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W. C. Lynch

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# JURY INSTRUCTIONS IN EMINENT DOMAIN CASES

W. C. LYNCH\*

The increasing use of the power of eminent domain, by the Federal Government and the State and its political subdivisions, has consequently resulted in a corresponding increase in litigation commonly referred to as "condemnation" or "eminent domain" actions.

Much of the recent litigation in cases of eminent domain arises out of the interstate highway construction program. With this fact in mind, this Court has prepared basic instructions for such cases.

Before setting forth the instructions, it must be pointed out:

(1) No claim is made as to originality of draftsmanship for all the topics covered. Portions of the instructions have been derived from such publications as *Federal Jury Practice and Instructions* by Judge Mathes and Judge Devitt, *Nichols' Eminent Domain*, instructions given by other North Dakota Judges and as requested by Counsel, and from decisions by our North Dakota Supreme Court.

(2) The instructions do not purport to be "error proof." While the instructions are intended to comply with the statutes of North Dakota pertaining to the law of eminent domain and the Supreme Court decisions of our state, it of course must be recognized that any instruction given is subject to review by our Supreme Court and that even this Court does not deem itself bound by the instructions in their present form.

(3) The instructions are intended to be useful as a guide only, subject to improvement and change and future decisions of our Supreme Court.

(4) The instructions are not designed to be applicable to every type of case of eminent domain. The omission or inclusion of certain paragraphs must be governed by the facts and circumstances of the particular case. Most of the difficult questions involving instructions in eminent domain cases arise where the land taken for highway purposes bisects property where the highest and best use of the property is residential or where the property is in the

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\* Judge of the District Court, Fourth Judicial District of North Dakota. Member, North Dakota Judicial Council Committee on Pattern Jury Instructions. LL.B., University of North Dakota.

early stages of development for residential use. It is to this type of situation that most of the instructions are applicable and were designed to cover.

Bearing the foregoing factors in mind, the instructions will be set forth together with some comment as to some of the specific instructions and in some instances the citations which were relied upon in drafting specific portions of the instructions will be given.

## EMINENT DOMAIN INSTRUCTIONS TO THE JURY

### 1. *Jurors' Duties*

Members of the jury, this is a civil action in which \_\_\_\_\_ is the plaintiff and \_\_\_\_\_ are the defendants.

I charge you that you are the sole and exclusive judges of all the questions of fact in this case and of the credibility of the witnesses. You must do this without fear or favor, uninfluenced by sympathy, passion or prejudice, basing your verdict strictly upon the whole of the evidence as you have heard it from the witness stand, together with any exhibits received in evidence, and the law governing the case as set forth by the Court in these Instructions.

### 2. *Credibility of Witnesses*

To you alone belongs the duty of weighing the evidence under the Court's instructions and of determining the credibility of those who have testified. As to these matters the Court expresses no opinion.

In weighing the evidence and in determining the credibility of those who have testified you may consider all of the facts and circumstances disclosed by the evidence tending to strengthen, weaken or contradict their testimony. You may consider the age, intelligence and experience of the witness; the strength or weakness of his recollection; his means or lack of means of knowing the facts about which he has testified; his possible interest in the outcome of the trial; any bias or prejudice he may have; his manner and appearance; whether he was frank or evasive while testifying; whether his testimony is reasonable or unreasonable.

If you find a conflict in the evidence you must reconcile it if you can because each witness is presumed to have testified truthfully. If you cannot do so, you have the right to determine which of the witnesses you will believe, in whole or in part.

You should give to all credible testimony its just and fair weight. You should consider the evidence in this case in the light of your

common sense and your ordinary experience and observation of human affairs.

### 3. *Matters of Common Knowledge*

You may in addition to the evidence offered in this case, take into consideration in connection therewith such matters of knowledge commonly known to all men of ordinary understanding and intelligence. You come into this jury box as reasonable persons and you are to weigh the evidence in the light of your common knowledge and experience.

However, you have no right to go outside the evidence and look for any theory upon which to build a verdict one way or the other. You have a right to draw from the facts and circumstances proven those just, fair and reasonable conclusions that an ordinary man would draw under like circumstances. You have no right to return a verdict in this case based upon your own notions of right and justice regardless of the evidence and the law. It is your duty, as jurors, to follow the Court's instructions on the law that applies to this case.

