birkett*, 62 Ill. 332, 336 (1872). However, it is not proper for jurors to agree in advance to accept the quotient as their verdict (*Peoria & R.I.R. Co. v. Birkett, supra*) on the ground that jurors may properly average the testimony if they do not agree in advance to be bound by the quotient. On the other hand, in *Groves & S.R.R. Co. v. Herman, supra*, it was held error to refuse an instruction “that in arriving at their verdict the jury should not average the testimony of the witnesses on the question of land damages and values.” (The opinion does not quote the instruction involved.) The committee feels that an instruction on the point would lead to confusion and might, by suggesting the possibility, encourage the jury to arrive at a quotient verdict. Therefore, no instruction is recommended.

300.42 Measure of Damages—Loss of Business Profits

The committee recommends that no instruction be given on the loss of business profits resulting from the condemnation of business property.

Comment

While evidence that the property is being used for the conduct of a particular business is admissible on the question of market value, evidence of the volume of business or the profits earned in the business is ordinarily not admissible. *Forest Preserve District v. Hahn*, 341 Ill. 599, 602-603; 173 N.E. 763, 765 (1930); *City of Chicago v. Central National Bank*, 5 Ill.2d 164, 175-176; 125 N.E.2d 94, 100 (1955); *Citizens Utilities Company v. Metropolitan Sanitary District*, 25 Ill.App.3d 252, 258-59; 322 N.E.2d 857, 863 (1st Dist.1974); and *City of Chicago v. Budd*, 121 Ill.App.2d 51, 56; 257 N.E.2d 161, 163-64 (1st Dist.1970). See also *Department of Transportation v. Gally*, 20 Ill.App.3d 32, 312 N.E.2d 759 (5th Dist.1974) (court properly refused to instruct jury that the law did not permit an award of damages for loss of business during construction).

The exception to the rule that evidence of business profits is not admissible occurs where the property's market value cannot be otherwise ascertained because it is put to a special use such as a cemetery, club house, or railroad terminal. In such cases “the law permits a resort to any evidence available to prove value including the net income from a business conducted on the property.” *Chicago Land Clearance Commission v. Darrow*, 12 Ill.2d 365, 372; 146 N.E.2d 1, 5 (1957); *People ex rel. Department of Transp. v. Quincy Coach House, Inc.*, 29 Ill.App.3d 616, 618-620; 332 N.E.2d 21, 23-25 (4th Dist.1975), *rev'd on other grounds*, 64 Ill.2d 350, 356 N.E.2d 13, 1 Ill.Dec. 13 (1976). The committee recommends that no instruction concerning business profits be given even in a case falling within this exception because such an instruction would emphasize one particular item of evidence.

Proof of rental income derived from the property, as distinguished from business income, is admissible. *Forest Preserve Dist. v. Krol*, 12 Ill.2d 139, 146; 145 N.E.2d 599, 603 (1957); *City of Chicago v. Lord*, 276 Ill. 357, 360, 115 N.E. 12, 14 (1916).

300.43 Measure of Damages—Present Use of Property

The committee recommends that no instruction be given on the present use of the property.

Comment

Evidence as to the use being made of the property at the time the condemnation petition is filed is relevant to the question of value and is admissible. *Housing Authority v. Kosydor*, 17 Ill.2d 602, 604; 162 N.E.2d 357, 358 (1959) (salvage yard); *City of Chicago v. Lord*, 276 Ill. 357, 360; 115 N.E. 12, 13 (1916) (rental property). This type of evidence might be introduced by way of testimony that the present use of the property is its highest and best use. *Housing Authority v. Kosydor*, *supra*. If the jurors view the property, as they usually do, they learn the general nature of its use.

The committee recommends that no instruction be given which informs the jurors that they may or should consider the present use being made of the land because it would only emphasize the obvious and would violate the general rule against singling out particular items of evidence for comment. *See City of Chicago v. Provus*, 415 Ill. 618, 625; 114 N.E.2d 793, 796, 797 (1953).

300.44 Measure of Damages—Property Taken to Be Considered as Part of the Whole Tract

In arriving at the fair cash market value of the property taken, you should determine its value considered as a part of the whole tract before the taking and not its value as a piece of property separate and disconnected from the rest of the tract.

Comment

Refusing an instruction of this type may be reversible error. *Forest Preserve Dist. v. Draper*, 387 Ill. 149, 157-159; 56 N.E.2d 410, 415 (1944). *Tri State Park Dist. v. First Nat. Bank of Cicero*, 33 Ill.App.3d 348, 351; 337 N.E.2d 204, 207 (2d Dist.1975), holds that property taken should be considered part of the whole tract. *See also Cook County v. LaSalle Nat'l Bank*, 1 Ill.App.3d 579, 582; 274 N.E.2d 919, 922 (5th Dist.1971).

In *Department of Transp. v. Association of Franciscan Fathers*, 93 Ill.App.3d 1141, 1148; 418 N.E.2d 36, 41-42; 49 Ill.Dec. 392, 399 (2d Dist.1981), the defendants argued that the denial of their tendered instruction to the jury, that they had a right to value the tract taken as a separate and distinct piece of property, rather than part of the whole, was in error. The court held it was not in error because “the only valuation theory presented by the Franciscans ... was based on the land as part of the whole.” *Id.*

Compare Lake County Public Bldg. Commission v. La Salle Nat. Bank, 176 Ill.App.3d 237; 531 N.E.2d 110, 125 Ill.Dec. 931 (2d Dist.1988) (two parcels not so closely connected that they could be treated as a single property; error to give IPI 300.44).

300.45. Measure of Damages to Remainder—Fee Taken—Fact of Damage to Remainder Contested

If you find there [will be] [is] damage to the remainder caused by the taking, the measure of that damage [will be] [is] the difference between the fair cash market value of the remainder immediately before the taking and the fair cash market value of the remainder immediately after the taking.

Notes on Use

This instruction should be used when the plaintiff not only contests the amount of damage to the remainder but also contests that the remainder will be damaged at all.

Comment

The measure of damages to the remainder is the difference between the fair cash market value of the property immediately prior to the taking, and the fair cash market value of the property immediately after the taking. *Department of Public Works & Bldgs. v. Maddox*, 21 Ill.2d 489, 493; 173 N.E.2d 448, 450 (1961); *County of Winnebago v. Rico Corp.*, 11 Ill.App.3d 882, 883; 296 N.E.2d 867, 868-869 (2d Dist.1973).

The damage to the remainder must be the direct and proximate consequence of the taking. Depreciation suffered in common by all lands in the vicinity of improvement is not compensable.

Aesthetic considerations, personal inconvenience and unsightliness of a public facility are not proper elements of damage and it is improper to instruct the jury to consider these elements. *Department of Public Works & Bldgs. v. Horejs*, 78 Ill.App.2d 284, 223 N.E.2d 207 (1st Dist.1966). Not all factors bringing about a reduction in value represent recoverable damages to land not taken. To sustain a claim for damages, the depreciation in value must be from a direct physical disturbance of a right the owner enjoys in connection with his property. *Department of Transp. v. Rasmussen*, 108 Ill.App.3d 615, 439 N.E.2d 48, 64 Ill.Dec. 119 (2d Dist.1982).

The expenditures made and costs incurred by the landowner in adapting the remainder to use after the taking are relevant, if reasonable and economical, as evidence of the depreciation in value, but not as recoverable items in themselves. *Department of Public Works v. Bloomer*, 28 Ill.2d 267, 191 N.E.2d 245 (1963). *Department of Transp. v. Jones*, 44 Ill.App.3d 592, 358 N.E.2d 402, 3 Ill.Dec. 235 (5th Dist.1976). This principle has been referred to as the “cost of cure” doctrine. *People ex rel. Department of Transp. v. Quincy Coach House, Inc.*, 29 Ill.App.3d 616, 332 N.E.2d 21 (4th Dist.1975), *rev'd on other grounds*, 64 Ill.2d 350, 356 N.E.2d 13, 1 Ill.Dec. 13 (1976). On the other hand, it has been held that when the government condemns only a portion of a building, and the part not taken may be rehabilitated according to some feasible and economical plan, these costs can be recovered as damage to the remainder. In such cases, the measure of damage to the remainder is the cost of rehabilitation less the value recovered by such reconstruction. *See City of Chicago v. Callender*, 396 Ill. 371, 71 N.E.2d 643 (1947). In such cases, this instruction may have to be supplemented accordingly.

