

No. 41017-6
On Appeal from Pierce County Superior Court Cause # 05-2-05211-8

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

CARL R. HOGAN,
Appellant/Cross-Respondent,

v.

BORDERS, INC.,
Respondent/Cross-Appellant.

**REPLY BRIEF OF APPELLANT/CROSS-RESPONDENT
CARL R. HOGAN**

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I. REPLY TO RESPONDENT'S BRIEF

A. **Because the Lease Conditions Borders' Right To Share in the Just Compensation Award Upon Events that Have Not Occurred, Borders Has No Right To Share in the Just Compensation Award.**

This Court has previously stated that a lessee has a right to share in a condemnation award "unless the lessee agrees otherwise." *State v. Trask*, 91 Wn. App. 253, 277, 957 P.2d 781 (1998) ("*Trask I*"). As the *Trask I* court explained, a lessee agrees not to share in a condemnation award when the lease conditions the right to share upon events that do not occur. *Id.* ("A lessee also agrees [not to share] if the lease provides that he or she will receive a share of the award only on the occurrence of events that do not come to pass.")

In its brief, Respondent/Cross-Appellant Borders, Inc. claims that nothing in their lease with Carl Hogan prohibits it from sharing in the condemnation award. Borders, however, ignores the last clause of Article 22(d) of the lease, which states:

Tenant's right to receive compensation for damages or to share in any award shall not be affected in any manner hereby if said compensation, damages or award is made by reason of the expropriation of any land or buildings constructed, made or owned by Tenant.

(CP 130) (emphasis added). Thus, Borders' right to share in any condemnation award is conditioned upon the award being made by reason of the expropriation of any land or buildings constructed, made or owned

by Borders. Because none of these conditions have occurred, Borders has no right to share in the award.

In addition, Borders relies heavily upon *Trask I* to support its claim that the lease did not extinguish Borders' common law right to share in a condemnation award. (Borders' Brief at 18-19) Borders' reliance upon *Trask I*, however, is misplaced because the tenant's recovery in *Trask I* was controlled by the lease and not by any common law right.

Unlike here, the jury in *Trask I* determined both the total just compensation award and the tenant's share of that award in a single proceeding. *Id.* at 261 & n.6. The *Trask I* jury found that the State should pay \$4.1 million as just compensation and that the tenant's share of this award amounted to \$394,000. *Trask I*, 91 Wn. App. at 261.

In the event of condemnation, the lease in *Trask I* allowed the tenant to recover all awards relating to tenant improvements:

If more than twenty-five (25) percent of the Leased Premises, including the Tenant Improvements, shall be taken or appropriated by any public or quasi-public authority under the power of eminent domain, then the tenant shall have the right, at its option, to terminate this Lease upon sixty (60) days written notice. In the event of any such taking or appropriation, the Landlord shall be entitled to any and all awards and/or settlements from such authority which relates to the compensation for raw land and **the Tenant shall be entitled to any and all awards and/or settlements relating to the Tenant improvements.** Neither party shall have any claim against the other for the value of any unexpired term of this Lease.

Trask I, 91 Wn. App. at 277-78 (emphasis added).

As the *Trask I* court emphasized, this lease provision represented an agreement between tenant and landlord that would allow the tenant to share in the condemnation award when the award related to tenant improvements:

As these provisions make clear, [the tenant] did not agree to forego compensation for his leasehold interest; on the contrary, **he and [the landlord] agreed that he would receive “any and all awards and/or settlements relating to the tenant improvements.”**

Trask I, 91 Wn. App. at 278 (emphasis added). Thus, *Trask I* provides an example of when a lease provision would allow a tenant to share in a condemnation award. It is this lease provision, and not any common law right, that formed the basis for the tenant’s recovery in *Trask I*.¹

Here, the parties have also addressed condemnation and have set out their respective rights and obligations in Article 22. Thus, judicial allocation applying common law principles is not indicated. If the conditions in the lease had occurred, as they did in *Trask I*, then Borders would have had the right to share in the condemnation award. Because

¹ On pages 18-19 of its brief, Borders makes the following, incorrect statement about the holding of *Trask I*:

After examining the lease, the [*Trask I*] Court held that the lessee “did not agree to forego compensation for his leasehold interest,” where, as here, the lessee did not “exercise his option to terminate the lease . . .” [quoting *Trask I* at 278]

Borders’ Brief at 18-19. This statement is a mischaracterization of the holding of *Trask I*. The key fact in *Trask I* centered not on whether the lessee had terminated the lease, but on the express language of the lease which permitted the tenant to receive “any and all awards and/or settlements relating to the tenant improvements.” *Trask I* at 278.

these conditions have not occurred, Borders has no right to share in the award.

