**27.06(B) SEVERANCE DAMAGES / With Cost of Cure Issue**

In this case, the property owner is seeking severance damages. Severance damages occur when (a) the government takes only part of the owner’s property, (b) the part taken and the part not taken were an integrated whole prior to the taking, and (c) as a result of the taking, there is a decrease in the fair market value of the part not taken. In this case, the property taken is called “Part T” and the property not taken is called “Part NT.”

You must first decide whether Part T and Part NT were an integrated whole prior to the taking. To make this determination, you should consider all the evidence about the two parts, including:

(1) whether they were under common ownership prior to the taking;

(2) whether they are physically connected; and

(3) whether they were used for the same purpose, or it is reasonably probable that they would be used for the same purpose.

If you find Part T and Part NT were not an integrated whole prior to the taking, then [owner] is not entitled to severance damages.

If you find that Part T and Part NT were an integrated whole prior to the taking, you must decide whether the fair market value of Part NT decreased as the result of the taking of Part T. If the answer is No, then [owner] is not entitled to any severance damages for Part NT. You must enter $0 on the verdict form on the line for severance damages for Part NT.

If the answer is Yes, you must determine the dollar amount of [owner’s] severance damages for Part NT.

[Insert either OPTION A or OPTION B]

**OPTION A--When Loss of Fair Market Value & Cost of Cure Are the Only Issues**

There are two steps to determine the amount of severance damages. The special verdict form includes both steps.

First, you must determine the dollar amount by which the taking of Part T reduced the fair market value of Part NT.

Second, you must consider [government’s] claim that [owner] could have prevented some or all of the decrease in the fair market value of Part NT if [owner] had [describe curative measure].

In considering [government’s] claim, you must determine if each of following elements is more likely true than not true:

1. [Curative measure] was feasible;

2. [Curative measure] would have prevented some or all of the decrease in the fair market value of Part NT; and

3. The reasonable cost of [the curative measure] would have been less than the decrease in the fair market value of Part NT.

If each of these elements is not more likely true than not true, you must award [owner] severance damages equal to the decrease in the fair market value of Part NT.

If all three of these elements are more likely true than not true, you must award [owner] severance damages calculated as follows:

If completion of [the curative measure] would have completely prevented any decrease in the fair market value of Part NT, you must award [owner] only the reasonable cost of [the curative measure]. Do not award any additional amount as severance damages for Part NT.

If completion of [the curative measure] would have partially eliminated the decrease in the fair market value of Part NT, you must award [owner] severance damages calculated as follows: (1) the reasonable cost of [the curative measure] plus (2) the decrease in the fair market value of Part NT that would have occurred despite completion of [the curative measure].

**OPTION B--When the Government Claims that a Loss in Fair Market Value is Offset by a Special Benefit to the Property from the Project, and Cost of Cure is an Issue**

There are three steps to determine severance damages. The special verdict form includes each of these steps.

**Step One**: In Step One, you must determine the dollar amount by which the taking of Part T reduced the fair market value of Part NT. I will refer to this amount as the Initial Loss of Fair Market Value.

**Step Two**: In Step Two, you must determine the Lost Fair Market Value for Part NT.

The [government] claims that the Lost Fair Market Value for Part NT is lower than the Initial Loss in Fair Market Value because completion of the project conferred a special benefit on Part NT which [increased] [will increase] Part NT’s fair market value. A special benefit is a benefit that is specific to Part NT and is not shared by other properties in the area or the community at large.

If you decide that completion of the project did not confer a special benefit on Part NT which [increased] [will increase] Part NT’s fair market value, there is no offset or reduction of the Initial Loss in Fair Market Value. As a result, the Lost Fair Market Value for Part NT is the same amount that you determined in Step 1. Proceed to Step 3, and evaluate the Lost Fair Market Value for Part NT, following the instructions that I will give you for Step 3.