**300.46 Measure of Damages to Remainder—Easement
Taken—Fact of Damage to Remainder Contested**

If you find there will be damage to the remainder caused by the presence of the easement, the measure of that damage is the difference between the fair cash market value of the remainder immediately before the easement is imposed and the fair cash market value of the remainder immediately after the easement is imposed.

Notes on Use

This instruction should be used when the plaintiff not only contests the amount of damage to the remainder but also contests that the remainder will be damaged at all.

**300.47 Measure of Damages to Remainder—Fee
Taken—Fact of Damage Admitted—
Amount Contested**

The measure of damages to the remainder is the difference between the fair cash market value of the remainder immediately before the taking and the fair cash market value of the remainder immediately after the taking.

Notes on Use

This instruction should be used when the fact of damage to the remainder is not contested but the amount of the damage is contested.

**300.48 Measure of Damages to Remainder—Easement
Taken—Fact of Damage Not Contested—
Amount Contested**

The measure of damages to the remainder is the difference between the fair cash market value of the remainder immediately before the easement is imposed and the fair cash market value of the remainder immediately after the easement is imposed.

Notes on Use

This instruction should be used when the fact of damage to the remainder is not contested but the amount of the damage is contested.

300.49 Measure of Damages to Remainder—Benefit or Detriment From Proposed Use

In determining the fair cash market value of the remainder after the taking, you may consider [any] [benefits] [or] [detriments] from the proposed public use, proved by the evidence, which [increase] [or] [decrease] the fair cash market value of the remainder.

[However, the law does not permit an award of damages for the loss or reduction of traffic which may result from (the installation of a median or divider strip) (the establishment of a one-way traffic regulation), and you should not consider this factor in determining damages to the remainder.]

Notes on Use

This instruction should be used in connection with IPI 300.45, 300.46, 300.47, or 300.48. It should not be given unless evidence of benefit or detriment to the remainder from the proposed public use has been introduced.

The second paragraph of this instruction should be given, if requested by the plaintiff, where the proposed improvement involves a median strip or one-way traffic regulation and there is also evidence of compensable elements of detriment from the proposed use. In such a case, it is necessary to distinguish between those elements of detriment which are compensable and those which are not. *See* IPI 300.51. Where both paragraphs of the instruction are used, it will *not* be necessary to give IPI 300.51.

Comment

Special benefits accruing to the part not taken by reason of the improvement must be set off against the damage to the remainder. *People ex rel. Department of Transportation v. Quincy Coach House, Inc.*, 29 Ill.App.3d 616, 624; 332 N.E.2d 21, 28 (4th Dist.1975), *rev'd on other grounds*, 64 Ill.2d 350, 356 N.E.2d 13, 1 Ill.Dec. 13 (1976); *Cuneo v. City of Chicago*, 400 Ill. 545, 553, 554; 81 N.E.2d 451, 455, 456 (1948) (increased accessibility). Such benefits must, however, “be real and substantial, not chimerical or speculative, and must be capable of measurement and computation.” *Department of Public Works & Bldgs. v. Divit*, 25 Ill.2d 93, 101; 182 N.E.2d 749, 753 (1962). General benefits are the general, intangible benefits which are supposed to flow to the public from a public improvement and the effects of which cannot be ascertained in monetary value. A recent decision has held that any benefits to the property which enhance its market value and are not conjectural or speculative are considered special rather than general benefits. *Illinois State Toll Highway Authority v. Heritage Standard Bank & Trust Co.*, 196 Ill.App.3d 5, 552 N.E.2d 1151, 142 Ill.Dec. 410 (2d Dist.1990) (instruction approved).

Illinois case law has established the rule that benefits to the remainder may be set off against damages to the remainder but not against the award for the part taken. Section 7-120 of the Act (735 ILCS 5/7-120 (1994)), the predecessor of which was enacted in 1967, presently provides:

Special Benefits. In assessing damages or compensation for any taking or property acquisition under this Article, due consideration shall be given to any special benefit that

will result to the property owner from any public improvement to be erected on such property. This Section shall be applicable to all private property taken or acquired for public use, and shall apply whether damages or compensation are fixed by negotiation, by a court, or by a jury.

It has been suggested that the traditional rule was changed by the passage of §7-120. *See* F. Righeimer, *Eminent Domain in Illinois*, §6.263, p. 193 (3d ed. 1986), and “Trial Procedure & Technique”, *Illinois Eminent Domain Practice* §8.44 (IICLE 1989). However, since 1967 (when §7-120 was enacted) the traditional rule has been reaffirmed without reference to §7-120. *People ex rel. Dept. of Transp. v. Quincy Coach House, Inc.*, 29 Ill.App.3d 616, 332 N.E.2d 21, 28 (4th Dist.1975), *rev'd on other grounds*, 64 Ill.2d 350, 356 N.E.2d 13, 1 Ill.Dec. 13 (1976) (“Where there is an enhancement to the remainder occasioned by the improvement for which the condemnation was instituted, that enhancement must be offset against the damages to the remainder [citation omitted], but cannot be used to offset compensation for the land taken”). Further, one court has rejected an argument based on the Righeimer suggestion, noting that such an interpretation would conflict with §7-118 of the Code and could violate equal protection guarantees under the constitution. *Illinois State Toll Highway Authority v. Heritage Standard Bank & Trust Co.*, 196 Ill.App.3d 5, 552 N.E.2d 1151, 142 Ill.Dec. 410 (2d Dist.1990).

It is also proper to consider detriment to the remainder which is reasonably certain to result from the use to be made of the part taken. *Chicago, P. & M.R. Co. v. Atterbury*, 156 Ill. 281, 283-284; 40 N.E. 826-827 (1895) (discharge of cinders, ashes and smoke and creation of fire hazard by condemnor's trains); *Board of Trade Tel. Co. v. Darst*, 192 Ill. 47, 49-51; 61 N.E. 398, 399-400 (1901) (detriments caused by proximity of condemnor's telephone poles); *Sanitary District v. Baumbach*, 270 Ill. 128, 133-134; 110 N.E. 331, 333-334 (1915) (obstruction of light, air and view by spoil banks along canal); *Trunkline Gas Company v. O'Bryan*, 21 Ill.2d 95, 100-101; 171 N.E.2d 45, 48-49 (1960) (permanent interference with farming caused by an improvement). Detriments resulting from a median strip in the highway or a one-way traffic regulation are not proper elements of damage. *See* Comment to IPI 300.51. For a discussion of whether the detriment must be “special” to the property owner as opposed to the detriment sustained by the public generally, *see* the Comment to IPI 300.50.

300.50 Measure of Damages to Remainder—Only "Special" Detriments and Benefits to Be Considered

The committee recommends that no instruction be given limiting the jury to a consideration of “special” detriments or benefits.

