

# **CONDEEMNEE'S JURY CHARGES**

*Georgia Eminent Domain Seminar*

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**CONDEMNATION; PRELIMINARIES AND THE PLEADINGS**

Ladies and Gentlemen of the jury, we have been trying what is known as a condemnation case between \_\_\_\_\_, Condemnor, and \_\_\_\_\_, Owners or Condemnees. The lawsuit the Condemnor has filed for this purpose is called the condemnation petition. It says in substance that the Condemnor has taken title to right-of-way for use as a public road over a described tract of Condemnees' land together with temporary construction easements.

Georgia Suggested Pattern Jury Charge Instructions, 5<sup>th</sup> Ed.; § 14.010 Condemnation; Preliminaries and the Pleadings

### **CONDEMNATION; BURDEN OF PROOF**

The law puts the burden of proof upon the condemnor to prove by a preponderance of evidence what amount of money constitutes just and adequate compensation for the property taken. While the burden of proof is upon the condemning authority, the owner of the property is also allowed to offer evidence upon the issues involved, and you must determine the issues in the case by the preponderance of the evidence as you find it to be.

Georgia Suggested Pattern Jury Charge Instructions, 5<sup>th</sup> Ed.; § 14.030 Condemnation; Burden of Proof

**CONDEMNATION; BURDEN OF PROOF; DEFINED**

Condemnor must prove its case by what is known as a preponderance of the evidence; that is, evidence upon the issues involved that, while not enough to wholly free the mind from a reasonable doubt, would be sufficient to incline a reasonable and impartial mind to one side of the issue rather than the other.

Georgia Suggested Pattern Jury Charge Instructions, 5<sup>th</sup> Ed.; § 14.031 Condemnation; Burden of Proof

**CONDEMNATION; BURDEN OF PROOF; PREPONDERANCE OF EVIDENCE**

Condemnor must prove its case by what is known as a preponderance of the evidence; that is, that superior weight of evidence upon the issues involved that, while not enough to wholly free the mind from a reasonable doubt, would be sufficient to incline a reasonable and impartial mind to one side of the issue rather than the other.

Georgia Suggested Pattern Jury Charge Instructions, 5<sup>th</sup> Ed.; § 14.032 Condemnation; Burden of Proof

**BURDEN OF PROOF NEVER SHIFTS**

Ladies and gentlemen of the jury, I charge you that the burden of proof always remains on the Condemnor DOT to establish just and adequate compensation for the property taken, which includes consequential damages, if any.

*Justice v. Ga. Power Co.*, 164 Ga. App. 599 (1), 298 S.E.2d 579 (1982)

*Pendarvis Constr. v. Cobb County*, 239 Ga. App. 14, 16, 520 S.E.2d 530 (1999).

**JUST AND ADEQUATE COMPENSATION**

Ladies and gentlemen of the jury, I charge you that the Constitution of the State of Georgia provides that private property shall not be taken or damaged for public purposes without just and adequate compensation being first paid.

Ga. Const. Art. I, § 3, Para. 1.

### **PROPERTY DEFINED**

Ladies and gentlemen of the jury, I charge you that property that is taken refers to whatever interest in the property is being taken by the condemnor, whether it is the entire ownership of it, or the right to use it for a special purpose, which is called an easement, or both, when both types of property are condemned in the same lawsuit.

The term “property” is a very comprehensive one, and is used not only to signify things real and personally owned but also to designate the right of ownership and that which is subject to be owned and enjoyed. The term “property” includes the right of an owner to possess, use, enjoy, and dispose of the property regardless of whether the property is real or personal, corporeal or incorporeal.

Georgia Suggested Pattern Jury Charge Instructions, 5<sup>th</sup> Ed.; § 14.110 Condemnation; Property, Defined  
*Woodside v. City of Atlanta*, 214 Ga. 75, 83, 103 S.E.2d 108 (1958).

**ALL USES TO BE CONSIDERED; TEST OF ADAPTABILITY**

Ladies and gentlemen of the jury, I further charge you that in determining the value of property when taken for public uses, you are neither restricted to the land's agricultural or productive qualities, nor to the condition which the land is in or the uses to which it is then applied by the owner. All of the capabilities of the property, and all of the uses to which the land may be applied or for which it is adopted, are to be considered.

