

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.

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COURT OF APPEALS
DIVISION II
10 DEC 21 PM 4: 03
STATE OF WASHINGTON
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BRIEF OF APPELLANT CARL R. HOGAN

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I. INTRODUCTION

This case concerns a tenant's right to share in an award to the property owner following the exercise of eminent domain by the government. Specifically, the trial court held that the tenant, Borders, Inc., was entitled to an award of \$711,602 as its share of the condemnation award made to the property owner, Carl Hogan. There are several reasons why the trial court erred in awarding \$711,602 to Borders.

First, the lease between Hogan and Borders states that Borders will share in a condemnation award only if the lease is terminated, if there is a separate award by the expropriating authority for Borders' unamortized expenses; and if the award arises from the expropriation of land or buildings constructed, made or owned by Borders. Borders has not terminated the lease and the remaining conditions necessary for Borders to share in the award have not occurred. Because the conditions necessary for Borders to share in the condemnation award have not occurred, Borders has no right to share in the award. Thus, the trial court erred when it denied Hogan's summary judgment motion and allowed this matter to proceed to trial.

In addition, the trial court erred when it held that Borders was entitled to an award of \$711,602 because this award was not supported by substantial evidence or by Washington law. In arriving at this award, the trial court accepted Borders' claim that the value of its leasehold was cut in half after the condemnation, even though the trial court admitted "there

is lots of data that was supplied by Hogan to suggest that that is not a realistic figure.” The trial court then applied this unrealistic figure not just through the initial term of the lease, but through all five options to renew, a renewal period that stretches from 2016 to 2040. In the process, the trial court ignored Borders’ duty to mitigate its damages by simply declining to renew the lease or renegotiating the lease rate at the end of the initial term. By applying Borders’ unrealistic damages figure over a 25-year renewal period, the trial court arrived at an inflated “just compensation” amount for Borders of \$355,801.

The trial court then compounded its error by concluding that equitable factors required it to *double* the just compensation amount for Borders, even though the equitable factors identified by the court do not support the doubling of Borders’ award. On the contrary, many of those factors warrant a reduction, rather than a doubling, of the award to Borders. For these reasons, the trial court erred when it awarded Borders \$711,602.

On appeal, Hogan requests that the Court hold that the lease precludes Borders from sharing in the condemnation award and that it was error for the trial court to deny Hogan’s summary judgment motion. Alternatively, Hogan requests that this Court hold that the trial court’s award to Borders is not supported by substantial evidence or Washington law, and instead award Borders realistic damages that are supported by substantial evidence and the law.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in denying Hogan's summary judgment motions to dismiss all claims by Borders.

2. The trial court erred in entering Conclusion of Law No. 1 which concluded that "Borders is entitled to share in the just compensation award pursuant to the terms of the lease between Borders and Hogan." (CP 828)

3. The trial court erred in entering Finding of Fact No. 10 which found that Borders presented credible evidence that the value of its leasehold would diminish by \$7 per square foot. (CP 827)

4. The trial court erred in entering Conclusions of Law Nos. 2 and 4 which concluded that the net present value of Borders' leasehold is \$1,400,000. (CP 828-9)

5. The trial court erred in entering Conclusion of Law No. 4 which concluded that Border's apportionment of the just compensation for access-related damages was \$355,801.10. (CP 829)

6. The trial court erred in entering Conclusion of Law No. 5 which concluded that it was "required" to apply equitable factors to "adjust" Borders' apportionment. (CP 829)

7. The trial court erred in entering Conclusion of Law No. 6 which concluded that equitable factors warranted a doubling of Borders' just compensation to the amount of \$711,602.00. (CP 830)

8. The trial court erred in entering Conclusion of Law No. 8 which concluded that \$711,602 (out of \$1.4 million in damages) is

“roughly proportionate to Hogan’s claimed damages in the first trial compared to the damages actually awarded by the jury.” (CP 830)