B. The Trial Court Erred When It Held that Borders' Damages Amounted To \$355,801 Because This Amount Is Based Upon an Unrealistic Figure Applied Over a 25 Year Period

- 1. No rational tenant would choose to spend \$2.3 million to sublet its space when it is under no contractual duty to remodel the space and where the vacancy of that anchor tenant would force the landlord to terminate the lease.**

Substantial evidence exists if the record contains “evidence of sufficient quality to persuade a fair minded rational person of the truth of the declared premise.” *World Wide Video, Inc. v. City of Tukwila*, 117 Wn.2d 382, 387, 816 P.2d 18 (1991). Here, the trial court’s finding that the value of Borders’ leasehold would decrease by half, from \$14 per square foot to \$7 per square foot, as a result of the diminished access caused by the City’s taking, is not supported by substantial evidence.

Initially, Pam Lent, Borders’ Director of Real Estate, arrived at this \$7 per square foot figure by using a single “comparable” transaction to support her opinion. (Apr. 14, 2010 RP at 246) Because this transaction was not consummated until two years after June 2007 (the date for valuing damages to Borders and Hogan), the trial court granted Hogan’s motion to exclude the transaction. (Apr. 12, 2010 RP at 6, 23) As a result, Lent had to scramble to come up with another basis to support her \$7 figure.

Lent settled on her “net effective rent” theory whereby Borders would be forced to move and then spend \$2.3 million to remodel Hogan’s

shopping center so that Borders could sublet the space. (Apr. 14, 2010 RP at 247-49; Borders Br. at 27). With Borders' spending this \$2.3 million, Lent argued that the value of Borders' leasehold would decrease by \$7 per square foot. Implausibly, Lent's net effective rent reduction of \$7 per square foot precisely equaled her prior calculation that was based on the excluded and improper "comparable" transaction.

When asked, however, Lent acknowledged that nothing in the lease would require Borders to sublet or remodel its space:

Q. Can you show me a provision then, or show the Court a provision where there is a contract requirement of the lease that Borders re-tenant at any time these premises?

A That would not be in this lease.

(Apr. 14, 2010 RP at 288)

Moreover, Borders' statement that it would be forced to expend \$2.3 million to remodel Hogan's shopping center defies common sense. The reason that Borders' position defies common sense is the "go-dark" clause in the lease between Hogan and Borders. (Ex. 1, p. 36) Under the go-dark clause, Borders could move out of the Shopping Center and pay rent for a short period of time (from 30 to 180 days). (Apr. 14, 2010 RP at 290-91) At that point, faced with the adverse impact of the vacant anchor tenant space, Hogan would be forced to terminate the lease and Borders would have no further obligation to pay rent. (Apr. 14, 2010 RP at 343)

Jeff Hogan, manager of the Willows Shopping Center, testified that Hogan would be forced to terminate the lease because Hogan could

not afford to replace an anchor tenant like Borders with a vacant space. (Apr. 14, 2010 RP at 343-44) As Hogan testified, an empty anchor tenant store “means it’s an empty center.” *Id.* at 344.

Furthermore, other tenants in the Willows Shopping Center have lease agreements allowing them to leave if Borders vacates the Center. (Apr. 13, 2010 RP at 138) Thus, Hogan would have no choice but to promptly terminate Borders’ lease and then immediately find and install a new anchor tenant of equal or better quality. Only by replacing Borders with a new anchor tenant compatible with the other tenants could Hogan avoid the domino effect of other major tenants leaving the Center. (Apr. 14, 2010 RP at 343-44)

Anthony Gibbons, Hogan’s expert, testified that Hogan’s only rational choice should Borders leave would be to terminate Borders’ lease. To do otherwise “would kill the Center.” (Apr. 13, 2010 RP at 174) Thus, Borders could vacate the center and then pay at most six months’ rent before Hogan would be forced to terminate the lease.