### 4. *Power of Eminent Domain*

This action is one arising out of the exercise of the State's power and right of eminent domain, which is the right to take private property for public use.

### 5. *Land Taken*

It is undisputed in this case that the State of North Dakota, in the exercise of its right and power of eminent domain and by appropriate proceedings, on \_\_\_\_\_, took from the plaintiff, \_\_\_\_\_, for highway purposes a tract of land described as:

(description)

### 6. *Just Compensation Defined*

The Constitution of North Dakota provides that private property shall not be taken or damaged for public use without just compensation to the owner.

Just compensation includes all elements of value that inhere in the property but it does not exceed market value fairly determined. The sum required to be paid the owner does not depend upon the uses to which he has devoted his land but is to be arrived at upon just consideration of all the uses for which it is suitable. The highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future is to be considered, not necessarily as the measure of value but to the

extent that the prospect of demand for such use affects the market value while the property is privately held.

Thus, the only issue to be determined by the Jury in this case will be the determination of the amount of compensation to be paid to the plaintiff as the owner of the land, and it is the duty of the jury to ascertain, from the evidence and the law governing the case as set forth by the Court in these Instructions, the amount of such compensation.

In considering this case you are instructed that you are to give no consideration to the fact that the trial of this case comes some time after the date of the taking. The value is to be determined as of the time of the taking.

The law applicable to the ascertaining of such compensation for the land actually taken is set forth later in these Instructions under the heading, "A. Compensation for Land Taken"<sup>1</sup>

### 7. Severance Damages

In addition, where the land taken is only a part of a larger parcel owned by the landowner, the law requires that just compensation must be made to the landowners for any damages which will accrue to the portion not taken by reason of its severance from the portion which has been taken and the construction of the highway in the manner proposed by the State. The law applicable to such compensation, called "Severance Damages," is set forth in these Instructions under the heading, "B. Severance Damages."

### 8. Burden of Proof

When in these Instructions the Court says that the "burden" or the "burden of proof" rests upon a certain party to prove a certain allegation this means that the party must prove his claim as to a particular issue of fact in dispute by evidence that is more convincing to you than the evidence presented by the other party in opposition to the claim.

"Evidence" is whatever is admitted in the trial as a part of the record, whether it be the testimony of a witness, an article, document or other instrument marked as an exhibit, or any other matters formally introduced and received.

You are instructed that the burden of proof in this case rests upon the plaintiff, the landowner, to prove the compensation and damages to which he may be entitled.<sup>2</sup>

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1. The most recent opinion of our Supreme Court as to the value of land taken under the power of eminent domain is the case of *Chandler v. Hjelle*, 126 N.W.2d 141 (N.D. 1964), in which our Court considered the factors entering into the determination of the "highest and best use" of the property taken.

2. It is my opinion that we should constantly strive to make jury instructions understandable to the jurors and avoid terminology that may be correct from a legal point of view but difficult to comprehend by the juror being instructed. For this reason I have avoided using such terms as "preponderance of the evidence," "tipping of the scales of justice," or the "greater weight of the evidence."

## A. COMPENSATION FOR LAND TAKEN

9. *Value as of Date of Taking*

As previously stated, the defendant has taken permanently one parcel of land, comprising a total of \_\_\_\_\_ acres from \_\_\_\_\_, the plaintiff.

You must base the amount of compensation for the land taken solely and strictly upon the evidence of the market value of the land as of the date on which the State took the land.<sup>3</sup>

10. *Market Value Defined*

“Market value” may be defined as the highest price for which property can be sold in the open market by a willing seller to a willing purchaser, neither acting under compulsion and both exercising reasonable judgment.

The market value of the land taken means the price in cash that the \_\_\_\_\_ acres in question would have brought at the time of the taking, considering its highest and most profitable use, if then offered for sale in the open market in competition with other similar properties at or near the location of the property, with a reasonable time allowed to find a purchaser.

What is a reasonable time within which to find a purchaser depends upon existing conditions and the surrounding circumstances, including the nature and character of the property and the use for which the property is suitable or physically adaptable.