Comment

Numerous cases contain language to the effect that the only damage to the remainder which is compensable is that which is “in excess of that sustained by the public generally.” *E.g.*, *County Board of School Trustees v. Elliott*, 14 Ill.2d 440, 446; 152 N.E.2d 873, 878 (1958); *Central Illinois Public Service Co. v. Lee*, 409 Ill. 19, 24; 98 N.E.2d 746, 750 (1951); *Citizens Utilities Company of Illinois v. Metropolitan Sanitary District of Greater Chicago*, 25 Ill.App.3d 252, 256-257; 322 N.E.2d 857, 861, 862 (1st Dist.1974). Such statements are usually found as part of a general discussion of damages, and there is no case which indicates clearly what constitutes damage sustained “by the public generally,” or who is included in “the public generally.” *Illinois Power & Light Corp. v. Talbott*, 321 Ill. 538, 548; 152 N.E. 486, 489 (1926), indicates, by way of dictum, that the depreciation of property by virtue of the building of a jail, police station or smallpox hospital in close proximity to the property may be the type of damage contemplated by the expression “damage not in excess of that sustained by the public generally.” However, a reading of the cases cited in *Talbott* indicates that the real bases for the denial of damages in such instances are practical considerations of public policy, and not any technical distinction between special damages and those sustained by the public generally. *See, e.g.*, *Frazier v. City of Chicago*, 186 Ill. 480, 57 N.E. 1055 (1900), where the court conceded that the property across the street from a smallpox hospital was damaged more than other property in the city, but still denied damages on grounds of public policy.

The real issue in these cases seems to be the type of damage claimed--whether it is remote or speculative, or a necessary consequence of a proper exercise of the police power--rather than whether it is sustained by a particular property owner in greater or lesser degree than the public generally. Clearly, the fact that the same damage is suffered by other property owners similarly situated does not make the damages non-compensable. (Consider, for example, the typical case involving the partial taking of many tracts for a road with each owner claiming--and recovering for--the identical type of damage to the part not taken.) The same is true of benefits:

“Special benefits do not become general benefits because the benefits are common to other property in the vicinity. The fact that other property in the vicinity of the proposed railroad will also be increased in value by reason of the construction and operation thereof furnishes no excuse for excluding the consideration of special benefits to the particular property in determining whether it has been damaged, and if it has, the extent of the depreciation in value.” *Peoria B. & C. Traction Co. v. Vance*, 225 Ill. 270, 273; 80 N.E. 134, 135 (1907).

In the *Vance* case *supra*, the court held it was reversible error to give, at the instance of the property owner, an instruction which informed the jury that, “Only such benefits as are special to this farm and not common to the other farms in the vicinity can be set off against damages to the land not taken.”

In affirming the trial court's rejection of an instruction tendered by the property owner defining "special benefits," the court in *Illinois State Toll Highway Authority v. Heritage Standard Bank & Trust Co.*, 196 Ill.App.3d 5, 552 N.E.2d 1151, 142 Ill.Dec. 410 (2d Dist.1990), held that IPI (Civil) 2d Nos. 300.47, 300.49, 300.80, and 300.81 accurately stated the law with regard to damages to the remainder.

**300.51 Measure of Damages to Remainder—Factors
Excluded—Median Strips in Highway—
Traffic Regulations**

The law does not permit an award of damages for the loss or reduction of traffic which may result from [the installation of a median or divider strip] [the establishment of a one-way traffic regulation], and you should not consider this factor in determining damages to the remainder.

Notes on Use

This instruction should be given, if requested by the plaintiff, whenever the jurors may have learned that the flow of traffic will be diminished by a median strip or a one-way traffic regulation. The instruction is especially appropriate where the property is devoted to a business use and the jury, in the absence of the instruction, would be likely to consider the question of lost business profits.

Comment

Compensation is not allowed for reduction of traffic. *Department of Public Works & Bldgs. v. Bloomer*, 28 Ill.2d 267, 273; 191 N.E.2d 245, 249 (1963) (“An owner had no vested property right in the flow of traffic past his land, and losses produced by the alternation of traffic flow or the installation of traffic control devices confer no right to compensation”); *Winnebago County v. Rico Corp.*, 11 Ill.App.3d 882, 883; 296 N.E.2d 867, 869 (2d Dist.1973); *Department of Public Works & Bldgs. v. Mabee*, 22 Ill.2d 202, 205; 174 N.E.2d 801, 802 (1961) (“The diminution in the value of land or loss of business occasioned by a one-way traffic regulation that diverts a portion of the flow of traffic from in front of one's premises is the result of the exercise of the police power; it is not the taking or damaging of property within the meaning of our constitution; and it is not therefore compensable”); *Ryan v. Rosenstone*, 20 Ill.2d 79, 169 N.E.2d 360 (1960) (Injunction against Director of Public Works to remove portion of median strip denied).

Evidence of reduced value on account of a median strip or traffic regulation is inadmissible. *Department of Public Works & Bldgs. v. Mabee, supra*, at 205-206; *Winnebago County v. Rico Corp.*, 11 Ill.App.3d 882, 883; 296 N.E.2d 867, 869 (2d Dist.1973). But the jurors will frequently learn of the divider or traffic regulation from other testimony in the case, from the construction plans, or from their view of the premises. This instruction is a safeguard against the improper allowance of damages based on this factor of reduced traffic.

Diminution of traffic must, of course, be distinguished from deprivation of material impairment of access, which is compensable. *Department of Public Works & Bldgs. v. Wolf*, 414 Ill. 386, 389; 111 N.E.2d 322, 323, 324 (1953); *Department of Public Works & Bldgs. v. Mabee, supra*, at 205, 174 N.E.2d at 802 (“The rule cannot be applied, however, where the property owner's free and direct access to the lane of traffic abutting on his property has not been taken or impaired”). On material impairment of access, which is compensable, see *Department of Public Works & Bldgs. v. Morse*, 3 Ill.App.3d 721, 279 N.E.2d 150 (5th Dist.1972) (substantial impairment of the ingress and egress of tractor-trailers which were necessary to defendants in maintenance of inventory would be compensable); *Department of Public Works & Bldgs. v. Wilson and Co., Inc.*, 62 Ill.2d 131, 140-141; 340 N.E.2d 12, 15 (1975); Department of

Transportation v. Shell Oil Co., 156 Ill.App.3d 304, 509 N.E.2d 596, 108 Ill.Dec. 900 (1st Dist.1987) (evidence of the decrease in gallons of gasoline pumped at gas station which lost part of its frontage to condemnation was relevant to a determination of the change in accessibility of the station); *Department of Transportation v. Rasmussen*, 108 Ill.App.3d 615, 621-622; 439 N.E.2d 48, 54-55; 64 Ill.Dec. 119, 125-126 (2d Dist.1982); *Streeter v. Winnebago County*, 44 Ill.App.3d 392, 396-397; 357 N.E.2d 1371, 1374; 2 Ill.Dec. 928, 932-933 (2d Dist.1976). *But see Winnebago County v. Rico Corp.*, 11 Ill.App.3d 882, 883; 296 N.E.2d 867, 869 (2d Dist.1973) (damage due to loss of access is not recoverable as damage to the remainder).

300.52 Measure of Damages To Remainder--Unilateral Stipulation Concerning Use of Planned Construction

The stipulation made by the plaintiff and read to you is a binding obligation which plaintiff-condemnor must perform. You are not to allow damages because of any possibility that the stipulation might not be performed.

Notes on Use

This instruction should be used when the plaintiff unilaterally agrees or “stipulates” to do the work in a certain way. For the case where the parties have reached a bilateral agreement, use IPI 300.53.

Comment

“The general rule has been announced in many cases that the filing in court of a stipulation by the petitioner in a condemnation proceeding, agreeing to do certain things which would reduce the injury to property not taken, subjects the estate acquired by the condemnation judgment to a condition of a perpetual and binding character, which cannot be evaded or denied.” *East Peoria Sanitary Dist. v. Toledo, P. & W. R.R.*, 353 Ill. 296, 306; 187 N.E. 512, 516; 89 A.L.R. 870 (1933); *See also* *Midwestern Gas Transmission Co. v. Mason*, 31 Ill.2d 340, 343; 201 N.E.2d 379, 381 (1964); *Commonwealth Edison Co. v. Danekas*, 104 Ill.App.3d 907, 433 N.E.2d 736, 60 Ill.Dec. 694 (2d Dist.1982). In *Elgin, J. & E.R. Co. v. Fletcher*, 128 Ill. 619, 21 N.E. 577 (1889), the court approved an instruction the trial court had given to the effect that “[T]he jury in considering their verdict, have the right to assume that the proposal and agreement of the said petitioner [to erect fences by a certain date] will be carried out, and the jury, in fixing their verdict, should not take into account any failure of the petitioner to keep and observe its agreement ...” The case was reversed, however, because the trial court had also given, at the instance of the defendants-appellees, another instruction which informed the jurors that they could award damages for the items covered by the stipulation, “unless the jury further believe the petitioner railroad company has, in open court, stipulated that it will, on or before the first day of May, A.D. 1888, construct, and thereafter maintain, suitable fences along its right of way on the property of respondents.” The court stated (128 Ill. at 625-626): “Whether the offer to fence, etc., is binding on appellant, is not a question of fact for the jury. It is purely a question of law, as the court treated it in the instruction quoted, given at the instance of appellant; and was therefore error to afterwards submit it, as was done by the instruction quoted, given on behalf of appellee, as a question of fact to the jury.”