Georgia Suggested Pattern Jury Charge Instructions, 5<sup>th</sup> Ed.; § 14.230 Condemnation; All uses to Be Considered; Test of Adaptability

O.C.G.A. § 22-2-62

*Hard v. Housing Authority of City of Atlanta*, 219 Ga. 74, 80, 132 S.E.2d 25 (1963)

### **DAMAGES: DIRECT & CONSEQUENTIAL**

There are two kinds of damage in this condemnation. The first pertains to the property actually taken or used by the condemnor and is called direct damages. The second pertains to the property the owner has left after the part the condemnor takes or uses is subtracted and is called consequential damages.

Georgia Suggested Pattern Jury Charge Instructions, 5<sup>th</sup> Ed.; § 14.100 Condemnation Damage; Direct,

Georgia Suggested Pattern Jury Charge Instructions, 5<sup>th</sup> Ed.; § 14.120 Condemnation Damage; Consequential

**DIRECT DAMAGES FOR PROPERTY TAKEN OR USED**

Concerning direct damages for the property taken or used, the “just and adequate” compensation to which the defendant is entitled under the Georgia Constitution has been defined as the actual value of his/her/its loss. The amount of compensation for these direct damages shall never be less than actual value, that is, the actual value for the direct damages shall never be reduced or offset by any alleged benefits to the remaining property of the defendant. Ordinarily actual value is the same as fair market value.

Ga. Const. 1983, art. I, sec. III, para. 1

*State Highway Dept. v. Robinson*, 103 Ga. App. 12 (1961)

Georgia Suggested Pattern Jury Charge Instructions, 5<sup>th</sup> Ed.; § 14.130 Condemnation; Direct Damages for Property Taken or Used

### CONSEQUENTIAL DAMAGES FOR PROPERTY NOT TAKEN

Consequential damage to the owner's property not taken is generally determined by figuring the difference between the value of the remaining property immediately before the taking and its value after the taking for a particular proposed improvement. This measure of consequential damages should be made as of the date of taking. Another way of stating the proper measure of consequential damages to the remainder of the owner's property is the decrease, if any, in the fair market value of this remainder in its circumstance just prior to the time of the taking compared with its fair market value in its new circumstance just after the time of the taking.

*State Highway Dept. v. Howard*, 124 Ga. App. 76 (1971)

*Sumner v. State Highway Dept.*, 110 Ga. App. 646 (1964)

*Wright v. MARTA*, 248 Ga. 372 (1981)

Georgia Suggested Pattern Jury Charge Instructions, 5<sup>th</sup> Ed.; § 14.140 Condemnation; Consequential Damages for Property Not Taken

### **CONSEQUENTIAL DAMAGE; INCONVENIENCE**

The defendant may not recover damages for mere inconvenience in the use of his/her/its property resulting from a condemnation unless such inconvenience may be shown by the evidence to affect the value of the defendant's remaining property as an item of consequential damage.

*Southwell v. State Highway Dept.*, 104 Ga. App. 479 (1961)  
Georgia Suggested Pattern Jury Charge Instructions, 5<sup>th</sup> Ed.; § 14.143 Condemnation;  
Consequential Damage; Inconvenience

**FAIR MARKET VALUE DEFINED**

Ladies and gentlemen of the jury, I charge you that the fair market value is the price a seller who desires, but is not required, to sell and a buyer who desires, but is not required, to buy, would agree is a fair price, after due consideration of all the elements reasonably affecting value.

*Wright v. MARTA*, 248 Ga. 372, 275, 283 S.E.2d 466 (1981)

*Central Georgia Power Co. v. Stone*, 139 Ga. 416, 419, 77 S.E.2d 565 (1913).

Georgia Suggested Pattern Jury Charge Instructions, 5<sup>th</sup> Ed.; § 14.200 Condemnation; Fair Market Value; Defined

### **ESTABLISHING MARKET VALUE**

Ladies and gentlemen of the jury, I charge you that the three recognized methods of establishing market value of a designated piece of property for purposes of a condemnation award are the comparable sales or “market” approach, income approach, and replacement cost less depreciation.

*Almond v. M.A.R.T.A.*, 161 Ga. App. 363, 288 S.E.2d 129 (1982).

**EVIDENCE OF FAIR MARKET VALUE**

Ladies and gentlemen of the jury, I charge you that the fair market value is a matter of opinion as to which you are entitled to consider both expert and non-expert testimony. I further charge you that an owner is competent to testify on his own behalf to offer his opinion as to the value of his property after stating that facts upon which his opinion is based.

