

EMINENT DOMAIN INSTRUCTIONS

Introduction

The changes from RAJI (CIVIL) 3d are intended to make the instruction more directly relevant to the case at hand. Passive voice has been changed to active where possible.

The RAJI (CIVIL) 3d Eminent Domain Instructions were, in most respects, unchanged from the original RAJI (CIVIL) Eminent Domain Instructions. RAJI (CIVIL) 4th eminent domain instructions reflect changes and refinements in the law since then. They have also been expanded to cover more commonly encountered issues than the RAJI (CIVIL) 3d Eminent Domain Instructions.

RAJI (CIVIL) 4th Eminent Domain Instructions are not intended to be exhaustive. Several issues addressed in earlier drafts were removed as being more properly subjects for motions in limine or appropriate objections than jury instructions, e.g., the scope of an owner's testimony or items that should not be included in determining just compensation, such as business losses or relocation expenses.

EMINENT DOMAIN 1

Outline of Trial

The trial will now begin. First, each side may make an opening statement. An opening statement is not evidence, it is an outline of the expected evidence. It is offered to help you understand and follow the evidence that will be presented during trial.

Next, [*name of condemnee*] will present witnesses and [*name of condemnor*] may cross-examine them. Then [*name of condemnor*] may present witnesses and [*name of condemnee*] may cross-examine. [*Name of condemnee*] may then present further evidence.

After the evidence has been presented, the attorneys will make their closing arguments. I will also instruct you on the law you are to apply in deciding the case.

You will then go to the jury room to deliberate and decide the case.

The final instructions I give you at the end of the trial may differ from these preliminary instructions based upon the evidence presented at the trial. The preliminary jury instructions will be replaced by the final jury instructions I will give you at the end of the trial. The final instructions will govern your deliberations.

SOURCE: RAJI (CIVIL) 4th Preliminary 13; MANUAL OF MODEL JURY INSTRUCTIONS FOR THE NINTH CIRCUIT (1985), § 10.13, as modified.

EMINENT DOMAIN INSTRUCTIONS

EMINENT DOMAIN 2

Power of Eminent Domain

Public agencies such as [*name of condemnor*] have the right to acquire private property for public use if they pay the owner the fair market value of the property.

In this case, [*name of condemnor*] is acquiring [*name of condemnee*]'s property for [describe the project]. [*Name of condemnor*] must pay [*name of condemnee*] the fair market value of the property [*name of condemnor*] is acquiring [plus the amount of severance damages, if any, to [*name of condemnee*]'s remaining property].

You must determine the fair market value of the property [*name of condemnor*] is acquiring [plus the amount of severance damages, if any, to [*name of condemnee*]'s remaining property] as of [*date of valuation*].

SOURCE: RAJI (CIVIL) 3d Eminent Domain 1 and 2; ARIZ. CONST. ART. 2 § 17; A.R.S. §§ 12-1111 and 1122 (1997).

COMMENT: RAJI (CIVIL) 3d Eminent Domain 1 informed the jury that the owner must be paid “just compensation.” RAJI (CIVIL) 3d Eminent Domain 2 then defines “just compensation” as “the fair market value of the property taken [and the amount of severance damages, if any, to the remaining portion].” The revised instruction simply shortens the equation. Instead of “money to be paid equals just compensation equals fair market value plus severance damages, if any,” the new instruction simplifies the formula to “money to be paid equals fair market value plus severance damages, if any.”

Using the word “acquires” instead of “take” is consistent with the definition of market value as the amount of money a willing buyer would pay a willing seller on the open market. *See Mandl v. City of Phoenix*, 41 Ariz. 351, 18 P.2d 271 (1933); *State ex rel. Ordway v. Buchanan*, 154 Ariz. 159, 162, 741 P.2d 292, 295 (1987); *City of Phoenix v. Wilson*, 200 Ariz. 2, 6, 21 P.3d 388, 392 (2001).