Attorneys for the condemning authority may bind the authority by stipulation even in the absence of a duly adopted resolution. *Illinois State Toll Highway Authority v. Heritage Standard Bank & Trust Co.*, 196 Ill.App.3d 5, 552 N.E.2d 1151, 142 Ill.Dec. 410 (2d Dist.1990).

300.53 Effect of Agreement With Respect To Damages

Plaintiff and defendant have agreed that plaintiff will pay and defendant will accept specific sums for the following items of damage which will be caused by construction of the proposed public improvement: [here list the items which have been stipulated to and are no longer elements in the case].

In arriving at your verdict you are not to include any amounts for these items. They will be paid for separately.

Notes on Use

Frequently plaintiff and defendant will agree on the amount of damages to be paid the defendant for such items as fencing, crop loss, soil compaction and drainage disruption. The foregoing instruction cautions the jury against including these items in their verdict.

Comment

A departure from a unilateral stipulation made by the condemnor would subject it to an action for damages (*see* Comment to IPI 300.52), “and the jury, in fixing their verdict, should not take into account any failure of the petitioner to keep and observe its agreement ...,” *Elgin, J. & E. R. Co. v. Fletcher*, 128 Ill. 619, 624; 21 N.E. 577, 578 (1889). *A fortiori*, the jury should not award defendant damages for items to which *both* parties have stipulated and agreed.

300.54 Measure of Damages--Easement Strip— Underground Pipeline Or Cable

The measure of damages to the property within the easement strip is the difference between the fair cash market value of the property immediately before the easement is imposed and the fair cash market value of the property immediately after the easement is imposed.

Comment

The measure of damages to the property within the easement strip in underground pipeline or cable cases is the diminution of the fair cash market value of the property burdened by the easement. *North Shore Sanitary District v. Schulik*, 12 Ill.2d 309, 312; 146 N.E.2d 25, 26 (1957); *Illinois Power & Light Corp. v. Talbott*, 321 Ill. 538, 544; 152 N.E. 486, 488 (1926); *Peoples Gas Light & Coke Co. v. Buckles*, 24 Ill.2d 520, 532-533; 182 N.E.2d 169, 176-177 (1962), *appeal dismissed, cert. denied*, 371 U.S. 185, 83 S.Ct. 266, 9 L.Ed.2d 227 (1962); *Lake County Forest Preserve District v. Frecska*, 85 Ill.App.3d 610, 616; 407 N.E.2d 137, 142; 40 Ill.Dec. 906, 912 (2d Dist.1980); and *Peoples Gas Light & Coke Co. v. Edgar County Bank & Trust Co.*, 32 Ill.App.3d 1005, 1008; 337 N.E.2d 80, 81-82 (4th Dist.1975). It may be appropriate to submit a special interrogatory when the existence of damages is contested. *North Shore Sanitary District v. Schulik*, *supra*.

**300.55 Measure of Damages To Easement Strip—
Overhead Electric Transmission Line—
Fact of Damage Contested**

If you find there will be damage to that part of the easement strip not occupied by the structures, the measure of that damage is the difference between the fair cash market value of that part of the easement strip immediately before the structures are in place and its fair cash market value immediately after the structures are in place.

[In arriving at the damages to that part of the easement strips which are not occupied by structures, you should take into consideration the fact that the owners will have and retain all the uses of said easement strips not inconsistent with the right to construct, operate and maintain the said transmission line.]

Notes on Use

This instruction should be used when the plaintiff not only contests the amount of damage to the easement strip but also contests that the easement strip will be damaged at all.

The bracketed paragraph must be used where the plaintiff has alleged in its petition for condemnation, and presents evidence, that the land owner will retain all uses of the easement not inconsistent with the plaintiff's use. *Central Ill. Public Service Co. v. Badgley*, 24 Ill.App.3d 294, 321 N.E.2d 26 (5th Dist.1974).

Comment

In an overhead electric transmission line case, the measure of damages to the easement strip is the depreciation in value caused by its subjection to the condemnor's superior right to use the strip for the transmission line. *Illinois Power & Light Corp. v. Talbott*, 321 Ill. 538, 544; 152 N.E. 486, 488 (1926).

Central Illinois Public Service Co. v. Montgomery, 81 Ill.App.2d 289, 225 N.E.2d 412 (5th Dist.1967) (abstract decision), holds that the measure of damages to remainder of property not taken is depreciation in the fair market value caused by a direct physical disturbance.

**300.56 Measure of Damages To Easement Strip—
Overhead Electric Transmission Line—
Fact of Damage Admitted--Amount Contested**

The measure of damages to that part of the easement strip not occupied by the structures is the difference between the fair cash market value of that part of the strip immediately before the structures are in place and its fair cash market value immediately after the structures are in place.

[In arriving at the damages to that part of the easement strips which are not occupied by structures, you should take into consideration the fact that the owners will have and retain all the uses of said easement strips not inconsistent with the right to construct, operate and maintain the said transmission line.]

Notes on Use

This instruction should be used when the fact of damage to the easement strip is not contested but the amount of the damage is contested.

The bracketed paragraph must be used when the plaintiff alleges in its petition for condemnation and presents evidence that the land owner will retain all uses of the easement not inconsistent with the plaintiff's use. *Central Illinois Public Service Co. v. Badgley*, 24 Ill.App.3d 294, 321 N.E.2d 26 (5th Dist.1974).

Comment

In an overhead electric transmission line case, the measure of damages to the easement strip is the depreciation in value caused by its subjection to the condemnor's superior right to use the strip for the transmission line. *Illinois Power & Light Corp. v. Talbott*, 321 Ill. 538, 544; 152 N.E. 486, 488 (1926).

Central Ill. Public Service Co. v. Montgomery, 81 Ill.App.2d 289, 225 N.E.2d 412 (5th Dist.1967) (abstract decision), holds that the measure of damages to remainder of property not taken is depreciation in the fair market value caused by a direct physical disturbance.

**300.57 Measure of Damages To Property Outside
Easement Strip--Overhead Electric
Transmission Line--Fact of Damage Contested**

If you find that the property of the defendant outside the easement strip will be damaged by the presence of the transmission lines or structures, or the use of the easement, the measure of that damage is the difference between the fair cash market value of the defendant's property outside the strip immediately before the structures are in place and its fair cash market value immediately after the structures are in place.

Comment

See Comments to IPI 300.18 and 300.45.

**300.58 Measure of Damages To Property Outside
Easement Strip--Overhead Electric
Transmission Line--Fact of Damage
Admitted--Amount Contested**

The measure of damages to the property of the defendant outside the easement strip is the difference between the fair cash market value of the property immediately before the structures are in place and its fair cash market value immediately after the structures are in place.

Comment

See Comments to IPI 300.18 and 300.45.

**300.59. Measure of Damages--Entire Fee Interest And
Entire Leasehold Taken**

In deciding whether the tenant is entitled to a share of the compensation to be paid for the entire property, you must first determine the fair rental value of the tenant's leasehold. If the fair rental value of the leasehold exceeds the rent agreed upon in the lease, the tenant is entitled to the excess. But if the fair rental value of the leasehold does not exceed the rent, the tenant is not entitled to any share of the compensation.

