Agenda
Advisory Committee on
Model Civil Jury Instructions

September 13, 2010
4:00 to 6:00 p.m.

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

Welcome and approval of minutes	Tab 1	John Young
Eminent Domain	Tab 2	Perrin Love

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

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

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

October 12, 2010 (Tuesday)
November 8, 2010
December 13, 2010
January 10, 2011 (Education Room)
February 14, 2011
March 14, 2011
April 11, 2011
May 9, 2011 (Education Room)
June 13, 2011
September 12, 2011
October 11, 2011 (Tuesday)
November 14, 2011
December 12, 2011

Tab 1

MINUTES
Advisory Committee on Model Civil Jury Instructions
June 14, 2010
4:00 p.m.

Present: John L. Young (chair), Honorable William W. Barrett, Jr., Juli Blanch, Francis J. Carney, Marianna Di Paolo, Phillip S. Ferguson, John R. Lund, Stephen B. Nebeker, Timothy M. Shea, Paul M. Simmons, Peter W. Summerill, David E. West

1. *CV201, "Fault" defined; CV209, "Cause" defined.* Mr. Shea revised CV201 and CV209 to remove causation from the definition of "fault," as discussed at the last meeting. Mr. Lund asked how the revised definition complies with the statutory definition of "fault." Messrs. Carney and Shea responded that it complies with the statutory definition, but in two instructions instead of one. At Dr. Di Paolo's suggestion, the second sentence of CV209 was revised to read, "You must also determine whether a person's fault caused the harm." The committee also considered the revised committee note to CV209. Mr. Simmons added a discussion of the foreseeability requirement and an explanation of why the committee rejected the "substantial factor" alternative instruction from MUJI 1st (MUJI 3.14). Mr. Summerill suggested putting the discussion of "substantial factor" before the discussion of "foreseeability," but the committee was satisfied with the note as written. The committee approved CV201 and CV209 as revised.

2. *CV211, Allocation of fault.* Mr. Lund asked what the jury was supposed to allocate if the definition of "fault" does not include causation. Mr. Ferguson noted that the question is whether the Liability Reform Act is a comparative fault statute or a comparative causation statute, a question the Utah Supreme Court has never squarely addressed. Mr. Lund thought the jury was to allocate overall "fault," as defined by the statute, and the statute includes an element of causation in its definition of fault. Mr. Summerill noted that the statute defines "fault" as any actionable breach of legal duty "causing *or contributing* to injury or damages" (Utah Code Ann. § 78B-5-817(2)) (emphasis added). He thought this language was broader than simply causation. Mr. Simmons noted, however, that, if a defendant's fault was not a "cause" of the plaintiff's harm, there could be no liability, and the jury would never reach the allocation question. Mr. Lund thought that "or contributing" may have been included to cover cases of contributory negligence. He thought that, if causation is removed from the jury instruction's definition of "fault," CV211 should tell the jury that it needs to allocate "the fault that caused the harm" and not just "fault." Mr. Lund thought that the instructions should allow a defendant to admit negligence but argue that no fault should be apportioned to him because his fault did not cause the plaintiff's harm. Mr. West thought the third sentence, which read, "Each person's percentage should be based upon how much that person's fault caused the harm," was misleading, because the jury must allocate fault, not causation. He noted that a defendant who may be 90% at fault may have caused only 1% of the damages. He thought that if the defendant's fault is a cause of the plaintiff's harm, the jury can apportion fault to the defendant in accordance with the egregiousness of the defendant's conduct and is not required to allocate fault based

solely on how much the defendant's fault contributed to the harm. Mr. West thought that the allocation should be based on negligence, not on causation. Messrs. Lund and Nebeker noted that it is ultimately a question of who should be responsible for the plaintiff's damages and to what extent. But Mr. Lund thought that the instruction should clearly tell the jury what it is they should base their allocation on. Mr. Ferguson questioned whether the instructions were consistent, since, in CV201, the jury is told that "fault" does not include causation, but in CV211 it is told that "fault" does include causation. After much discussion, the committee revised CV211 to read:

> [Name of party] claims that more than one person's fault was a cause of the harm. If you decide that more than one person is at fault, you must decide each person's percentage of fault that caused the harm. This allocation must total 100%.
>
> You may also decide to allocate a percentage to the plaintiff. [Name of plaintiff]'s total recovery will be reduced by the percentage that you attribute to [him]. If you decide that [name of plaintiff]'s percentage is 50% or greater, [name of plaintiff] will recover nothing.
>
> When you answer the questions on damages, do not reduce the award by [name of plaintiff]'s percentage. I will make that calculation later.