USE NOTE: The date of valuation is the date of the summons. A.R.S. § 12-1123(A).

Use bracketed language appropriate to the facts.

EMINENT DOMAIN 3

Definition of Market Value

(Non-ADOT cases filed before 8/22/02)

Fair market value is the highest cash price a willing buyer would pay a willing seller on the open market where the seller has a reasonable time to find a buyer and the buyer knows everything about the property.

SOURCE: *Mandl v. City of Phoenix*, 41 Ariz. 351, 18 P.2d 271 (1933); A.R.S. § 12-1122(C), effective 8/22/02; *State ex rel. Ordway v. Buchanan*, 154 Ariz. 159, 162, 741 P.2d 292, 295 (1987); *City of Phoenix v. Wilson*, 200 Ariz. 2, 6, 21 P.3d 388, 392 (2001); *Moschetti v. City of Tucson*, 9 Ariz. App. 108, 111, 449 P.2d 945, 948 (1969); *Town of Paradise Valley v. Young Financial Servs., Inc.*, 177 Ariz. 388, 391, 868 P.2d 971, 974 (1983); *State ex rel. Morrison v. McMinn*, 88 Ariz. 261, 264, 355 P.2d 900, 903 (1960); *Flood Control Dist. of Maricopa County v. Hing*, 147 Ariz. 292, 300, 709 P.2d 1351, 1359 (Ct. App. 1985); *Mastick v. State*, 118 Ariz. 366, 371, 576 P.2d 1366, 1371 (Ct. App. 1978) *reh'g denied, rev. denied*; *Selective Resources v. Superior Court*, 145 Ariz. 151, 154, 700 P.2d 849, 852 (Ct. App. 1984) *rev. denied*.

USE NOTE: Use in all cases prior to August 22, 2002, *except* where the Arizona Department of Transportation (ADOT) is the condemning authority. For ADOT cases and cases filed on or after August 22, 2002, use Eminent Domain 3A.

Use bracketed language appropriate to the facts.

EMINENT DOMAIN INSTRUCTIONS

EMINENT DOMAIN 3A

Definition of Market Value (ADOT and cases filed on or after 8/22/02)

Fair market value is the most probable cash price a willing buyer would pay a willing seller on the open market where the seller has a reasonable time to find a buyer and the buyer knows everything about the property.

SOURCE: *Mandl v. City of Phoenix*, 41 Ariz. 351, 18 P.2d 271 (1933); A.R.S. § 28-7091 (formerly A.R.S. § 28-1865(N)); A.R.S. § 12-1122(C), effective 8/22/02; *State ex rel. Ordway v. Buchanan*, 154 Ariz. 159, 162, 741 P.2d 292, 295 (1987); *City of Phoenix v. Wilson*, 200 Ariz. 2, 6, 21 P.3d 388, 392 (2001); *Moschetti v. City of Tucson*, 9 Ariz. App. 108, 111, 449 P.2d 945, 948 (1969); *Town of Paradise Valley v. Young Financial Servs., Inc.*, 177 Ariz. 388, 391, 868 P.2d 971, 974 (1983); *State ex rel. Morrison v. McMinn*, 88 Ariz. 261, 264, 355 P.2d 900, 903 (1960); *Flood Control Dist. of Maricopa County v. Hing*, 147 Ariz. 292, 709 P.2d 1351, 1359 (Ct. App. 1985); *Mastick v. State*, 118 Ariz. 366, 371, 576 P.2d 1366, 1371 (Ct. App. 1978) *reh'g denied, rev. denied*; *Selective Resources v. Superior Court*, 145 Ariz. 151, 154, 700 P.2d 849, 852 (Ct. App. 1984) *rev. denied*.

USE NOTE: Use in cases where the Arizona Department of Transportation (ADOT) is the condemning authority and cases filed on or after August 22, 2002.

Use bracketed language appropriate to the facts.

EMINENT DOMAIN 4

Property Use

You may consider the property's present and past uses when you determine fair market value.