Notes on Use

IPI 300.23 should be used with this instruction.

Comment

The case of *Corrigan v. City of Chicago*, 144 Ill. 537, 548; 33 N.E. 746, 749 (1893) established the measure of damages where the entire leasehold is taken:

The measure of the compensation for the estate of the tenant taken is the value of her leasehold estate, subject to the rent covenanted to be paid. If the value exceeds the rental she will be entitled to recover the excess. If it does not exceed the rent reserved, she will receive nothing.

In applying the Corrigan formula, the court in *Yellow Cab Co. v. Howard*, 243 Ill.App. 263 (1st Dist.1927) determined the lessee's interest as follows:

| | |
|---------------------------------------------------------------|-------------|
| Fair rental value per year (20,160 sq. ft. @ 48¢) equals | \$ 9,676.80 |
| Lease had 1 3/4 years to run so \$9,676.80 x 1.75 equals | 16,934.40 |
| Rent at \$6,000 per year for 1.75 years equals | 10,500.00 |
| Difference between value and rent due tenant is | 6,434.40 |

The reason the tenant is entitled only to the value of the leasehold in excess of the rent reserved is that, where the entire leasehold is taken, the tenant is relieved of the obligation to pay rent. *Ibid.*

In determining the excess of the fair rental value over the rent agreed upon in the lease, only “*the present value* of the rentals [that would be] required to discharge the rental obligations” shall be considered. *Department of Public Works & Bldgs. v. Metropolitan Life Ins. Co.*, 42 Ill.App.2d 378, 389; 192 N.E.2d 607, 613 (1st Dist.1963) (emphasis added). Thus, in the *Metropolitan Life* case, the lessee was obligated by the terms of the lease to pay \$67.60 semi-annually for the next ninety-five years. In calculating the amount of the lessee's damages, the court held that the present value of those rentals at the time of condemnation was “that amount which if placed in an account at compound interest of 5% would be sufficient to permit the lessee to draw out the sum of \$67.60 semi-annually for ninety-five years for purposes of paying rental on the part taken, so that the account and the lease would terminate at the same time.” 42 Ill.App.2d at 389-390.

Reduction to present cash value of the lump sum of the rents has long been recognized as

inherent in the measure of damages. *Corrigan v. City of Chicago*, 144 Ill. 537, 545; 33 N.E. 746, 748 (1893).

Where only a portion of the leased property is taken, leaving a part susceptible of occupation under the lease, the tenant is not relieved from the payment of the rent reserved for the full term. *Stubbings v. Village of Evanston*, 136 Ill. 37, 43-44; 26 N.E. 577, 578 (1891); *Yellow Cab Co. v. Stafford-Smith Co.*, 320 Ill. 294, 296; 150 N.E. 670, 671 (1926). In that event, the measure of the tenant's damages is the present worth of the reserved rental attributable to the portion of the leasehold estate taken plus any "bonus" attributable to that portion. *Department of Public Works & Bldgs. v. Metropolitan Life Ins. Co.*, 42 Ill.App.2d 378, 389; 192 N.E.2d 607, 612, 613 (1st Dist.1963). See also *Peoria, B. & C. Traction Co. v. Vance*, 234 Ill. 36, 41; 84 N.E. 607, 609 (1908).

Where the entire tract covered by the lease is not taken, but the part remaining is not susceptible of occupation for a purpose substantially similar to the one for which the property was leased, the rule is the same as if the entire tract were taken. *Yellow Cab Co. v. Howard*, 243 Ill.App. 263, 280 (1st Dist.1927).

In *Department of Public Works & Bldgs. v. Blackberry Union Cemetery*, 32 Ill.App.3d 62, 65; 335 N.E.2d 577, 579-580 (2d Dist.1975), the court held where there is a partial condemnation of a tenant's leasehold, that the test is the fair rental value of leasehold taken, less the rent.

**300.60 Measure of Damages--Leasehold The Only Interest Taken—
Tenant's Right To Compensation Contested**

In deciding whether the defendant is entitled to compensation for the taking of his leasehold interest, you must first determine the fair rental value of the defendant's leasehold. If the fair rental value of the leasehold exceeds the rent agreed upon in the lease, the defendant is entitled to the excess. But if, on the other hand, the fair rental value of the leasehold does not exceed the rent, the defendant is not entitled to compensation.

Notes on Use

IPI 300.24 should be used with this instruction.

300.61 Range of Verdict

The amount of your verdict must be within the range of the evidence. It cannot be more than the highest figure nor less than the lowest figure testified to by the witnesses.

Comment

A verdict which exceeds the maximum amount of damages and compensation testified to by the witnesses or a verdict which is less than the minimum amount of damages and compensation testified to by the witnesses cannot stand even though the jury may have viewed the premises. *Peoria Gaslight & Coke Co. v. Peoria Terminal Ry. Co.*, 146 Ill. 372, 381; 383, 34 N.E. 550, 552 (1893) (instruction that permitted the jury to base its award on a view of the premises provided it had considered the other testimony in the case held to be reversible error); *Forest Preserve District v. Kelley*, 69 Ill.App.3d 309, 319; 387 N.E.2d 368, 376; 25 Ill.Dec. 712, 720 (2d Dist.1979) (where the verdict was within the range of the evidence and the jury had viewed the premises, the verdict was not a mistake); *Forest Preserve District v. Folta*, 377 Ill. 158, 36 N.E.2d 264 (1941) (verdict which exceeded range set aside); *Central Illinois Public Service Co. v. Rider*, 12 Ill.2d 326, 329; 146 N.E.2d 48, 50 (1957) (verdict which exceeded range set aside).

300.70 Instruction On Use of Verdict Forms--Just Compensation--Fact of Damage To Remainder Contested--Single Tract

When you retire to the jury room you will first select a foreperson. He or she will preside during your deliberations.

Your verdict must be unanimous.

Forms of verdicts are supplied with these instructions. After you have reached your verdict, fill in and sign the appropriate form and return it into court. Your verdict must be signed by each of you. You should not write or mark upon this or any of the other instructions given to you by the court.

When you have determined the just compensation to be paid for the property taken, you will complete Verdict Form A.

You will also decide whether there are damages to the remainder, and if you find there are damages to the remainder, then you will complete Verdict Form B.

If you find that there [is] [will be] no damage to the remainder, write the word “none” in the blank on the verdict form.

300.70.1 Forms of Verdict--Just Compensation--Fact of Damage to Remainder Contested--Single Tract

Verdict Form A

We, the jury, find the just compensation to be paid to the defendant for the taking of his property to be ____\$.

[Signature Lines]

Verdict Form B

We, the jury, further find the damages to the remainder to be ____\$.

[Signature Lines]

300.71 Instruction On Use of Verdict Form--Just Compensation— Fact of Damage To Remainder Not Contested--Single Tract

When you retire to the jury room you will first select a foreperson. He or she will preside during your deliberations.

Your verdict must be unanimous.

A verdict form is supplied with these instructions. After you have reached your verdict, fill in and sign the verdict form and return it into court. Your verdict must be signed by each of you. You should not write or mark upon this or any of the other instructions given to you by the court.

When you have determined the just compensation to be paid for the property taken, you

will complete the verdict form.

[When reading this instruction, the court should now say, “which reads as follows:” and should then read the verdict form to the jury.]

**300.71.1 Form of Verdict--Just Compensation—Fact
of Damage to Remainder Not Contested—
Single Tract**

Verdict Form _____

We, the jury, find the just compensation to be paid to the defendant for the taking of his property to be \$_____.

We further find the damages to the remainder to be \$_____.

[Signature Lines]

**300.72 Instruction On Use of Verdict Forms--Just
Compensation--Fact of Damage To
Remainder Not Contested Or Contested—
Multiple Tracts**

When you retire to the jury room you will first select a foreperson. He or she will preside during your deliberations.

Your verdict must be unanimous.