Georgia Suggested Pattern Jury Charge Instructions, 5<sup>th</sup> Ed.; § 14.200 Condemnation; Fair Market Value; Opinion Evidence  
*State Highway Dep't v. Parker*, 114 Ga. App. 270, 150 S.E.2d 875 (1966).

## EXPERT WITNESSES

Testimony has been given in this case by certain witnesses who are termed experts. Expert witnesses are those who because of their training and experience possess knowledge in a particular field that is not common knowledge or known to the average citizen. The law permits expert witnesses to give their opinions based upon that training and experience.

You are not required to accept the testimony of any witnesses, expert or otherwise. Testimony of an expert, like that of all witnesses, is to be given only such weight and credit as you think it is properly entitled to receive.

O.C.G.A. §24-9-67

*McCoy v. State*, 237 Ga. 118 (1976)

*Columbia County v. Doolittle*, 270 Ga. 490 (1999).

**VALUE**

Ladies and gentlemen of the jury, I charge you that the question for you to decide in this case is not what the Condemnor has gained, but the value of what the Condemnees have lost.

*State Highway Dep't. v. Thomas*, 115 Ga. App. 372, 154 S.E.2d 812 (1967); *Foundation v. Metropolitan Atlanta Rapid Transit Authority*, 147 Ga. App. 465, 249 S.E.2d 296 (1978).

**JUST COMPENSATION; PUT OWNER IN SAME POSITION**

Just and adequate compensation for the property taken is intended to put the owner in substantially the same financial position that he was in prior to the taking.

*Metropolitan Atlanta Rapid Transit Authority v. Funk*, 263 Ga. 385 (1993)

*Metropolitan Atlanta Rapid Transit Authority v. Mobasser*, 212 Ga.App 260 (1994)

**FAIR MARKET VALUE NOT NECESSARILY SAME AS ACTUAL VALUE**

Ladies and gentlemen of the jury, I charge you that although fair market value is ordinarily the same as actual value, there may be circumstances in which it may not be the same, and under those circumstances your measure of damage would be actual value. It is up to you to determine whether such circumstances exist.

*State Highway Dept. v. Robinson*, 103 Ga. App. 12 (1961)

*State Highway Dept. v. Whitehurst*, 106 Ga. App. 532 (1962)

Georgia Suggested Pattern Jury Charge Instructions, 5<sup>th</sup> Ed.; § 14.240 Condemnation; Fair Market Value Not Necessarily Same as Actual Value

### REPLACEMENT COST

Ladies and gentlemen of the jury, I charge you that evidence of replacement cost of the property taken is relevant and admissible in determining the value of the subject property. The cost to acquire or construct property and improvements similar to that taken by the Condemnor is relevant evidence to be used in determining the value of the property taken.

*Almond v. M.A.R.T.A.*, 161 Ga. App. 363, 288 S.E.2d 129 (1982)  
*Fulton County v. Morton*, 196 Ga. App. 334, 396 S.E.2d 65 (1990).

## **REPLACEMENT COST**

Ladies and gentlemen of the jury, I charge you that in determining replacement cost you are entitled to consider all costs and expenses that are necessary for the new structure to possess the same function and utility as the original structure, even if such costs and expenses are greater than those associated with the construction of the original structure.

*DOT v. El Carlo Motel*, 140 Ga. App. 779, 232 S.E.2d 126 (1976).

### **CREDIBILITY OF WITNESSES**

The jury must determine the credibility of the witnesses. In deciding this, you may consider all of the facts and circumstances of the case, including the witnesses' manner of testifying, their intelligence, their means and opportunity of knowing the facts about which they testify, the nature of the facts about which they testify, the probability or improbability of their testimony, their interest or lack of interest in the outcome of the case, and their personal credibility as you observe it.

O.C.G.A. §§ 24-9-80, 24-4-4.

### **CONFLICTING EVIDENCE; RECONCILIATION**

Any conflicts in the evidence are to be reconciled whenever possible. All witnesses are presumed to speak the truth, and if possible, you should not attribute a false statement to any of them. If you find that you cannot reconcile conflicting evidence, then you should believe the evidence that is most reasonable and believable to you and decide the case by the preponderance of the evidence as you find it to be.