You are to assume that the purchaser in such a transaction was desirous of buying the property, but not forced to buy, and that the seller was desirous of selling the property, but not forced to sell; and that both buyer and seller were fully informed on that date as to all circumstances and factors favorable and unfavorable with respect to the property, and as to all uses to which the property was then being put, and as to the highest and best use and all other uses for which the property was at that time actually and potentially suitable and adaptable.

In arriving at your estimate of the value, you should take into account all factors as revealed by the evidence which could fairly be suggested by the seller to increase the price paid, and all counter-arguments as revealed by the evidence which the buyer could fairly make to reduce the price to be paid by him, to the extent that you believe such matters would have been considered in the bargaining as to price. Your determination is to be made in the light of all facts affecting value as shown by the evidence.

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3. It is not unusual for the actual trial of eminent domain cases to take place quite some time after the date that the power of eminent domain was actually exercised. It is basic that the market value is to be determined as of the date of taking. See 4 NICHOLS, EMINENT DOMAIN § 12.23(1) (rev. 3rd ed. 1962).

Determination of the value of land at a given date is necessarily based upon assumption rather than fact. So it is not necessary, in order to establish proof of value, to point out any particular person who was ready, able, and willing, at the time of the taking to purchase the property at any particular price.

### 11. *Comparable Sales*

Witnesses for both parties have been permitted to testify as to certain sales of real property that they believed to be comparable to the land involved in this case. It is for the jury to determine the weight to be given such testimony of allegedly comparable sales. In determining market value you may take into consideration evidence of the sales of land that you find to be comparable to the land involved in this law suit which occurred within a time reasonably near the date of taking.<sup>4</sup>

### 12. *Additional Matters to be Considered*

In determining the market value of property, the jury may consider not only the opinions of the various witnesses who testified as to value, but also all other evidence in the case which may aid in determining value such as location of the property, the surroundings and general environment, and peculiar suitability of the property for particular uses, and the reasonable probabilities as to potential future uses, if any, for which the property was suitable or physically adaptable and for which it in all reasonable probability would become available within a reasonable time after the date of taking; all as shown by the evidence to have existed at the time of taking.

The just compensation to which a landowner is entitled in an eminent domain proceeding cannot be increased or decreased by either the owner's reluctance to sell or by the fact of the need of the State Highway Department for the land which was taken.

You should give no consideration to the fact that the State desires this land for a particular purpose, and you must exclude from consideration any special value it might have to the State as distinguished from others who may or may not have the power to condemn. The necessities of the State must not be considered by you

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4. The general requirements that must be met before evidence of a comparable sale may be admitted in evidence are set forth in 5 NICHOLS, EMINENT DOMAIN § 21.31 (rev. 3rd ed. 1962), in which the North Dakota case of Reeder v. Hanson, 55 N.D. 331, 213 N.W. 492 (1927), is cited. In examining the cases cited pertaining to the admissibility of alleged "comparable sales" the only point not in dispute is that no two properties are exactly alike and no general rule can be laid down regarding the degree of similarity that must exist to make such evidence admissible. See Covina Union High School Dist. of Los Angeles v. Jobe, 171 C.A.2d 340, 345 P.2d 78 (1959). The admission or exclusion of "comparable sales" rests largely with the sound discretion of the trial court and will not be interfered with unless abused. See City of San Diego v. Boggeln, 164 C.A.2d 1, 330 P.2d 74 (1958). If the property in question is sufficiently similar to the land taken by eminent domain so that evidence as to such a sale may have some bearing on the value of the property under consideration and would aid the jury in its determination, I believe the better practice is to permit such evidence to be received and then leave the jury to determine the weight to be given such evidence of allegedly comparable sales under an appropriate instruction as set forth above.

in any way. By the same token, you should not take into consideration the value of the land to the former owner. That does not mean that the former owner does not have the right to give his opinion as to the fair market value of his own lands. Land might, however, have a certain peculiar value to the owners and a certain peculiar value to the taker. That is not the measure by which you should arrive at the compensation contemplated by the Constitution. As between individuals and private owners, the owners may demand any price they see fit for the property, but when it is taken for a public use or purpose, the owner is entitled to receive only the market value of the property as of the date of taking.

The determination of value in this case is not a matter or formula of artificial rules, but of sound judgment and discretion based upon a consideration of all the relevant facts in this particular case.

