**27.02 FAIR MARKET VALUE**

In order to compute just compensation in this case, you must determine the fair market value of the property as of [insert date of take].

Fair market value is the price that a willing and informed seller would accept from a willing and informed buyer on the open market. A willing seller is one who is free to sell or not to sell and a willing buyer is one who is free to buy or not to buy. Informed sellers and buyers are fully knowledgeable about the property and about general market conditions that affect the property. Willing and informed sellers and buyers are not required or under pressure to act. You must assume that they would not know that the property might be taken for this project.

Fair market value depends upon factors such as market conditions, the nature and character of the property, the use for which the property is suitable, and any other factors that reasonable buyers and sellers would consider.

Finally, fair market value is based on the property's highest and best use. This is not necessarily its current use but must be a use that is reasonably probable and physically possible. The use must also be consistent with the law [unless there is a reasonable probability that the law will change and that reasonable buyers and sellers would consider such a change in arriving at a price].

**Use Note**

This instruction should be given in every case unless the parties agree or the court makes a preliminary finding that market value is not the appropriate measure for determining just compensation.

The bracketed language should be given if the condemnee has alleged that a change in zoning status (or other legal restriction) would enhance the value of the property and the court has made a threshold determination that sufficient evidence has been presented to allow a jury reasonably to conclude there may be a change in legal status that would affect the value of the property.

**Comment**

In Alaska, the fundamental goal of just compensation is to make the property owner whole. *City of Kenai v. Burnett,* 860 P.2d 1233, 1242 (Alaska 1993), *citing* *State v. Hammer*, 550 P.2d 820, 826 (Alaska 1976). In eminent domain proceedings, just compensation is measured by the loss suffered by the owner and not the benefit to the condemnor. *Hammer*, 550 P.2d at 824; *Vezey v. State,* 798 P.2d 327, 332 (Alaska 1990), *citing Gackstetter v. State*, 618 P.2d 564 (Alaska 1980)(“In other words, just compensation in the constitutional sense is what the owner has lost, and not what the condemnor has gained.”); *see Ketchikan Cold Storage Co. v. State*, 491 P.2d 143, 150 (Alaska 1971) ("[T]he property owner should be placed as fully as possible in the same position as he was in just prior to the taking of his property.").

Fair market value is recognized by the Alaska Supreme Court as the primary method of measuring just compensation. *See Marten v. State*, 554 P.2d 407, 409 (Alaska 1976); *Dash v. State*, 491 P.2d 1069, 1074-75 (Alaska 1971); *State v. 7.026 Acres*, 466 P.2d 364, 365 (Alaska 1970); *Bridges v. Alaska State Housing Authority*, 375 P.2d 696, 698 (Alaska 1962). For an instruction on fair market value sustained by the Alaska Supreme Court, *see State v. 7.026 Acres*, 466 P.2d at 365 n.3.

Fair market value is "the amount a fully informed seller would receive from a fully informed buyer in a normal, open market sale." *Marten v. State*, 554 P.2d at 409. In other words, it is "the price in money that the property could be sold for on the open market under fair conditions between an owner willing to sell and a purchaser willing to buy, with a reasonable time allowed to find a purchaser." *State v. 7.026 Acres*, 466 P.2d at 365; *see Bridges v. Alaska Housing Authority*, 375 P.2d at 698.

The highest and best use to which the property may be put must be considered in determining fair market value. *Martens v. State,* 554 P.2d at 409; *Babinec v. State*, 512 P.2d 563, 570-71 (Alaska 1973); *Dash v. State*, 491 P.2d at 1073; *Ketchikan Cold Storage Co*., 491 P.2d at 151. In essence, the highest and best use of the property is the reasonably probable legitimate use that makes the property most valuable.

In determining the highest and best use, the jury may consider zoning changes or other changes in the legal status of the property which were reasonably probable at the time of the taking. *See Martens v. State*, 554 P.2d 407; *Dash v. State*, 491 P.2d at 1073 (allowing evidence of reasonably probable subdivision to be admitted); *State v. 7.026 Acres*, 466 P.2d at 366-67 (allowing evidence of proposed subdivision plan to be admitted).

Although fair market value is the generally accepted test for determining just compensation, another measure may apply in certain circumstances. *City of Kenai v. Burnett,* 860 P.2d at 1242 (“A fair market valuation is only one way to accomplish this task, and other damage measures may be used when the fair market value measure would not be adequate to make the property owner whole.”); *see Gackstetter v. State*, 618 P.2d 564, 567 (Alaska 1980) ("[F]air market value is not the end in itself, but merely a means to achieve the goal of just compensation." *Id*.). For example, compensation based on loss of appreciation has been approved. *State v. Doyle*, 735 P.2d 733, 737 (Alaska 1987). Another example was the use of replacement cost to compensate for buildings destroyed through illegal use of a declaration of taking. *Bridges v. Alaska Housing Authority*, 375 P.2d 696, 699 (Alaska 1962). *See generally United States v. 50 Acres of Land*, 467 U.S. 24, 105 S.Ct. 451, 83 L.Ed.2d 376 (1984) (rejecting substitute facilities doctrine). No generalized instruction can be offered to cover all situations. When a special test of just compensation is used, it should be substituted in this and other instructions for the fair market value concept.

For a discussion of "date of valuation," see Comment to Article 27.00.