*Ramco Roofing and Supply Co. Inc. v. Kaminsky*, 156 Ga. App. 708 (1980)

*Durham v. Holeman*, 30 Ga. 619 (1860)

*White v. Fulton*, 68 Ga. 511 (1882) (and various cases cited to note “reconciliation” following O.C.G.A. §24-4-4)

## SLOPE EASEMENT

The Condemnor's acquisition of the slope easement of the property of the Condemnee deprives the property owners of control over the land and thus constitutes a taking of that property for which the property owners must be compensated. It is your responsibility to determine and compensate Condemnee for the fair market value of the property taken for a slope easement.

*MVP Investment Co. v. North Fulton Express Oil, LLC*, 282 Ga. App. 512, 513-514 (2006)

*DOT v. Arnold*, 243 Ga.App. 15, 19(2) (2000)

*DOT v. Mendel*, 237 Ga.App. 900, 900-901(1) (1999)

### CHANGE IN ROAD GRADE

“Where . . . consequential damages result to property because of a change in the road grade, the measure of damages to the abutting property is the difference between the market value of the property before and after the change.”

*State Highway Department v. Murray*, 102 Ga.App. 210, 215-216 (1960)

### **LIMITED-ACCESS ROAD; DEPRIVATION OF ACCESS RIGHTS**

A limited-access highway is a special kind of highway provided for by law. A person ordinarily has the right of access to a public road or highway that goes through the person's property; that is, the right to go on or off the highway from or to the property, which is a property right and for which the person is entitled to be paid if a condemnation takes away that right.

...

If the construction of a limited-access highway interferes with the owner's access right, the owner's right of access to an existing road would have to be taken into account, condemned, and included in the owner's compensation for land actually taken.

Georgia Suggested Pattern Jury Charge Instructions, 5<sup>th</sup> Ed.; § 14.310; Condemnation, Limited-Access Road; Deprivation of Access Rights.

### **RIGHT OF ACCESS**

The right of access, or easement of access, to a public road is a property right which arises from ownership of land contiguous to a public road, and the landowner cannot be deprived of this right without just and adequate compensation being paid.

*Cobb County v. Annox Self Storage # 1*, 294 Ga. App. 218, 668 S.E.2d 851 (2008).

### **RIGHTS OF INGRESS AND EGRESS**

An existing means of ingress and egress to a public road may not be substantially interfered with without compensation. Thus, any substantial interference with existing rights of ingress and egress will entitle a landowner to damages.

*Dep't of Transp. v. Robinson*, 260 Ga. App. 666, 580 S.E.2d 353 (2003)

*Harper Inv., Inc. v. Dep't of Transp.*, 251 Ga. App. 521, 554 S.E.2d 619 (2001)

### **DAMAGES: CIRCUITY OF TRAVEL**

The measure of compensation for interference with the right of access is also the loss in value to the remaining property caused by the interference. In assessing this loss, the jury may consider the inconvenience and circuity of alternative means of access and the dependence of businesses operated on the property on traffic flow. This measure should not suggest that damage to access rights is a separate item of damage in addition to consequential damages; instead, the right of access is treated as a component part of the remaining property, and interference with access is one of the factors in determining the extent of overall consequential damage to the remainder.

2 Ga. Jur. Property § 19:90

*Dep't of Transp. v. Whitehead*, 253 Ga. 150, 317 S.E.2d 542 (1984)

*Dep't of Transp. v. Whitehead*, 253 Ga. 150, 317 S.E.2d 542 (1984)

*Mathis v. Dep't of Transp.*, 185 Ga. App. 658, 365 S.E.2d 504 (1988)

*Dougherty County v. Hornsby*, 213 Ga. 114, 97 S.E.2d 300 (1957)

*Downside Risk, Inc. v. Metropolitan Atlanta Rapid Trans. Auth.*, 156 Ga. App. 209, 274 S.E.2d 653 (1980)

*Nelson v. City of Atlanta*, 138 Ga. 252, 75 S.E. 245 (1912) (overruled on other grounds by, *Bowers v. Fulton County*, 221 Ga. 731, 146 S.E.2d 884, 20 A.L.R.3d 1066 (1966))

*Klumok v. State Highway Dept.*, 119 Ga. App. 505, 167 S.E.2d 722 (1969).