9. The trial court erred in entering Conclusion of Law No. 9 which concluded that Borders is entitled to prejudgment interest in the amount of \$175,567.97. (CP 830)

10. The trial court erred in entering Conclusion of Law No. 10 which concluded that Borders was entitled to attorneys’ fees and costs in the amount of \$30,959.21. (CP 830)

11. The trial court erred in entering Conclusion of Law No. 11 which concluded that “the total judgment to be entered in favor of Borders is \$918,129.18.” (CP 830)

12. The trial court erred in ordering that “Borders’ share of the just compensation award is \$711,602”; that “Borders is entitled to prejudgment interest in the amount of \$175,567.97”; that “Borders is entitled to its costs, including reasonable attorneys’ fees” in the amount of \$30,959.21; and that “the total judgment award to Borders is \$918,129.18.” (CP 850)

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Does a lease prohibit a tenant from sharing in a condemnation award when the lease provides that the tenant will share in the award only on the occurrence of events that do not come to pass, as in this case where the lease agreement conditioned Borders’ right to share in

the condemnation award upon events that have not occurred and cannot occur? (Assignments of Error 1-2, 10-12)

2. Did the trial court err when it concluded that Border's apportionment of the just compensation for access-related damages was \$355,801.10 because this conclusion was not supported by substantial evidence or by Washington law? (Assignments of Error 3-5)

3. Did the trial court err when it concluded that equitable factors warranted a doubling of Borders' "just compensation" to \$711,602 because this conclusion was not supported by Washington law nor by the facts of this case? (Assignments of Error 6-8, 11-12)

4. Did the trial court err when it concluded that Borders was entitled to a prejudgment interest award of \$175,567.97? (Assignment of Error 9, 12)

IV. STATEMENT OF THE CASE

1. The City of Puyallup Files a Petition for Eminent Domain.

The trial between Hogan and Borders occurred in the second, or apportionment, stage of the condemnation proceedings initiated by the City of Puyallup on February 17, 2005. On that day, the City of Puyallup filed a Petition in Eminent Domain to take a portion of the Willows Shopping Center and other property on Puyallup's South Hill (the "Takings Property"). (CP 4-31)

The City filed the petition as part of its plan to construct a new roadway, called the 39th Avenue SE Extension Project, running east of

Meridian Avenue in Puyallup. (CP 5, 16) Specifically, the City's plan called for the taking of a 12,044 square foot piece of the Willows Shopping Center and the demolishing of a KeyBank building that straddled the property line between the shopping center and the adjacent KeyBank parcel on the south side of the Center.

Carl Hogan is the owner of the Willows Shopping Center. Hogan and all of the tenants of the shopping center, including KeyBank and Borders, were named in the petition. (CP 4-5) Only one tenant, KeyBank, had its leased property physically taken. (Apr. 13, 2010 RP 142-43) In addition to the property physically taken, the City's action will substantially impair access to and from the remainder of the Shopping Center. (CP 403-04; Apr. 13, 2010 RP 107-09)

Initially, the City's plan eliminated the primary ingress and egress entrance to the center. (CP 403) Later, the City modified its plan to allow an inbound-only, "5th Leg" entrance from Meridian Avenue. (CP 62-66, 406) (A diagram of the Willows Shopping Center with the 5th leg entrance-only access, Ex. 38, is attached to this brief as Appendix B.)