Borders’ statement that it would leave the Shopping Center and then pay \$2.3 million to remodel the center simply does not make sense. No rational tenant would choose to spend \$2.3 million to sublet its space when it is under no contractual duty to remodel the space and when the only choice for the landlord would be to terminate the lease as quickly as possible to avoid having a major anchor space remain empty and dark.

In contrast to Borders’ irrational position, Hogan’s estimate of Borders’ damages is supported by the expert testimony of Anthony

Gibbons and Donald Palmer. Gibbons and Palmer both offered testimony that the value of Borders' leasehold would decline by \$1.50 per square foot as the result of the diminished access following the City's taking. (April 13, 2010 RP at 83, 140-41)

Gibbons noted that the fair market value of the leasehold prior to the change in access was \$14 per square foot. (April 13, 2010 RP at 132, 140-41) After examining comparable leases, Gibbons concluded that the fair market value of Borders' leasehold would decline by \$1.50 per square foot as the result of the diminished access following the City's taking. (April 13, 2010 RP at 140-41). Gibbons explained the rationale for his opinion:

This was my judgment as to the decline in the market value of the Borders store between the before and after case. In my opinion, it went from a store that was \$14 a square foot down to a store that was \$12.50 a square foot. And that was my opinion of the rental value of the space, and that came from both looking at the rent that other tenants pay in other shopping centers, as well as the rent being paid in this shopping center. For instance, Sturtevant's on the backside of the Center is paying \$11 a square foot. That is, obviously, a worse location than even the Borders building would be in the after case. So the rent has to be higher than the \$11.

Q These were computed as of what date?

A These were computed as of June of 2007.

Q Okay. Go ahead.

A The other two tenants in the Center, which were in an inferior location in the before case, now are in a superior location. Their rents are \$13.50. So, in my opinion, the rent

would be somewhere higher than \$11 and lower than \$13.50, and I concluded with \$12.50.

(April 13, 2010 RP at 140-41).²

Palmer testified that Gibbons' opinion of value was "reasonable," although Palmer noted that the City of Puyallup's appraiser had concluded that the value of Borders' lease would not decline at all following the condemnation. (April 13, 2010 RP at 88) Thus, Palmer stated that "the rent reduction is somewhere between zero to \$1.50." *Id.* The testimony of both appraisers supports a valuation of Borders' damages of at most \$1.50 per square foot.

Absent Borders spending \$2.3 million so that it might sublet its lease, there is no basis to support Borders' position that the value of its leasehold decreased by \$7 per square foot. Indeed, the trial court acknowledged that "there was evidence presented at trial that \$7 per square foot diminution in value was not a realistic figure." (CP 829; Apr. 20, 2010 RP at 403) Because this \$7 per square foot reduction is not supported by substantial evidence, the trial court erred when determining Borders' damages.

² As this quote demonstrates, Borders' statement on page 11 of its Brief—that Gibbons "admitted that Borders' space had gone from the best in the Shopping Center to the worst"—is a misrepresentation of Gibbons' testimony.

2. Borders' position that it has a right to be compensated for five options to renew a lease, when the contract rate of the lease is significantly more than the market rate, defies common sense and Washington law.

In assessing Borders' damages, Hogan only considered the initial term of the lease and not the five, five-year options to renew. Hogan's position is logical: no rational tenant would choose to renew a lease where the rent is by the tenant's calculation double the market rate. And where the tenant admits that it would vacate the space, there would not be any renewals, let alone five renewals of five years each.

In addition, Hogan's position is consistent with a party's duty to mitigate its damages, a concept that has been recognized in condemnation cases. *See, e.g., State v. Wandermere Co.*, 89 Wn. App. 369, 384, 949 P.2d 392 (1997), *rev. den.* 135 Wn.2d 1012, 960 P.2d 939 (1998) (“[o]ther jurisdictions have approved the concept of mitigation of damages in eminent domain cases”); *State v. Weiswasser*, 693 A.2d 864 (N.J. 1997).