### FAIR MARKET VALUE

Ladies and gentlemen of the jury, I charge you that for condemnation purposes, when fair-market value will not afford just and adequate compensation because property is not of the type generally bought and sold on the open market or by reason of other special factors, such property is "unique." A property owner may recover compensation for the value of his property where the property has a unique value to him such that fair market value does not represent just and adequate compensation.

*Department of Transportation v. A.R.C. Security, Inc.*, 189 Ga. App. 34, 375 S.E.2d 42 (1989)  
Pursley, Ga. Eminent Domain, §§ 5-12, 6-3 (1982)  
*Taylor v. Jones County*, 205 Ga. App. 628, 422 S.E.2d 890 (1992)

## ZONING

Ladies and gentlemen of the jury, I charge you that any controlling zoning requirements of a local government are relevant in determining questions of value of property. You are also entitled to consider the existence of a special exception from current zoning laws such as a "grandfathered use," in assessing the value of the land at issue to the condemnee.

*DOT v. Brooks*, 153 Ga. App. 386, 265 S.E.2d 610 (1980)

*Simmons v. DOT*, 225 Ga. App. 572, 484 S.E.2d 332 (1997)

**COMPENSATION FOR PECULIAR VALUE OF LAND**

Ladies and gentlemen of the jury, I charge you that compensation for peculiar value of land taken by eminent domain is confined to property having an existing use to which the owner of the property is devoting it at the time it is taken when such land possesses an enhanced value for such use.

*DOT v. Arnold*, 243 Ga. App. 15, 530 S.E.2d 767 (2000)

### RECOVERY FOR DESTRUCTION OF A BUSINESS

Ladies and gentlemen of the jury, I charge you that in condemnation proceedings in order to recover for the destruction of a business the property must be unique or peculiarly suited for the use to which the owner is devoting it at the time of the taking. Property is unique where there is some special or peculiar relationship between the location of the property and the business operated on the property.

Property has peculiar value where it has an existing use by the owner at the time it is taken if the land possesses a peculiar value for such use.

If you find that there will be a total destruction of the business at its present location and that the property is unique or particularly suited for that use, then you would be authorized to determine the amount of just and adequate compensation for business losses. This amount would be separate from and in addition to the actual damages and consequential damages.

*Hinson v. DOT*, 135 Ga. App. 258, 217 S.E.2d 606 (1975)

*Housing Authority v. Troncalli*, 111 Ga. App. 515, 142 S.E.2d 93 (1965)

*Downside Risk Inc. v. Metropolitan Atlanta Rapid Transit Authority*, 168 Ga. App. 202, 308 S.E.2d 547 (1983)

*DOT v. Arnold*, 243 Ga. App. 15, 530 S.E.2d 767 (2000)

### **DATE OF STABILIZATION**

The value of the property taken, as well as the consequential damage to contiguous property is to be determined as of the date of taking. The date of taking in an inverse condemnation action is the "date of stabilization." The date of stabilization is the point in time when the damaging activity has reached a level which substantially interferes with the owner's use and enjoyment of his property."

*Hulsey v. Department of Transp.*, 230 Ga. App. 763, 498 S.E.2d 122 (1998)

## OPTION AGREEMENT

Prior to the demolition of Plaintiff's home in this case, Defendant DOT had an option contract that gave it the right to demolish any encroachments. This option for demolition and removal of encroachments expired on April 11, 2007.

Option contracts are by nature unilateral because they allow one party complete discretion in exercising the option. 7 Ga. Jur. Contracts § 1:24.

Because of the one-sidedness of an option contract, the law requires that the party owning the option perform all of its obligations under that contract with particular timeliness. *Pac. Grove Holding, LLC v. Hardy*, 243 Ga. App. 161, 165 (2000).

**VERDICT; GENERALLY**

Ladies and gentlemen of the jury, I charge you that the form of your verdict in each case can only be as follows:

“We, the jury, find in favor of Condemnee in the matter of \_\_\_\_\_ [civil file action no.]\_\_\_\_\_ in the sum of \_\_\_\_\_ dollars;”

You should insert such sum in dollars as you find shall be sufficient as just and adequate compensation. You should add up all damages of every sort that the defendant is entitled to, and the total sum would be the amount of your verdict.

Georgia Suggested Pattern Jury Charge Instructions, 5<sup>th</sup> Ed.; § 14.520 Condemnation; Verdict; Generally