Forms of verdicts are supplied with these instructions. After you have reached your verdict, fill in and sign the appropriate forms and return them into court. Your verdicts must be signed by each of you. You should not write or mark upon this or any of the other instructions given to you by the court.

You are to return a separate verdict form for each tract of property involved in this case. A separate verdict form for each tract will be furnished to you for that purpose. Each form will be marked with the name of the tract and the defendant to which the form applies.

When you have determined the just compensation to be paid for each tract taken, you will complete the appropriate verdict form.

You will also decide [whether there is] [the amount of the] damage to the remainder [, and if so, the amount of that damage]. You will then complete the appropriate verdict form for each remainder.

[If you find there (is) (will be) no damage to a remainder, write the word “None” in the blank on the appropriate form.]

300.72.1 Forms of Verdict--Just Compensation--Fact of Damage to Remainder Not Contested or Contested--Multiple Tracts

Verdict Form--Part Taken

We, the jury, find the just compensation to be paid to the defendant [defendant's name] for the taking of his property [insert identifying name or number of part taken] to be \$_____.

[Signature Lines]

Verdict Form--Damage to Remainder

We, the jury, find the just compensation to be paid to the defendant [defendant's name] for the remainder of his property [insert identifying name or number of remainder] to be \$_____.

[Signature Lines]

**300.73 Instruction On Use of Verdict Forms—
Easement Strip--Underground Pipeline Or
Cable--Damage To Land Outside Strip Not
Contested Or Contested**

When you retire to the jury room you will first select a foreperson. He or she will preside during your deliberations.

Your verdict must be unanimous.

Forms of verdicts are supplied with these instructions. After you have reached your verdict, fill in and sign the appropriate forms and return them into court. Your verdicts must be signed by each of you. You should not write or mark upon this or any of the other instructions given to you by the court.

When you have determined the damage to the property within the easement strip, you will complete the appropriate verdict form.

You will also decide [whether there is] [the amount of the] damage to the defendant's property outside the easement strip [, and if so, the amount of that damage].

[If you find there (is) (will be) no damage to the property outside the easement strip, write the word "None" in the blank on the appropriate form.]

**300.73.1 Forms of Verdict--Easement Strip—
Underground Pipeline or Cable--Damage
to Land Outside Strip Not Contested or Contested**

Verdict Form--Damage to Property Within the Easement Strip

We, the jury, find the damages to be paid to the defendant defendant's name for the damage to his property within the easement strip identify easement strip by name and number to be \$_____.

[Signature Lines]

Verdict Form--Damage to Property Outside the Easement Strip

We, the jury, find the damages to be paid to the defendant defendant's name for the damage to his property outside the easement strip identify property outside the easement strip by name and number to be \$_____.

[Signature Lines]

**300.74 Instruction On Use of Verdict Forms—
Overhead Electric Transmission Line Case—
Damage To Easement Strip Not Contested Or Contested—
Damage To Land Outside Strip Not Contested Or Contested**

When you retire to the jury room you will first select a foreperson. He or she will preside during your deliberations.

Your verdict must be unanimous.

Forms of verdicts are supplied with these instructions. After you have reached your verdict, fill in and sign the appropriate forms and return them into court. Your verdicts must be signed by each of you. You should not write or mark upon this or any of the other instructions given to you by the court.

When you have determined the just compensation to be paid to the defendant for his part of the property which is occupied by the structures supporting the transmission lines, you will complete the appropriate verdict form.

[When reading this instruction, the court should now say, “This verdict form reads as follows:” and should then read the corresponding verdict form to the jury.]

You will also decide [whether there is] [the amount of the] damage to that part of the easement strip not occupied by the structures [, and if so, the amount of that damage].

[When reading this instruction, the court should now say, “This verdict form reads as follows:” and should then read the corresponding verdict form to the jury.]

[If you find there (is) (will be) no damage to that part of the easement strip not occupied by the structures, write the word “None” in the blank on the appropriate form.]

You will also decide [whether there is] [the amount of the] damage to the defendant's property outside the easement strip [, and if so, the amount of that damage].

[When reading this instruction, the court should now say, “This verdict form reads as follows:” and should then read the corresponding verdict form to the jury.]

[If you find there (is) (will be) no damage to the defendant's property outside the easement strip, write the word “None” in the blank on the appropriate form.]

Notes on Use

Where there is no damage claimed to the land outside the easement strip, omit the paragraphs that deal with that type of damage.

Use the bracketed material in accordance with whether damage to the part of the easement strip not occupied by the structures and to the part of the property lying outside the easement strip is contested or not contested.

**300.74.1 Forms of Verdict--Overhead Electric Transmission
Line Case--Damage to Easement Strip Not
Contested or Contested--Damage to Land Outside
Strip Not Contested or Contested**

Verdict Form--Property Occupied by Structures

We, the jury, find the just compensation to be paid to the defendant [defendant's name] for the taking of that part of his property which is occupied by the structures supporting the transmission lines identify property occupied by structures by name and number to be \$_____.

[Signature Lines]

Verdict Form--Damage to Easement Strip Not Occupied by Structures

We, the jury, find the damages to be paid to the defendant [defendant's name] for the damage to that part of the easement strip which is not occupied by the structures supporting the transmission lines [identify part of easement strip not occupied by structures by name and number] to be \$_____.

[Signature Lines]

Verdict Form--Damage to Property Outside the Easement Strip

We, the jury, find the damages to be paid to the defendant [defendant's name] for the damage to his property outside the easement strip [identify property outside the easement strip by name and number] to be \$_____.

[Signature Lines]

**300.75 Instruction On Use of Verdict Forms--Just Compensation—
Total Taking of Fee--Total Taking of Leasehold—
Tenant's Share Contested**

When you retire to the jury room you will first select a foreperson. He or she will preside during your deliberations.

Your verdict must be unanimous.

Forms of verdicts are supplied with these instructions. After you have reached your verdict, fill in and sign the appropriate forms and return them into court. Your verdicts must be signed by each of you. You should not write or mark upon this or any of the other instructions given to you by the court.

When you have determined the total just compensation to be paid for the property taken, you will complete the appropriate verdict form.

[When reading this instruction, the court should now say, “This verdict form reads as follows:” and should then read the corresponding “total just compensation” verdict form to the jury.]

You will also decide whether the tenant is entitled to a share of that compensation, and, if so, the amount of the tenant's share. You will then complete the appropriate verdict form for the tenant.

[When reading this instruction, the court should now say, “These verdict forms read as follows:” and should then read the corresponding tenant verdict forms to the jury.]

**300.75.1 Forms of Verdict--Just Compensation--Total
Taking of Fee--Total Taking of
Leasehold--Tenant's Share Contested**

Verdict Form--Total Just Compensation

We, the jury, find the just compensation to be paid to the defendant [defendant's name] for the taking of his property insert identifying name or number of property taken to be \$_____.

[Signature Lines]

Verdict Form--Tenant Entitled to Share Compensation

We, the jury, find that the tenant [tenant's name] is entitled to share in the total just compensation. We further find the tenant's share of the total just compensation to be \$_____, said amount to be deducted from the total just compensation to be paid to the defendant [defendant's name].

[Signature Lines]

Verdict Form--Tenant Not Entitled to Share Compensation

We, the jury, find that the tenant [tenant's name] is not entitled to share in the total just compensation.

[Signature Lines]

**300.76 Instruction On Use of Verdict Form--Total
Taking of Leasehold--Leasehold The Only
Interest Taken**

When you retire to the jury room you will first select a foreperson. He or she will preside during your deliberations.

Your verdict must be unanimous.

A verdict form is supplied with these instructions. After you have reached your verdict, fill in and sign the verdict form and return it into court. Your verdict must be signed by each of you. You should not write or mark upon this or any of the other instructions given to you by the court.

You will decide whether the defendant [defendant-tenant's name] is entitled to compensation, and, if so, the amount of that compensation. You will then complete the verdict form.