Borders, however, claims that the trial court correctly included the five renewal options in its damages calculation, even though Borders would be renewing a lease where it argued that the contract rent was double the market rate. In support of its position, Borders relies upon *Spokane School District v. Parzybok*, 96 Wn.2d 95, 633 P.2d 1324 (1981). Borders even goes so far as to call *Parzybok* “nearly analogous” to the case at hand: “In a nearly analogous setting, the Washington Supreme Court held that a lessee's option to purchase is compensable in a

condemnation action. *Parzybok*, 96 Wn.2d at 104.” Borders’ Brief at p. 30.

To call *Parzybok* “nearly analogous” to current case is a gross mischaracterization of *Parzybok*. In *Parzybok*, the Washington Supreme Court carefully explained that an option is a property right only after the option has increased in value after being granted:

Where the land has increased in value after the option was granted, it cannot be denied that the option is a valuable contract right which is destroyed by the condemnation of the land to which it pertains.

Parzybok, 96 Wn.2d at 97. The court noted that if the property declines in value, then the optionee could simply elect not to exercise the option: “[T]he optionee always has the choice of foregoing his option if the market value of the property has declined.” *Parzybok*, 96 Wn.2d at 98. The *Parzybok* court stressed that it is “the very nature of an option that it will exercised only if profitable.” *Id.*

In *Parzybok*, the amount of the condemnation award (\$47,000) was more than double the option price (\$22,000). *Parzybok*, 96 Wn.2d at 96. While the option in *Parzybok* was a valuable right, the court was careful to note that that is not always the case: “Not every option to purchase is necessarily of sufficient value and substance to entitle the holder to participate in a condemnation award.” *Id.* at 104.

But because the option in *Parzybok* had increased in value and because it was logical to assume that it would therefore be exercised, the court held that it was a property right sufficient to warrant compensation:

Suffice it to say that where, as here, the option is contained as a covenant in a lease, and where the lease has been maintained in good standing up to the time of condemnation, and **there is every reason to suppose that the option would be exercised when the time ripens, the property having meanwhile increased in value**, the conclusion is inescapable that the optionee has suffered a loss of his property, be it only a contract right, in a definitely measurable amount.

Parzybok, 96 Wn.2d at 104 (emphasis added).

Here, however, where it is undisputed that the option to renew has decreased in value, there is no reason to suppose that it will be exercised when the time ripens. Under the guidelines established in *Parzybok*, the options to renew here are neither valuable nor compensable. Thus, the trial court erred when it calculated Borders' damages over all five of the five-year options to renew.

C. The Trial Court Erred In Doubling Borders' Damages Because the Equitable Factors Cited by the Court Do Not Support a Doubling of the Award.

After incorrectly using a diminution in value of \$7 per square foot applied through the year 2040 to arrive at an inflated damage amount of \$355,801, the trial court then compounded its error by applying equitable factors to *double* this amount to arrive at Borders' share of the just compensation award. (CP 828-30) The equitable factors identified by the trial court, however, do not warrant the doubling of Borders' damages. According to the trial court:

5. The following factors require equitable adjustment of the calculation [\$355,801] set forth in ¶ 4:

- The calculation assumes the jury awarded \$2,850,000 for “take” damages and costs to cure; **however, there is no way to know the basis upon which the jury awarded damages.**
- The calculation adopts Borders’ view that its leasehold has diminished by \$7 per square foot; **however, there was evidence presented at trial that \$7 per square foot diminution in value is not a realistic figure.**
- The calculation assumes that Borders will exercise its five options to renew; **however, Borders could mitigate its damages and exercise its right not to renew the lease after 2015.**
- The calculation assumes the Project has been built; **however, no one knows when the Project will be built and thus when access will be impaired.**
- Hogan **and Borders** have employed different litigation tactics in 2009 and 2010.

(CP 829) (emphasis added).

As discussed in Hogan’s opening brief, none of the five factors cited by the trial court would justify any increase in Borders’ damages.

The first factor cited by the trial court—that “there is no way to know the basis upon which the jury awarded damages”—is irrelevant. In condemnation cases, where an undivided total lump sum is initially awarded, the jury makes no award of specifically-identifiable compensation to individual interest holders. That determination has been reserved for the court in the apportionment phase. In addition, there was undisputed testimony at both trials supporting a determination by the court

that \$2.85 million of the \$5.15 million lump-sum award should be apportioned to property interests other than Borders, leaving only \$2.3 million remains to be divided between Borders and Hogan.