You may also consider any reasonable uses to which its owner might put the property in the future if you find:

1. The proposed future use is reasonably probable; and
2. A willing buyer would pay a premium for that probability as of [*date of valuation*].

You may not consider those uses that are mere possibilities or speculation.

SOURCE: RAJI (CIVIL) 3d Eminent Domain 3; *City of Phoenix v. Wilson*, 200 Ariz. 2, 21 P.3d 388 (2001); *Mandl v. City of Phoenix*, 41 Ariz. 351, 18 P.2d 271 (1933); *State ex rel. Morrison v. McMinn*, 88 Ariz. 261, 355 P.2d 900 (1960); *Town of Paradise Valley v. Young Financial Services, Inc.*, 177 Ariz. 388, 868 P.2d 971 (Ct. App. 1993); *City of Tucson v. Rickles*, 109 Ariz. 82, 505 P.2d 253 (1973).

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EMINENT DOMAIN 5

Highest and Best Use

In determining fair market value, you must consider the highest and best use of the property. The highest and best use is the legal use that is physically possible, financially feasible, and results in the highest value.

SOURCE: *City of Phoenix v. Wilson*, 200 Ariz. 2, 6, 21 P.3d 388, 392 (2001); *Maricopa County v. Barkley*, 168 Ariz. 234, 245, 812P.2d 1052, 1063 (Ct. App. 1990); *Town of Paradise Valley v. Young Financial Servs., Inc.*, 177 Ariz. 388, 391, 868 P.2d 971, 974 (Ct. App. 1993); APPRAISAL INSTITUTE, *THE APPRAISAL OF REAL ESTATE*, pp. 305, 307 (12th ed. 2001).

COMMENT: The court must decide whether the use is lawful.

EMINENT DOMAIN 6

Zoning

You may consider changes in [zoning] [and/or] [land use restrictions] if you find:

1. A change is reasonably probable; and
2. A willing buyer would pay a premium for that probability as of [*date of valuation*].

You may not consider changes in [zoning] [and/or] [land use restrictions] that are mere possibilities or speculation.

SOURCE: *Town of Paradise Valley v. Young Financial Servs., Inc.*, 177 Ariz. 388, 391, 868 P.2d 971, 974 (1983); *State ex rel. Morrison v. McMinn*, 88 Ariz. 261, 264, 355 P.2d 900, 903 (1960); *Flood Control Dist. of Maricopa County v. Hing*, 147 Ariz. 292, 299, 709 P.2d 1351, 1358 (Ct. App. 1985); *Moschetti v. City of Tucson*, 9 Ariz. App. 108, 112, 449 P.2d 945, 949 (1969); *City of Tucson v. Rickles*, 109 Ariz. 82, 505 P.2d 253 (1973).

USE NOTE: Use bracketed language appropriate to the facts.

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EMINENT DOMAIN 7

Project Influence (Zoning)

If you find that [the reasonable probability of] a change in [zoning] [and/or] [land use restrictions] existed before the acquisition because of [*name of project*], then you must disregard [the probability of] that change when you determine the fair market value of the property being acquired [and the remaining property].

SOURCE: *Town of Paradise Valley v. Young Financial Servs., Inc.*, 177 Ariz. 388, 391, 868 P.2d 971, 974 (Ct. App. 1993).

USE NOTE: Use bracketed language appropriate to the facts.

EMINENT DOMAIN 8

Project Influence

In determining the fair market value of the property being acquired [and the remaining property], you must disregard any decrease or increase in market value to the property before the acquisition which was caused by the [*name of project*] or by the likelihood that [part of] the property would be acquired for the [*name of project*].

SOURCE: *State v. Hollis*, 93 Ariz. 200, 379 P.2d 750, 753-54 (1963); *Uvodich v. Arizona Bd. of Regents*, 9 Ariz. App. 400, 453 P.2d 229, 234-35 (1969); A.R.S. § 28-7097 (ADOT cases).