The committee approved the instruction as revised.

3. *CV299B. Special Verdict--One Defendant (Comparative Fault).* Mr. Shea replaced "negligence" with "fault that caused the harm" in the first paragraph of Question 5 and replaced "negligence" with "fault" in other questions as well.

4. *CV1015, Negligence. Definition of "negligence"; and CV1050, Comparative fault.* Mr. Shea noted that the problems the committee had considered with the instructions on "fault" and "comparative fault" in the negligence instructions also apply to the products liability instructions on negligence and comparative negligence, CV1015 and CV1050. Mr. Young suggested sending the revisions to CV201, CV209, and CV211 to the Products Liability Subcommittee to consider whether similar revisions need to be made to the products liability negligence and comparative fault instructions.

5. *Post-trial Surveys.* Mr. Shea noted that he had not yet received the report on civil jury trials for the month of May 2010. Mr. Carney said that he had contacted the attorneys in the jury trials he knew about. Only Rob Jeffs and Eric Schoonveld responded.

6. *CV2012, Noneconomic damages. Loss of consortium.* Based on Rob Jeffs' e-mails to Mr. Carney, the committee considered a proposal to modify CV2012. Mr. Jeffs did not think the current instruction adequately addressed the situation of a housewife who is not able to do her "job" as a housewife or homemaker. The instruction he had proposed in his case said that, to award damages for loss of consortium, the plaintiff must prove that she has suffered

> (1) a significant permanent injury that substantially changes her lifestyle and
>
> (2) one or more of the following:
>
> (a) incapability of performing the types of jobs she performed before the injury; or
>
> (b) inability to provide the companionship, cooperation, affection, aid or sexual relations she provided before the injury.

Mr. Simmons thought the statute is ambiguous. It allows the spouse of an "injured" person to maintain an action for loss of consortium and defines "injured" or "injury" as

> a significant permanent injury to a person that substantially changes that person's lifestyle and includes the following:
>
> (i) a partial or complete paralysis of one or more of the extremities;
>
> (ii) significant disfigurement; or
>
> (iii) incapability of the person of performing the types of jobs the person performed before the injury . . . .

Mr. Simmons thought the phrase "and includes the following" was ambiguous. It could mean "includes but is not limited to the following," that is, that subparagraphs (i) through (iii) are only illustrative of the type of injuries that are sufficiently significant and permanent to give rise to a claim for loss of consortium, or it could mean that one of the types of injury set out in subparagraphs (i) through (iii) must exist for the plaintiff to have a claim for loss of consortium. Dr. Di Paolo thought it meant the latter but acknowledged that the statute could be better drafted. Mr. Simmons said that his firm was researching the issue but did not have an answer yet. The committee saw no reason to change CV2012 at this time but thought that a housewife's inability to do her job as a housewife would be covered under subparagraph (iii) of the statute (subparagraph (2)(c) of the current instruction).

7. *Next Meeting*. There will be no committee meeting in July or August 2010. The next meeting will be Monday, September 13, 2010, at 4:00 p.m.

The meeting concluded at 5:40 p.m.

Tab 2

Eminent Domain

(1) CV1601. Eminent Domain Committee Notes 1
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(1) CV1601. Eminent Domain Committee Notes

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

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

Several MUJI I instructions have been deleted. [need to identify]

(2) CV1602. Condemnation proceedings.

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

References

Utah Const. Article. I, Section 22.

Utah Code Section 78B-6-511.

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

MUJI 1

16.1, 16.4, 16.5

Committee Notes

On constitutional issues and public use? Pete Summerill and Perrin Love

Approved

(3) CV1603. Definition of just compensation.