The second equitable factor identified by the trial court is both irrelevant and contradictory. This factor is irrelevant because the trial court's statement, "The calculation adopts Borders' view that its leasehold has diminished by \$7 per square foot," is not an equitable factor—rather it is the basis upon which the trial court arrived at the \$355,801 damage figure. It would be improper to then assign an additional value for the decrease in leasehold value and thereby increase the award to Borders. This factor is also contradictory because the trial court admitted "there was evidence presented at trial that \$7 per square foot diminution in value is not a realistic figure." Where the \$7 per square foot is not "a realistic figure," Borders' damages have been overstated. Doubling that figure only compounds this overstatement.

The third equitable factor is also irrelevant and contradictory. This factor is irrelevant because Borders' option to renew its lease is part of the court's original damages calculation and thus not an equitable factor warranting an increase. This factor is contradictory because it acknowledges that Borders could mitigate its damages by electing not to renew its lease.

The fourth factor cited by the trial court—that no one knows when the 39th Avenue SE Extension Project will impair access to the Willows Center—reflects uncertainty that was already factored into the calculation

of Borders' damages. It would be improper to then assign an additional value for the issue of uncertainty and thereby increase the award to Borders. The uncertainty over when access will be impaired does not justify any increase in Borders' apportionment, let alone a doubling of that amount.

The last equitable factor cited by the trial court, that Hogan and Borders have employed different litigation tactics in the two trials, also does not support a doubling of Borders' damages. As the trial court noted in its oral ruling, Borders "played coy at trial in phase one." (Apr. 20, 2010 RP at 404-05) When Pamela Lent testified at the first trial, she made no reference to the \$3.4 million in damages to Borders which she claimed at the second, apportionment trial.³ (Apr. 14, 2010 RP at 279, 282-83) Had the jury heard the full extent of the damages alleged by Borders in the second trial, it may well have increased the amount of damages awarded in the condemnation trial—to the benefit of both Borders and Hogan. Borders should not be awarded for playing coy.

In defense of the trial court's equitable factors, Borders claims that a trial court can consider the loss of future profits in adjusting a damages award. Borders' Brief at 33. Although Borders acknowledges that future profits cannot be considered in determining damages, Borders cites *Pierce*

³ In a footnote, Borders complains that Hogan did not reserve any portion of the just compensation award for Borders' damages, although Hogan reserved funds for KeyBank's apportionment. (Borders Brief at p. 38 n.14) What Borders fails to mention, however, is that Borders, unlike KeyBank, never stated the amount of its claimed damages until April 2010, ten months after the first trial. (See Ex. 11 at p. 7, discussed at page 45 of Hogan's opening brief)

County v. King, 47 Wn.2d 328, 287 P.2d 316 (1955), for the proposition that future profits can be considered in equitable apportionment. Borders' Brief at 33. The *King* case, however, can be distinguished from the case at hand.

In *King*, the court held that a vendor under an executory land contract could elect to either take the balance of the purchase price in lump sum, or to leave the balance of the purchase price in the registry of court, to be paid in installments pursuant to the provisions of the contract. *Id.* 334-35. Thus, the court held that the vendor could elect to receive future *payments* that were determined by the contract and not future *profits* that are, of course, speculative. Thus, *King* does not authorize a court to consider future profits in any equitable adjustment.

In addition to the equitable factors listed by the court in its conclusions of law, Borders cites other factors, such as \$711,602 being roughly half of the damages claimed by Borders. Borders' Brief at 34-35. That the amount awarded by the court is half of the inflated damages claimed by Borders, and rejected by the trial court, is hardly a compelling equitable factor warranting a doubling of Borders' damages.

For these reasons, the equitable factors cited by the court do not support any increase in Borders' apportionment, let alone a doubling of that amount.

II. RESPONSE TO BORDERS' CROSS-APPEAL

Under RCW 8.28.040, interest on a judgment in any eminent domain proceeding is suspended pending an appeal. This statute states:

Whenever in any eminent domain proceeding, heretofore or hereafter instituted for the taking or damaging of private property, a verdict shall have been returned by the jury, or by the court if the case be tried without a jury, fixing the amount to be paid as compensation for the property so to be taken or damaged, such verdict shall bear interest at the maximum rate of interest permitted at that time under RCW 19.52.020 from the date of its entry to the date of payment thereof. PROVIDED, that the running of such interest shall be suspended, and such interest shall not accrue, for any period of time during which the entry of final judgment in such proceeding shall have been delayed solely by the pendency of an appeal taken in such proceeding.