The amount of the compensation ascertained and assessed by the jury must be determined for the land taken and by having your foreman insert the amount on the verdict form in the space provided after the words, "compensation for land taken containing \_\_\_\_\_ acres."

## B. SEVERANCE DAMAGES

### 13. *Severance Damages Defined*

Our law provides that if the land taken constitutes only a part of a larger parcel of land owned by the landowner, any damages which may accrue to the portion of land not sought to be taken by reason of its severance from the portion sought to be taken and the construction of the improvement in the manner proposed by the State shall also be separately ascertained and assessed by the jury as "severance damages."

Thus, in this case, the land taken for highway purposes constitutes only a part of a larger parcel of land owned by the landowner. Therefore, the landowner is entitled to compensation not only for the market value of the land actually taken for highway purposes, but also any such additional amount as will be equivalent to any diminution or lowering of the market value of the landowner's remaining land caused by such taking and the construction of the highway in the manner as proposed.

You are instructed that damages must be direct and certain or proximate and may not be contingent, remote, imaginary or speculative.

As previously stated, "market value" in a case such as this is the highest price for which property can be sold in the open market by a willing seller to a willing purchaser neither acting under compulsion and both exercising reasonable judgment. The law to be applied in determining "market value" for the purpose of ascertain-



ing the amount of any severance damages is the same as set forth in these instructions under the heading "A. Compensation for Land Taken."

Severance damages, if any, must also be ascertained and assessed by the jury as of the date of taking.<sup>5</sup>

#### 14. *Benefit*

In cases where property is taken by the public, as in this case, you are required to determine if the remaining property is benefited by the improvement. Any benefit shall be deducted from the amount of severance damages and the amount of such benefit, if any, is to be inserted in the space provided in the Verdict Form after the phrase "less any benefits."

If you find no severance damages insert the word, "none."<sup>6</sup>

#### 15. *Drainage*

Members of the jury, you are instructed that in constructing a highway the State Highway Department has a duty to furnish drainage to the remaining property equal in capacity and efficiency to that existing prior to the construction. However, the State Highway Department is not under a duty to improve the drainage or to furnish perfect drainage. Accordingly, if you find from the evidence in this case that the drainage to the remaining land is equal in capacity and efficiency to that existing prior to the acquisition, you shall not allow damages for interference with the drainage. On the other hand, if you find the drainage to the remaining land is not equal in capacity and efficiency to that existing prior to the acquisition of the land taken, you may consider this in determining any such effect on the market value of the land remaining.

#### 16. *Right of Access*

Right of access means the right of ingress to a highway from abutting land and egress from a highway to abutting land.

The rights of an abutting owner to ingress and egress are private rights which cannot be taken or damaged without just compensation. Such rights of access are property rights. The owner had a right to reasonable and convenient access to his property considering all the uses to which the property is adaptable and available.

Although owners of real property abutting upon an existing highway have as an easement or appurtenance to such property the

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5. See N.D. CENT. CODE § 24-01-01.1; *Little v. Burleigh County*, 82 N.W.2d 603 (N.D. 1957); *Olson v. Thompson*, 74 N.W.2d 432 (N.D. 1956); and *Lineburg v. Sandven*, 74 N.D. 364, 21 N.W.2d 808 (1946).

6. Unless the condemnor alleges benefit to the remaining property and in addition there is probative evidence of such benefit that would justify a jury to assess the amount of benefits, any instructions on benefit, of course, should not be given.

right of access to and from the highway, this does not mean that an owner of abutting property is entitled, as against the public, to access at all points in the boundary between the land and the highway. Such owner is entitled only to reasonable and convenient access to his property, considering all the uses to which the property is adapted and available.

Any lack of reasonable and convenient access to the landowner's property may be considered by the jury as to whether or not it adversely affected the market value of the remainder of the landowner's property in assessing the amount of severance damages.<sup>7</sup>

### 17. *Damages Assessed Separately*

Severance damages must be ascertained and assessed by the jury separately, and therefore when you have agreed upon the amount of such severance damages your foreman should insert the same on the verdict form after the words, "Severance Damages."

## C. GENERAL LAW

### 18. *Landowner's Opinion*

The law permits an owner of property, in which land is taken in an eminent domain trial to testify as to his opinion of the market value of such land and the testimony of an owner as to value is to be weighed and considered by you the same as that of any other witness expressing an opinion as to market value at the time of the taking. You should determine if the reasons given in support of the landowner's opinion as to market value are sound or unsound and you may reject that opinion or give it any weight you may think it deserves.