Alternative 1:

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

Alternative 2:

Just compensation is:

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

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

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

References

Utah Code Section 78B-6-511.

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

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

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

Committee Notes

Alternative 1 should be given when the owner's entire property is taken. Alternative 2 should be given when part of the owner's property is taken and severance damages are in issue. If Alternative 2 is used, the judge should instruct the jury on the definition of "severance damages." See Instruction CV1616, Severance damages.

MUJI 1

16.5

Approved

(4) CV1604. Burden of proof.

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

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

References

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

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

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

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

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

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

Committee Notes

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

MUJI 1

16.6

Approved

(5) CV1605. Fair market value.

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

(1) there is no pressure on either one to buy or sell; and

(2) the buyer and the seller know all of the facts about the property.

You are to determine fair market value of the property on [valuation date].

References

Utah Code Section 78B-6-511.

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

Redevp. Agency of SLC v. Mitsui Invest., Inc., 522 P.2d 1370 (Utah 1974).

Utah State Rd. Comm'n v. Wood, 452 P.2d 872 (1969).

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

Sigurd v. State, 142 P.2d 154 (Utah 1943).

Committee Notes

Approved

Note From the Subcommittee:

The Eminent Domain subcommittee deliberated extensively about whether to include the word "prudent" in the definition of a willing buyer and seller, and voted (by majority vote, not unanimously) to include it in the fair market value instruction provided to the full Committee. Since submitting that instruction, the subcommittee has noted two instances in which the definition of fair market value does not include 'prudent" in its definition.

The first is MUJI II 2010, relating to economic damages for tortious injury to real or personal property, which states:

CV2010 "Fair market value" defined.

Fair market value is the highest price that a willing buyer would have paid to a willing seller, assuming that there was no pressure on either one to buy or sell; and that the buyer and seller were fully informed of the condition and quality of the [item of personal property].

References

Knickerbocker v. Cannon, 912 P.2d 969, 982 (Utah 1996).

Winters v. Charles Anthony, Inc., 586 P.2d 453 (Utah 1978).

The second is the definition of Fair Market Value in the Utah Property Tax Act. Subsection 59-2-102(12) states:

"Fair market value" means the amount at which property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of the relevant facts. For purposes of taxation, "fair market value" shall be determined using the current zoning laws applicable to the property in question, except in cases where there is a reasonable

probability of a change in the zoning laws affecting that property in the tax year in question and the change would have an appreciable influence upon the value.

We bring these definitions to the attention of the Committee, because we are not certain of any reason that the definitions of fair market value should be different for eminent domain or tort damages.

We have also noted that some appraisals use the definition of fair market value in the Utah Property Tax Act as the basis for their appraisals. Earlier the subcommittee noted that some appraisals use the definition of fair market value from FIRREAl, which does include it.

(6) CV1606. Fair market value of easement.

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

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

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

References

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

Wykoff v. Barton, 646 P.2d 756 (Utah 1982).

Provo City Corp. v. Knudsen, 558 P.2d 1332 (Utah 1977).

North Union Canal Co. v. Newell, 550 P.2d 178 (Utah 1976).

Committee Notes

This instruction should be modified, or an additional instruction given, if there is a dispute about the scope of the easement or the uses remaining to the property owner after the easement is taken, to explain the scope and respective uses under the easement. The bracketed part of the instruction relating to severance damages should be given only in partial taking cases in which severance damages are in issue.

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

Approved

(7) CV1607. Highest and best use.

You must determine fair market value based on the property's highest and best use. Highest and best use is not necessarily the actual use of the property on [valuation

date]. The highest and best use includes any potential use that is reasonably probable and that results in the property's highest value . A potential use is reasonably probable if:

(1) the property is physically suited or adaptable to the potential use;

(2) the property is legally available for the potential use, or if there is a reasonable probability that any legal restriction or barrier will be removed or modified; and

(3) there is enough demand for the use in the marketplace to influence the fair market value of the property.