RCW 8.28.040 (emphasis added).

This statute applies only when the owner continues to have beneficial use of the property during pendency of the appeal. *See Sintra, Inc. v. City of Seattle*, 96 Wn. App. 757, 980 P.2d 796, *rev. denied*, 140 Wn.2d 1021, 10 P.3d 406 (1999). Here, Borders has continued to have beneficial use of the property pending Hogan's appeal.⁴ (CP 824-25; 869)

On July 19, 2010, the trial court granted Hogan leave to deposit \$911,129.18 in the court's registry. (CP 846, 871) The \$911,129.18

⁴ The Willows Shopping Center is a very profitable location for Borders; as of 2008, that location generates approximately \$1 million in profits per year for Borders. (Apr. 14, 2010 RP at 310)

represented the total award to Borders, including prejudgment interest and costs. (CP 850)

Applying RCW 8.28.040, the trial court's order suspended the running of interest "for any period of time during which the entry of final judgment in this proceeding shall be delayed solely by the pendency of an appeal taken in this proceeding." (CP 871) The court's order also stayed enforcement of the judgment until entry of the final order after appeal. (CP 871)

Borders' cross-appeal claims that the court erred in applying RCW 8.28.040 to suspend post-judgment interest. (CP 872) Borders argues that the court erred for two reasons: (1) final judgment has already been entered thus rendering the suspension of interest under RCW 8.28.040 inapplicable and (2) the statute only applies to condemnation actions and not apportionment proceedings. Borders' Brief at 39-41.

Borders's first argument is wrong under Washington law and the facts of this case. First, in an *eminent domain proceeding*, a judgment is not final until an appeal has run its course:

Therefore, it becomes evident the words 'final judgment' contained in RCW 8.04.090 refer to a judgment that becomes final on termination of the right of appeal. **Where an appeal is taken, the judgment does not become final until final disposition on appeal.**

State v. Wachsmith, 4 Wn. App. 91, 95, 479 P.2d 943 (1971) (emphasis added).

In support of its holding, the *Wachsmith* court cited *State v. Laws*, 51 Wn.2d 346, 322 P.2d 134 (1958), where the court stated: “[W]e fixed the time the judgment became final by determining when the right of appeal terminated.” *Laws*, 51 Wn.2d at 352. And in *Malott v. Randall*, 11 Wn. App. 433, 435-36, 523 P.2d 439 (1974), the court noted:

It is apparent that in this jurisdiction [Washington] the words ‘final judgment’ mean that judgment which shall have become final by expiration of the time for appeal or by affirmance on appeal, when used in a connotation other than the right to appeal.

Id. at 435-36 (footnote omitted).

These cases are consistent with the order entered by the trial court, which clearly contemplated that this matter will not become final until after the pendency of this appeal:

2. Under RCW 8.28.040, this being an eminent domain proceeding, the running of interest shall be suspended, and such **interest shall not accrue, for any period of time during which the entry of final judgment in this proceeding shall be delayed solely by the pendency of an appeal taken in this proceeding.**

...

4. Upon deposit by Respondent Hogan in the Registry of the Court of the additional sum of \$20,000 as security for payment of attorneys fees and costs on appeal, enforcement of the judgment shall be stayed forthwith thereupon without any further Order of this Court, **until entry of the final order on the appeal.**

(CP 846) (emphasis added).

Thus, under Washington law and the trial court's order, a final judgment under RCW 8.28.040 will not occur until this appeal has run its course.

Borders' second argument, that RCW 8.28.040 does not apply to apportionment proceedings is contradicted by the first sentence of the statute. By its very terms, RCW 8.28.040 applies "in any eminent domain proceeding." The legislature could have limited the statute to only the initial trial in a condemnation proceeding, excluding the apportionment phase, but it did not do so.