[When reading this instruction, the court should now say,
“which reads as follows:” and should then read the verdict
form to the jury.]

If you find that the defendant is entitled to compensation for the taking of his leasehold interest, insert the amount in the blank in the form. If you find that the defendant is not entitled to compensation for the taking of his leasehold interest, insert the word “None” in the blank in the form.

**300.76.1 Form of Verdict--Just Compensation--Total
Taking of Leasehold--Leasehold the Only
Interest Taken**

Verdict Form--Leasehold Interest Only

We, the jury, find the just compensation to be paid to the defendant [defendant-tenant's name] for the taking of his leasehold [insert identifying name or number of property taken] to be \$_____.

[Signature Lines]

300.80 JUST COMPENSATION DEFINITION

When I use the words “Just Compensation” for the defendant's property which [will be] [has been] taken, I mean the fair cash market value of the property at its highest and best use [on insert filing date of complaint].

Notes on Use

The past tense should be used when the property has been taken under the “Quick Take” provision of the Eminent Domain Act, 735 ILCS 5/7-103 (1994).

There are two situations when the instruction might have to be modified: (1) when the property owner seeks to show depreciation in the value of the property prior to the filing which was proximately caused by the public improvement; and (2) when the property owner seeks to show a substantial appreciation in the value of the property between the time the complaint is filed and the time of trial. *See* the discussion of the *City of Rock Island* and *Kirby Forest Industries* cases in the Comment below.

Comment

The constitution provides that “[p]rivate property shall not be taken or damaged for public use without just compensation as provided by law.” Ill. Const. Art. 1, §15 (1970). This requirement is repeated in the Eminent Domain Act, 735 ILCS 5/7-101 to 7-129 (1994). Definitions of “just compensation” have ranged from the “amount of money necessary to put him in as good condition financially as he was with the ownership of the property,” *People ex rel. Director of Finance v. Young Women's Christian Ass'n*, 74 Ill.2d 561, 572; 387 N.E.2d 305, 311; 25 Ill.Dec. 649, 655 (1979), to a “sum of money that is the equivalent of the value of the property.” *Chicago Land Clearance Comm'n v. Darrow*, 12 Ill.2d 365, 371-372; 146 N.E.2d 1, 5 (1957). But despite differences in definition, the applied measure of just compensation has been constant. The value to the owner of the property taken or damaged for his particular purposes, or its value to the condemnor for some special use, have been rejected in favor of the market value of the property at the highest and best use to which it is adapted. *City of Chicago v. Harrison-Halsted Building Corp.*, 11 Ill.2d 431, 143 N.E.2d 40 (1957); *Peoples Gas Light & Coke Co. v. Buckles*, 24 Ill.2d 520, 531-532; 182 N.E.2d 169, 176 (1962), *appeal dismissed, cert. denied*, 371 U.S. 185, 83 S.Ct. 266, 9 L.Ed.2d 227 (1962); *Department of Public Works & Bldgs. v. Association of Franciscan Fathers*, 44 Ill.App.3d 49, 57-58; 360 N.E.2d 70, 77-78; 4 Ill.Dec. 323, 331-332 (1976), *s24 affirmed*, 69 Ill.2d 308, 314-19; 371 N.E.2d 616, 618-620; 13 Ill.Dec. 681, 683-85 (1977)

Defining just compensation for the jury in terms of the “richer or poorer” test is not recommended. *See* Comment to IPI 300.82.

This instruction is consistent with §7-121, under which all evidence of value and the determination of just compensation must be made as of the date on which the complaint was filed, and it was approved in *Department of Public Works & Bldgs. v. Guerine*, 19 Ill.App.3d 509, 311 N.E.2d 722 (2d Dist.1974).

However, the property owners have the right to establish the amount of any depreciation

in the value of their property which was proximately caused prior to the filing by the public improvement for which their property was taken. *City of Rock Island v. Moline Nat. Bank*, 54 Ill.App.3d 853, 368 N.E.2d 1113, 11 Ill.Dec. 505 (1977). And in *Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 104 S.Ct. 2187, 81 L.Ed.2d 1 (1984), the Supreme Court said that it is a violation of the fifth amendment to give the property owner substantially less than the market value of his property at the time of the “taking” by the government. Therefore, if an owner's property appreciates substantially between the time the complaint is filed and the time that payment is tendered, it is arguable that §7-121 may be subject to qualification or exception. There are presently no Illinois appellate decisions considering the effect of the *Kirby* decision on Illinois condemnation law and practice.

300.81 Fair Cash Market Value--Definition

When I use the words “fair cash market value” I mean that price which a willing buyer would pay in cash and a willing seller would accept, when the buyer is not compelled to buy and the seller is not compelled to sell.

Comment

In discussing just compensation, the Illinois Supreme Court has used the terms “fair cash market value” and “market value” interchangeably. *E.g.*, *Crystal Lake Park Dist. v. Consumers' Co.*, 313 Ill. 395, 402; 145 N.E. 215, 218 (1924). However, it is cash market value which the jury must determine. *Forest Preserve District v. Barchard*, 293 Ill. 556, 563; 127 N.E. 878, 881, 882 (1920); *City of Chicago v. Mullin*, 285 Ill. 296, 300; 120 N.E. 785, 787 (1918); *Dady v. Condit*, 209 Ill. 488, 493; 70 N.E. 1088, 1090 (1904); *Department of Transportation v. Toledo, Peoria & W. R. Co.*, 59 Ill.App.3d 886, 889; 376 N.E.2d 88, 90-91; 17 Ill.Dec. 195, 198 (3d Dist.1978); *Department of Business and Economic Development v. Pioneer Trust & Savings Bank*, 39 Ill.App.3d 8, 10-11, 349 N.E.2d 467, 470-71 (2d Dist.1976). Although evidence of credit sales of comparable property and evidence of sales on deferred payments is admissible, it is for the jury to determine the weight to be given that evidence in determining the ultimate fact of fair cash market value. *Forest Preserve Dist. v. Barchard*, 293 Ill. 556, 127 N.E. 878 (1920); *City of Chicago v. Mullin*, 285 Ill. 296, 300; 120 N.E. 785, 787 (1918); *Dady v. Condit*, 209 Ill. 488, 493; 70 N.E. 1088, 1090 (1904); *Department of Conservation v. Aspegren Financial Corp.*, 72 Ill.2d 302, 310-313; 381 N.E.2d 231, 235-236; 21 Ill.Dec. 153, 157-158 (1978); *Department of Public Works & Bldgs. v. Klehm*, 56 Ill.2d 121, 125-126; 306 N.E.2d 1, 3-4 (1973).

This instruction was approved in *Department of Public Works & Bldgs. v. Guerine*, 19 Ill.App.3d 509, 311 N.E.2d 722 (2d Dist.1974), and *Illinois State Toll Highway Authority v. Heritage Standard Bank & Trust Co.*, 196 Ill.App.3d 5, 552 N.E.2d 1151, 142 Ill.Dec. 410 (2d Dist.1990).

300.82 Just Compensation--Richer Or Poorer--Owner To Be Made Whole--Definition

The committee recommends that no instruction be given defining “just compensation” in terms of the “richer or poorer” test or on the basis that the owner should be “made whole.”

Notes on Use

“Just compensation” is defined in IPI 300.80.