If you decide that completion of the project conferred a special benefit on Part NT, and that this special benefit [increased] [will increase] Part NT’s fair market value, the amount of this increase offsets any loss in fair market value in Part NT that was caused by the taking of Part T. To apply this offset, you must first decide the dollar amount by which the special benefit from completion of the project increased Part NT’s fair market value. I will refer to this amount as the Special Benefit Amount. Subtract the Special Benefit Amount from the Initial Loss in Fair Market Value. If the remaining amount is zero or a negative number, [owner] is not entitled to any severance damages for Part NT, and you must enter $0 on the verdict form for severance damages to Part NT. If the remaining amount is more than zero, this number is the Lost Fair Market Value for Part NT. Proceed to Step 3, and evaluate the Lost Fair Market Value for Part NT following the instructions that I will give you for Step 3.

**Step 3**: In Step Two, you determined the Lost Fair Market Value for Part NT. Now, you must consider [government’s] claim that [owner] could have prevented some or all of the Lost Fair Market Value for Part NT if [owner] had [describe curative measure].

In considering [government’s] claim, you must determine if each of following elements is more likely true than not true:

1. [Curative measure] was feasible;

2. [Curative measure] would have prevented some or all of the Lost Fair Market Value for Part NT; and

3. The reasonable cost of [the curative measure] would have been less than the amount of the Lost Fair Market Value for Part NT.

If each of these elements is not more likely true than not true, you must award [owner] severance damages. The amount of the severance damages is an amount that is equal to the Lost Fair Market Value for Part NT, as you determined in Step

If all three of these elements are more likely true than not true, you must award [owner] severance damages for Part NT that are computed as follows:

If completion of [the curative measure] would have completely prevented the Lost Fair Market Value for Part NT, you must award [owner] only the reasonable cost of [the curative measure]. Do not award any additional amount for severance damages for Part NT.

If completion of [the curative measure] would have partially eliminated the Lost Fair Market Value for Part NT, you must award [owner] severance damages for Part NT calculated as follows: (1) the reasonable cost of [the curative measure] plus (2) the amount of the Lost Fair Market Value for Part NT that would have occurred even after completion of [the curative measure].

**Use Note**

This instruction should be given when the government takes a portion of the property owner’s land, and the property owner claims that the taking decreased the value of the portion that the government did not take. In this instruction, the terms Part T and Part NT refer to the properties taken and not taken. Prior to giving this instruction, the court may replace these terms with designations appropriate to the case.

Instruction 27.06(B) should be used when the government is claiming that the owner could have avoided the claimed severance damages by taking curative measures. If the government is not claiming that the owner could have avoided the claimed severance damages by taking curative measures, use Instruction 27.06(A)

Option A should be given when the government is not claiming that the fair market value of the remaining parcel was increased by any special benefit conferred on the property by completion of the project, but the government is claiming that the owner’s severance damages are limited by the cost of cure.

Option B should be given when the government claims that the fair market value of the remaining parcel increased due to a special benefit conferred by completion of the project, and the government is also claiming that the owner’s severance damages are limited by the cost of cure.

It may be necessary to add an instruction defining "common ownership" in situations where the properties are owned in different legal capacities, such as by a partnership, corporation, or trust.

**Comment**

In some circumstances, the property owner’s duty to mitigate damages may limit the property owner’s recovery. *See City of Kenai v. Burnett*, 860 P.2d 1233, 1242 (Alaska 1993). The duty to mitigate loss to the remaining property is often referred to as the “cost to cure.” 4A *Nichols on Eminent Domain* § 14A.04[1] (2017). Under this concept, when the owner can take steps to “cure” the loss to the remaining property, the owner’s recovery is limited to the lesser of the cost to cure or the damage to the remainder. *Id*. § 14.04[2][a].

Cost to cure is a proper measure of damages only when the award puts the owner in as good a position as the owner enjoyed prior to the taking, and is less than the decrease in fair market value otherwise caused by the taking. *Id*; *cf. City of Kenai*, 860 P.2d at 1242 (reimbursement for cost of cure must be sufficient to make the property owner whole). When the government asserts cost of cure as a limitation on the property owner’s recovery, the government bears the burden of proof. *Nichols*, § 14.04[2][a]. The government’s burden of proof includes proving that the proposed cure is feasible or reasonably likely. *Id*.