Moreover, there is no requirement that apportionment occur in a separate trial. See for example *Trask I*, where the jury determined the total just compensation award and the tenant's share of that award in a single proceeding. *Trask I* at 261 & n.6. Under Borders' strained interpretation, it is not clear if RCW 8.28.040 would apply to a combined condemnation/apportionment proceeding.

Finally, Borders relies upon *State v. Lacey*, 84 Wn.2d 33, 524 P.2d 1351 (1974), to support its assertion that RCW 8.28.040 is limited to condemnation actions initiated by public entities. Borders' Brief at 41-42. There is nothing, however, either in the plain text of RCW 8.28.040 or in *Lacey*, that limits RCW 8.28.040 to condemnation actions initiated by public entities.

Moreover, *Lacey* acknowledged that the interest-tolling provision of RCW 8.28.040 applies when the "owner continues in the beneficial use of his property." *Lacey*, 84 Wn.2d at 37-38. The Court of Appeals in

Sintra referred to *Lacey* when it emphasized that the interest-tolling provision of RCW 8.28.040 applies when the owner maintains beneficial use of the property through the pendency of the appeal:

[A]s the Supreme Court clarified in *State v. Lacey*, 84 Wash.2d 33, 37-38, 524 P.2d 1351 (1974), the proviso [in RCW 8.28.040] is a special rule with limited applicability. It presumes that the owner continues in the beneficial use of the property during the pendency of the appeal. Interpreted in light of the constitutional guarantee of just compensation, the proviso in [RCW 8.28.040] cannot suspend accrual of interest during the pendency of an appeal when the owner enjoys no beneficial use of the property and has nothing to substitute for it.

Sintra, 96 Wn. App. at 762. Because the owner in *Sintra* had been deprived of the beneficial use of his property, the court held that “the special interest suspension rule in RCW 8.28.040” did not apply. *Id.*

That is not the case here. The Borders’ bookstore in the Willows Shopping Center is very profitable, generating approximately \$1 million in profits per year for Borders. (Apr. 14, 2010 RP at 310) In issuing its order suspending interest during the pendency of this appeal, the trial court noted that this beneficial use has continued throughout this proceeding: “Right now . . . [Borders is] making their profit the same way they were before this ever started.” (July 16, 2010 RP at 12-13)

As the trial court held, Borders should not be able to claim these profits *and* interest at that the same time:

[I]t seems to me that the position the Hogans are taking is consistent with the rationale in [*State v. Lacey*]. They are saying that if there’s truly no loss of anything, if you are

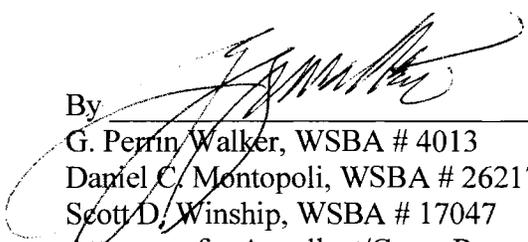
not disadvantaged, then you ought not to be able to have interest also, and that's the case here.

(July 16, 2010 RP at 11). Because Borders has not been deprived of the beneficial use of its property, the interest-suspending provision of RCW 8.28.040 applies.

For these reasons, Hogan requests that this Court affirm the trial court's order suspending interest and staying enforcement throughout the pendency of this appeal.

DATED this 11th day of April, 2011.

VANDEBERG JOHNSON & GANDARA, LLP

By 

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Carl Hogan

CERTIFICATE OF SERVICE

The undersigned makes the following declaration under penalty of perjury as permitted by RCW 9A.72.085.

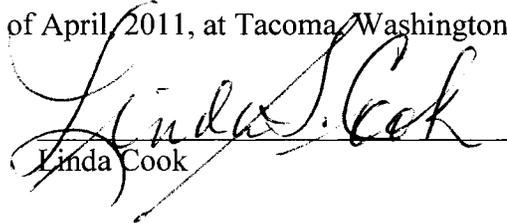
I am a legal assistant for the firm of Vandenberg Johnson & Gandara. On the 11th day of April, 2011, I deposited in the mails of the United States a properly stamped and addressed envelope containing a copy of the Reply Brief of Appellant/Cross-Respondent Carl R. Hogan to:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 11th day of April, 2011, at Tacoma, Washington.


Linda Cook

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