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

References

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

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

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

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

Committee Notes

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

Approved

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

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

(1) there was a reasonable probability of a change; and

(2) a prudent and willing buyer and seller would consider the probability of a change in agreeing on a purchase price for the property.

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

References

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

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

Approved

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

You must determine the fair market value of the property taken, [and any severance damages to the remaining property], based solely on the testimony of the witnesses

who have given their opinion. You may consider other evidence only to help you understand and weigh the testimony of the witnesses.

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

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

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

References

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

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

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

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

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

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

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

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

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

Committee Notes

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

This instruction modifies the former MUJI I 6.2 (Owner Testifying). The Committee considered the former MUJI 16.2 to be argumentative and to unfairly highlight to the jury issues surrounding an owner's credibility.

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

MUJI 1st

16.2

(10) CV1610. Viewing of property.

You may consider your viewing of the property only to help you evaluate the evidence you have seen and heard in the courtroom. Your viewing of the property is not

itself evidence of fair market value, and you may use it only to help you gain a better understanding of the testimony.

References

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

MUJI 1

16.18

Probably delete, since it rarely happens.

(11) CV1611. Project influence.

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

References

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

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

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

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

Committee Notes

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

MUJI 1st

Approved

(12) CV1612. Value of undeveloped land.

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

References

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

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

Committee Notes

This instruction should be given when the property taken is undeveloped land, suitable for development, but no tangible steps have been taken for development. The propriety of the instruction, and the precise wording of the instruction, may vary when

certain steps or actions have been taken to subdivide the property, but subdivision has not been completed. See generally, 4 Nichols on Eminent Domain § 12B.14.

Approved

(13) CV1613. Value of improved property.

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

References

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

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

Committee Notes

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

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

Approved

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

Alternative 1:

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

Alternative 2:

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

References

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

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

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

Committee Notes

The Committee believes that these alternative instructions should be given to avoid any confusion when an appraiser determines the fair market value of property by

capitalizing income. Alternative 1 should be given when no witness capitalizes income on the property to determine fair market value; Alternative 2 should be given when one or more witnesses capitalize income.

Approved

(15) CV1615. Interest and moving expenses.

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

References

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

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

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

MUJI 1

16.12

Approved

(16) CV1616. Severance damages.

[Name of condemnor] has taken only part of [name of property owner]'s property. In addition to determining the fair market value of the property taken, you must determine whether there have been any severance damages to the remaining property. Severance damages means any loss of fair market value to the remaining property caused by the taking [or by the proposed construction of [describe public improvement] on the property taken].

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

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

References

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

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

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

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

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

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

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

Committee Notes

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

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

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

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

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

Approved

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

If you find that (1) the fair market value of the remaining property can be repaired or restored to its fair market value, as part of the whole, before the taking, and (2) the reasonable cost to repair or restore the remaining property is less than the difference between its fair market value before and after the taking, then the measure of severance damage is the reasonable cost to repair or restore the remaining property .

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

References

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

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

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

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

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

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

Committee Notes:

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

(18) CV1618. Access.

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

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

References

Utah Code Section 72-7-103.

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

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

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

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

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

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

Committee Notes

This instruction should be given only when a property owner claims that a partial taking has deprived the owner of reasonable access to the remaining property after the taking, when the access was derived from the fact that the property abutted a public street or right of way. This instruction should be modified when a specific easement, access point, or right of way has been taken or closed in connection with a partial taking. For example, if a property owner has a legally established access point, right of way, or easement, derived from a contract, deed, or prior governmental grant, that access point would be a property right and the taking of that access point must be considered in determining severance damages, whether or not the owner still had

reasonable access without the access point. See generally, Hampton v. State, 445 P.2d 708 (Utah 1968).

Approved

(19) CV1619. Vested right of access.

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

(20) CV1620. Special benefits.

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

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

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

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

References

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

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

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

Committee Notes

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

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

Approved

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

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

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

References

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

Committee Notes

To be given when there are multiple defendants.

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

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

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

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

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

References

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

Committee Notes

This instruction should be given after Instruction CV1621, Apportionment of just compensation among multiple interests.

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

purpose of this instruction is therefore similar in purpose to the instruction on just compensation.

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