USE NOTE: Use bracketed language appropriate to the facts.

EMINENT DOMAIN INSTRUCTIONS

EMINENT DOMAIN 9

Change of Access

Before this case, [*name of condemnee*]'s property had reasonable access to the adjoining public road and street system. This access has been changed, but other access is available or will be provided. Therefore, you should decide whether the property still has or will have reasonable access.

A property has reasonable access when a person can go to the property from the highway or from the property to the highway by a reasonable roadway connection between the public road system and the property.

If you find that the property still has or will have reasonable access, then [*name of condemnee*] is not entitled to any damages for the change of access. If you find that the property does not or will not have reasonable access and this has decreased the value of the remainder of [*name of condemnee*]'s property, then you should consider this decrease when you determine the amount of severance damages.

SOURCE: RAJI (CIVIL) 3d Eminent Domain 5; *State v. Schaffer*, 105 Ariz. 478, 467 P.2d 66 (1970).

COMMENT: The only modification from RAJI (CIVIL) 3d Eminent Domain 5 is replacing “defendant” with the name of the condemnee.

CAVEAT: This instruction should be given where there has been a change of access only, not where there has been a complete loss of access. In the latter situation, only the severance damage instruction applies.

EMINENT DOMAIN 10

Witnesses and Comparable Sales

Witnesses in this case have expressed an opinion of the fair market value of the subject property [and the severance damage, if any]. They have testified as to the price and other terms and circumstances of sales of the subject property or other properties which they consider to be comparable to the subject property. Generally, the more similar one property is to another, the closer the value of the one may be expected to approach the value of the other.

In weighing the opinion of a witness who has used comparable sales in arriving at his opinion of the subject property, you may consider the following: was the sale freely made and in good faith; how close was the date of the sale to the date of valuation; how similar is the size and shape of the sale property to the size and shape of the subject property; how similar are the physical features, including both improvements and natural features; how similar is the use to which the sale property is or may be put to the use which is or may be made of the subject property; how far is the sale property from the subject property; and how similar is the neighborhood of the sale property to the neighborhood of the subject property.

SOURCE: RAJI (CIVIL) 3d Eminent Domain 6.

USE NOTE: Use bracketed language appropriate to the facts.

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EMINENT DOMAIN 11

Burden of Proof

[*Name of condemnee*] has the burden of proving the fair market value of the property [*name of condemnor*] is acquiring [and the amount of severance damages, if any, to the remainder].

[[*Name of condemnor*] has the burden of proving the amount of special benefits, if any].

SOURCE: RAJI (CIVIL) 3d Eminent Domain 7; *State ex rel. Ordway v. Buchanan*, 154 Ariz. 159, 741 P.2d 292 (1987); *Pima County v. Palos Companies Unlimited*, 140 Ariz. 481, 682 P.2d 1148 (1984); *Choisser v. State ex rel. Herman*, 12 Ariz. App. 259, 469 P.2d 493 (1970); *State ex rel. Herman v. S. Pac. Co.*, 8 Ariz. App. 238, 445 P.2d 186 (1968); *Town of Williams v. Perrin*, 70 Ariz. 157, 217 P.2d 918 (1950); *Maricopa County v. Shell Oil Co.*, 84 Ariz. 325, 327 P.2d 1005 (1958).

Taylor v. State ex rel. Herman, 12 Ariz. App. 27, 467 P.2d 251 (1970) (regarding special benefits).

USE NOTE: Use bracketed language appropriate to the facts.

EMINENT DOMAIN 12

Severance Damages

[You must decide whether] [T]he property taken is part of a larger parcel. The [*name of condemnee*] is entitled to recover the fair market value of the part acquired by [*name of condemnor*]. [*Name of condemnee*] also is entitled to severance damages if the fair market value of the remaining property is reduced by the acquisition or by the proposed improvement.

The measure of severance damages is the difference between the fair market value of the remaining property before the acquisition and the fair market value of the remaining property after the acquisition.