### 19. *Expert Opinion*

The rules of evidence ordinarily do not permit a witness to testify as to his opinion or conclusions. An exception to this rule exists in the case of an expert witness. A witness who by education and experience has become expert in any art, science or profession may state his opinion as to a matter in which he is an expert, and which is material to the case, and may also state the reasons for such opinion.

The testimony of an expert witness as to value constitutes his opinion based upon education, study, experience, investigation, knowledge of the property, prices paid for other similar property in the vicinity, and all other reasons given for such opinion.

You should consider each expert opinion received in evidence in

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7. *Chandler v. Hjelle*, 126 N.W.2d 141 (N.D. 1964).

this case and give it such weight as you think it deserves. You should decide whether the opinion of a witness was expressed with or without sufficient investigation or knowledge of the material facts to form an accurate opinion, and whether the reasons given in support of the opinion are sound or unsound and you may reject that opinion or give it any weight you may think it deserves.

### 20. *Quotient Verdict*

It will be improper for you to arrive at the amount to be awarded the plaintiff, if you find that it should be awarded damages, by the so-called "quotient method;" that is, by first agreeing to be bound and then arriving at such amount by having each individual juror set down the amount he or she considers the proper award, and then adding such sums together and dividing that number by the number of jurors and making the result the amount to be awarded by the jury as damages. Another method of arriving at a quotient verdict might be through taking the testimony as to the highest value and the lowest value and, as we say, "split the difference." Each of these methods that I have outlined to you is illegal and should not be used or considered by you in any respect and you should be careful to completely avoid them.

### 21. *Attorney Fees and Costs*

Members of the jury, you are instructed that the laws of the State of North Dakota require the State Highway Department in a case such as this to pay the court costs and reasonable attorney's fees to the property owner. However, the Court will determine the amount of such costs and attorney's fees which will be allowed and you shall not consider such costs and fees or allow such matters to enter into your deliberations in arriving at your verdict.<sup>8</sup>

### 22. *Viewing Premises*

After the case was concluded you were taken for a view of the acreage here involved. At that time the Court instructed you that the purpose of your viewing the premises was not to gather evidence for yourselves, but merely so that you could better understand the testimony of the witnesses. Please have that in mind in arriving at

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8. The allowance of attorney's fees and costs is set forth in N.D. CENT. CODE § 28-26-06, as amended by the 1965 Legislature. Guidelines for the determination of reasonable attorney's fees by the court are set forth in the case of *United Development Corp. v. State Highway Dept.*, 133 N.W.2d 439 (N.D. 1965). The allowance of attorney's fees and costs is a matter for the court to determine and is not a proper subject of deliberation by the jury. However, as a practical matter, jurors often speculate as to the amount of attorney's fees and costs in any given case and it is my opinion that it does affect their judgment; thus, the giving of this instruction. It is the practice of this court to have counsel agree at the pre-trial conference that interest at the statutory rate will be added to the jury determination of the value of the property, pursuant to agreement of counsel. If, however, counsel will not agree as to the addition of interest at the statutory rate, then it is my opinion that an appropriate instruction on interest must be included in the Court's instructions.

your verdict, as your view of the land in question was solely for the purpose I have stated.

### 23. *Verdict Unanimous*

Members of the jury, I charge you that your verdict must be unanimous. All members of the jury must agree in reaching a verdict. You are not to reveal to the Court or to any person how the jury stands, numerically or otherwise, until you have reached an unanimous verdict.

### 24. *Foreman*

Upon retiring to the jury room, you will select one of your number to act as your foreman. The foreman will preside over your deliberations and be your spokesman in Court. It is his or her duty to see that discussion is carried on in an orderly and proper fashion, that the issues are fully and freely discussed, and that every juror is given an opportunity to express his or her views. When ballots are to be taken, the foreman will see to it that it is done.

The form of verdict has been prepared for your convenience and you will take this form to the jury room. When you have reached unanimous agreement as to your verdict, you will have your foreman fill in, date and sign the form. You will then advise the bailiffs and they will bring you into Court to return that verdict.