

NEW EMINENT DOMAIN JURY INSTRUCTIONS ADOPTED

By Paul B. Terpak



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named to the Virginia Lawyer Hall of Fame. He is a graduate of the University of Virginia and its School of Law and is a past president of the Fairfax Bar Association and past chair of the Virginia State Bar Committee on Lawyer Discipline.

The Virginia Model Jury Instruction Committee, chaired by Justice Stephen R. McCullough, has adopted new Eminent Domain Jury Instructions, as proposed by a special Subcommittee of the Virginia State Bar Real Estate Section Eminent Domain Committee. The Subcommittee was composed of a group of attorneys representing both condemnors and landowner's counsel including Charles Lollar, Elizabeth Chupik, Michael Coughlin, Adam Cherry, Sandy Cherry, Nancy Auth and Paul Terpak, Chair. This is the first wholesale rewrite of Eminent Domain Jury Instructions in decades. Revisions include not only substantial changes to reflect new law on highest and best use, lost profits, enhancement, and mitigation costs, but also extensive revision to Scope Notes, Governing Statutes, Case Authority, and Practice Commentary.

There are several completely new instructions:

46.080 Lost Access

"Lost access" means a change of vehicular or pedestrian access to property that is caused by a public use project for which the power of eminent domain has been exercised against the property and which results in a reduction in the value of the property. Any liability for lost access shall be made a part of any award for damage to the residue. You must ensure that any compensation awarded for lost access shall not be duplicated in the compensation otherwise awarded to the owner of the property.

46.085 Lost Profits

You shall determine and specify the amount of lost profits owed to the [business; farm] owner if you find that the [business; farm] owner proved with reasonable certainty the amount of the loss and that the loss was directly and proximately caused by the taking or damaging of the property where the [business; farm] is or was located.

"Lost profits" means a loss of profits or expected profits suffered by a [business; farm] operation as a result of a taking or damaging of the property on which the [business; farm] operation is operated for a period not to exceed three years from the later of (i) the date of valuation or (ii) the date the state agency or its contractor prevents the owner from using the land or any of the owner's other property rights are taken. The [business; farm] operation claiming lost profits is entitled to compensation whether part of the property or the entire parcel of property is taken or damaged.

To award lost profits, the following conditions must be met:

1. the loss cannot be reasonably prevented by a relocation of the [business; farm] operation, or by taking steps and adopting procedures that a reasonably prudent person would take and adopt;
2. the loss will not be included in relocation assistance provided by the condemning agency;
3. compensation for the loss will not be duplicated in the compensation otherwise awarded to the owner of the property taken or damages; and
4. the loss shall be determined in accordance with generally accepted accounting principles applied on a consistent basis.

46.200 Just Compensation-Common Area

The common area owned by a property owner's association that is taken shall be valued on the basis of the common area's highest and best use as though it were free from restriction to sole use as a common area.

46.210 Just Compensation-Reasonable Probability of Rezoning

You may consider the following factors, among others, to determine whether there is, as of the date of valuation, a reasonable probability of rezoning of the subject property in the near future:

the rezoning of nearby property, growth patterns, change of use patterns and character of neighborhood, demand within the area for certain types of land use, sales of related or similar properties at prices reflecting anticipated rezoning, physical characteristics of the subject and of nearby properties, and the age of the zoning ordinance.

You must not evaluate the property as though the rezoning is already an accomplished fact. You must evaluate the property under the restrictions of the existing zoning and give consideration to the impact upon market value of the likelihood of a change in zoning.

The burden of proving a reasonable probability of rezoning in the near future rests on the property owner.

A full set of the new instructions with commentary and authority is a mandatory tool for any eminent domain practitioner. Copies are available online and in hard copy.

Please note that the full annotated version of these model jury instructions is available for purchase from Matthew Bender® by way of the following link:

<https://store.lexisnexis.com/categories/area-of-practice/civil-procedure-154/virginia-model-jury-instructions-civil-skuusSku7357>