SOURCE: RAJI (CIVIL) 3d Eminent Domain 4; A.R.S. § 12-1122 (1956); *Pima County v. DeConcini*, 79 Ariz. 154, 285 P.2d 609 (1955); *County of Maricopa v. Paysnoe*, 83 Ariz. 236, 319 P.2d 995 (1957); *State ex rel. Ordway v. Buchanan*, 154 Ariz. 159, 163, 741 P.2d 292, 296 (1987).

USE NOTE: Use bracketed language appropriate to the facts.

EMINENT DOMAIN INSTRUCTIONS

EMINENT DOMAIN 13

Information Discovered After Date of Valuation

A condition of the property that existed on *[date of valuation]* but was discovered after *[date of valuation]* must be considered when you determine fair market value. The condition may increase or decrease the value of the property.

SOURCE: *Selective Resources v. Superior Court*, 145 Ariz. 151, 153-154, 700 P.2d 849, 851-852 (Ct. App. 1984) *rev. denied*.

JUDICIAL COUNCIL OF CALIFORNIA CIVIL JURY INSTRUCTIONS (2003-04), CACI No. 3505 .

EMINENT DOMAIN 14

Value of Easement

[*Name of condemnor*] has taken the right to use a portion of [*name of condemnee*]'s land for a specific purpose. That right is called an "easement." After an easement has been taken, the property owner has the right to use the land for any purpose that does not conflict with the easement.

You must determine the fair market value of the easement on [*date of valuation*]. The fair market value of the easement is determined by subtracting the fair market value of the land after the easement was taken from the fair market value of the land before the easement was taken.

SOURCE: JUDICIAL COUNCIL CALIFORNIA CIVIL JURY INSTRUCTIONS (2003-04), CACI No. 3510.

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EMINENT DOMAIN 15

Special Benefits

You must determine the amount of special benefits, if any.

Special benefits are any increase in fair market value to the remaining property after the acquisition which results from the relation of the property to [*name of project*]. A special benefit is one that is either unique to the property or shared only by similarly situated properties.

In determining the amount of special benefits, if any, you must not consider general benefits. General benefits are those benefits which are enjoyed by the general community as a result of the construction of [*name of project*].

SOURCE: *Taylor v. State ex rel. Herman*, 12 Ariz. App. 27, 467 P.2d 251 (1970); *Phoenix Title & Trust Co. v. State ex rel. Herman*, 5 Ariz. App. 246, 425 P.2d 434 (1967); *Defnet Land & Inv. Co. v. State ex rel. Herman*, 14 Ariz. App. 96, 480 P.2d 1013 (1971).

EMINENT DOMAIN 16

Project Construction

For the purpose of determining the value of the remainder of the larger parcel, you must assume that the [*name of project*] and related facilities will be constructed in the manner proposed by [*name of condemnor*] in its construction plans.

SOURCE: A.R.S. § 12-1122(A)(2).

EMINENT DOMAIN INSTRUCTIONS

EMINENT DOMAIN 17

Cost of Cure

Severance damages may be reduced or eliminated by curing the condition causing the severance damages if the cost of cure is less than the amount of severance damages avoided by the cure.

[If you find the severance damages will be wholly cured, you must award [*name of condemnee*] the lesser of (1) the cost to cure or (2) the full amount of severance damages, but not both.]

[or]

[If you find that the severance damages are not wholly cured, you must award [*name of condemnee*] the lesser of (1) the cost to cure, plus remaining severance damages, or (2) the full amount of severance damages, but not both.]

SOURCE: *Pima County v. DeConcini*, 79 Ariz. 154, 157, 285 P.2d 609, 611 (1955); *County of Maricopa v. Shell Oil*, 84 Ariz. 325, 327 P.2d 1005 (1958); *Pima County v. Palos Companies Unlimited*, 140 Ariz. 481, 484, 682 P.2d 1148, 1151 (Ct. App. 1984).

USE NOTE: Use bracketed language appropriate to the facts.