Comment

The Illinois Supreme Court has accepted fair cash market value as the standard for determining just compensation for land taken, *Housing Authority v. Kosydor*, 17 Ill.2d 602, 605-606; 162 N.E.2d 357, 359 (1959), and the difference between the value of the land before and after the taking, *County Board of School Trustees v. Elliott*, 14 Ill.2d 440, 444-446; 152 N.E.2d 873, 876-877 (1958), as the standard for determining the damages to land not taken. The application of these two standards does not necessarily result in making the property owner “whole,” so that he will not be “poorer or richer” by reason of the property being taken. Consequently, the “richer or poorer” instruction does not define “just compensation” accurately and might confuse and mislead the jury. There are many financial losses which an owner may suffer as a result of the taking which the court has held to be noncompensable insofar as the law of eminent domain or the Illinois Constitution is concerned. Examples of such financial losses which are not compensable are (1) cost of moving personal property, *Housing Authority v. Kosydor*, 17 Ill.2d 602, 605-608; 162 N.E.2d 357, 359-361 (1959); (2) value of business and business income, *Chicago Land Clearance Commission v. Darrow*, 12 Ill.2d 365, 371-373; 146 N.E.2d 1, 5-6, 68 A.L.R.2d 532 (1957); (3) payments made by the owner for financing, appraisal and architects' fees for a proposed improvement on the property, *City of Chicago v. Provus*, 415 Ill. 618, 621; 114 N.E.2d 793, 794, 795 (1953); (4) loss of land for future expansion of the business, *City of Chicago v. Equitable Life Assurance Society*, 8 Ill.2d 341, 348; 134 N.E.2d 296, 300 (1956); (5) reduced traffic flow by virtue of a median strip, *Department of Public Works & Bldgs. v. Mabee*, 22 Ill.2d 202, 174 N.E.2d 801 (1961); and (6) loss of business during the time the improvement is being constructed, *Department of Public Works & Bldgs. v. Maddox*, 21 Ill.2d 489, 493-494; 173 N.E.2d 448, 450-451 (1961).

In *Housing Authority v. Kosydor*, 17 Ill.2d 602, 607; 162 N.E.2d 357, 360 (1959), the court held that “just compensation” does not include payment of moving expenses except where private property is taken only temporarily for public use. The court then made the following statement:

Absent this exception, a condemnee's right of compensation is limited to the market value of the interest taken. “Only in the sense that he is to receive such value is it true that the owner must be put in as good position pecuniarily as if his property had not been taken.” *United States v. General Motors Corp.*, 323 U.S. 373, 379; 65 S.Ct. 357, 360; 89 L.Ed. 311.

In *City of Quincy v. V.E. Best Plumbing & Heating Supply Co.*, 17 Ill.2d 570, 576-577; 162 N.E.2d 373, 377-378 (1959), the owner's counsel argued to the jury that, while the jury could not give the owner compensation for moving, for its inconvenience, or for the loss of goodwill in

that location, the jury could give the owner just compensation that would render it neither richer nor poorer, and that the jury would be so instructed by the court. Even though the condemnor did not object to that argument, the court held that making such an argument was reversible error.

300.83 Fair Rental Value--Definition

When I use the words “fair rental value” I mean that amount of rent which a tenant willing to rent would pay and an owner willing to lease would accept, when the tenant is not compelled to rent and the owner is not compelled to lease.

Comment

The basis for determining the damages a tenant has sustained is “fair rental value.” *Commercial Delivery Service v. Medema*, 7 Ill.App.2d 419, 424; 129 N.E.2d 579, 581 (1st Dist.1955); *Department of Public Works & Bldgs. v. Blackberry Union Cemetery*, 32 Ill.App.3d 62, 65; 335 N.E.2d 577, 580 (2d Dist.1975). This instruction is patterned after the definition of fair cash market value, IPI 300.81. The word “cash” is not used because rent is usually paid in cash.

300.84 Highest and Best Use--Definition

When I use the expression “highest and best use” of property I mean that use which would give the property its highest cash market value on [insert date complaint was filed]. [This may be the actual use of the property on that date or a use to which it was then adaptable and which would be anticipated with such reasonable certainty that it would enhance the market value on that date.]

Notes on Use

The bracketed material should be used only where there is evidence of adaptability to other uses which may be anticipated with reasonable certainty.

Comment

The highest and best use of property includes “not only the actual uses of the land, but its capabilities insofar as they add to its market value.” *Haslam v. Galena & S.W.R. Co.*, 64 Ill. 353, 355-356 (1872); *Housing Authority v. Kosydor*, 17 Ill.2d 602, 608; 162 N.E.2d 357, 360 (1959); *Department of Transp. v. Toledo, P. & W. R. Co.*, 59 Ill.App.3d 886, 889; 376 N.E.2d 88, 90-91; 17 Ill.Dec. 195, 198 (3d Dist.1978).

There must be a present capacity for a use which may be anticipated with reasonable certainty so that it enhances the market value of the property on the date of the complaint. *Pittsburgh, C., C. & St. L. Ry. Co. v. Gage*, 286 Ill. 213, 224; 121 N.E. 582, 586, 587 (1918); *Illinois Light & Power Co. v. Bedard*, 343 Ill. 618, 626-27; 175 N.E. 851, 854 (1931); *Department of Public Works & Bldgs. v. Association of Franciscan Fathers*, 44 Ill.App.3d 49, 57-58; 360 N.E.2d 70, 77-78; 4 Ill.Dec. 323, 330-331 (2d Dist.1976), *aff'd*, 69 Ill.2d 308, 314-319; 371 N.E.2d 616, 618-620; 13 Ill.Dec. 681, 683-685 (1977).

This instruction was approved in *Department of Public Works & Bldgs. v. Guerine*, 19 Ill.App.3d 509, 311 N.E.2d 722 (2d Dist.1974).

See Comment to IPI 300.80.

300.85 Reasonable Probability of Rezoning

If you find that on insert date complaint was filed there was a reasonable probability of rezoning the property, then you may consider the effect of such rezoning in determining just compensation in this case.

Notes on Use

This instruction should only be used where there is evidence of a reasonable probability of rezoning and also should be used in conjunction with IPI 300.84.

Comment

The reasonable probability of rezoning is a proper factor to consider in determining the value of the property. *Department of Public Works & Bldgs. v. Rogers*, 39 Ill.2d 109, 233 N.E.2d 409 (1968); *Department of Transportation v. Western Nat. Bank*, 63 Ill.2d 179, 347 N.E.2d 161 (1976).

In *Department of Public Works & Bldgs. v. Association of Franciscan Fathers*, 69 Ill.2d 308, 371 N.E.2d 616, 13 Ill.Dec. 681 (1977), the Illinois Supreme Court reaffirmed the above rule and held that the trial court erred by failing to give the jury an instruction on the reasonable probability of rezoning. The court recommended giving a separate instruction in conjunction with IPI 300.84.

Lake County Forest Preserve Dist. v. Reliance Standard Life Ins. Co., 29 Ill.App.3d 145, 329 N.E.2d 344 (2d Dist.1975), held that under the conditions enumerated in the opinion, the doctrine of reasonable probability of rezoning may be extended to allow consideration of the reasonable probability of annexation. And in *Lake County Forest Preserve Dist. v. Petersen*, 93 Ill.App.3d 731, 417 N.E.2d 862, 49 Ill.Dec. 172 (2d Dist.1981), the court held that the doctrine of reasonable probability of rezoning may be extended to include the reasonable probability of obtaining an E.P.A. permit for operation of a sanitary landfill on the land to be condemned. If the trial court determines that the jury may consider evidence of the reasonable probability of these or other future events in determining the issue of just compensation, then this instruction should be modified accordingly.

300.86 Remainder--Definition--Fee Case

When I use the word “remainder” I mean the defendant's property which is not taken by the plaintiff and which the defendant claims is damaged by the taking.

Comment

This definition of “remainder” permits the use of a single word in these instructions to express the concept of “the defendant's property which is not taken by the plaintiff and which the defendant claims is damaged by the taking.”

In a case involving an easement the instruction should be modified to read:

When I use the word “remainder” I mean the defendant's property outside the easement strip which defendant claims is damaged by the imposition of the easement.

Ordinarily an easement is not considered a taking of property.

300.87 Easement--Definition

When I use the term “easement,” I mean the right to use the property of another for purpose.

Comment

For the purposes of condemnation cases an easement has been defined as the “subjection [of a part of defendant's property] to condemnor's superior right to use the land for the purpose for which it is condemned.” *North Shore Sanitary Dist. v. Schulik*, 12 Ill.2d 309, 312; 146 N.E.2d 25, 26 (1957).