2. The "Just Compensation" Trial Between Hogan and the City of Puyallup

On March 5, 2007, the trial court bifurcated the condemnation proceedings. (CP 39-52) The first or "just compensation" stage would determine the total damages necessary to compensate Hogan for the City's taking, with only Hogan and the City of Puyallup participating in this stage. (CP 40) In the just compensation stage, a jury would determine the

just compensation for the taking as a whole, without regard to the separate interests that might be affected by the taking. Then a second or “apportionment” trial would determine if any other party had the right to share in the just compensation award. (CP 40)

On June 11, 2007, by stipulation the trial court entered an “Order of Immediate Possession and Use” granting the City immediate use and possession of the Takings Property at 39th and Meridian Avenue. (CP 53-61) Under Washington law, “the date of valuation of the property shall be the date of entry of the order granting to the state immediate possession and use of the property.” RCW 8.04.092. Thus, June 11, 2007 was the date used to measure damages caused by the City’s taking. (Apr. 13. 2010 RP at 104)

The City’s initial design for the intersection at 39th and Meridian eliminated both ingress and egress from this principal means of access to the Willows Shopping Center. (CP 403) In its stead, a new access point was to be provided off of the new 39th Avenue directly south of the Borders’ building. (CP 404) Subsequently, the City attempted to mitigate the impact of that decision by adding back an inbound-only, “5th leg” at the intersection of 39th and Meridian. (CP 62-66, 406; Ex. 38) With this entrance-only access, however, drivers coming to the Willows Center would not be able to exit at the same place they entered and there would be no readily apparent and equally convenient way for drivers to exit the Center. (CP 357, 406, 496-97; Ex. 38, attached as Appendix B)

In May and June 2009, the City and Hogan tried the matter of just compensation to a jury. (CP 68) The trial to determine just compensation addressed not only the value of the property taken, but also the loss in value to the remaining property caused by the substantially impaired access to the shopping center. (CP 827)

At the trial, both Hogan and the City presented evidence that the value of the property taken, combined with costs directly related to the physical taking, would amount to \$2,850,000. (CP 827) In addition, Hogan presented evidence that his total damages, which included costs directly related to the physical taking, plus damages to the remaining property caused by the diminished access, amounted to \$11,900,000. (CP 827)

On June 10, 2009, the jury returned a verdict in the lump-sum amount of \$5,150,000. (CP 68) While the jury did not specify how they arrived at this lump-sum amount, it can be inferred that the jury awarded \$2,850,000 for the property physically taken, since the evidence produced by both the City and Hogan essentially agreed on this amount (CP 827). Subtracting that amount from the \$5,150,000 awarded by the jury leaves \$2,300,000 for the damages to the remaining property stemming from the impairment in access to the shopping center. (CP 828-30) On June 15, 2009, the Court entered judgment against the City in the amount of \$5,788,959, which included the amount awarded by the jury plus \$638,959 in pre-judgment interest. (CP 68-69)

3. The Apportionment Stage

Only two tenants, KeyBank and Borders, asserted claims to share in the just compensation award. KeyBank filed its claim in July 2006, while Borders waited until August 2009, nearly two months after the jury's verdict, to file its claim. (CP 37-38, 73-76)

In March 2010, Hogan and KeyBank settled KeyBank's claim. (CP 391) Hogan and Borders were unable to reach a settlement, and Hogan moved for the summary judgment dismissal of Borders' claim. (CP 82-89)

a) Hogan Moves for Summary Judgment

At summary judgment, Hogan contended that Borders had no right to share in the condemnation award because the lease established conditions for Borders to share in the award, and these conditions had not and could not occur. (CP 82-89) Specifically, the lease between Hogan and Borders stated that Borders could share in a condemnation award only if the lease is terminated; if there is a separate award by the expropriating authority for Borders' unamortized construction expenses; and if the award arises from the expropriation of land or buildings constructed, made or owned by Borders. Because none of these conditions had occurred, Hogan moved for summary judgment dismissal of all claims by Borders. (CP 82-89)

At the February 19, 2010 hearing, the trial court requested additional briefing as to whether Borders would have any remedy if the court were to hold that the lease did not completely prohibit Borders from sharing in the condemnation award. (CP 232) Hogan responded to this

request by filing a supplemental brief pointing out that the lease did provide Borders with a potential breach of contract claim should Hogan fail to endeavor to provide a reasonable alternative following an impairment of access. (CP 232-42) Hogan also contended that no reasonable jury would find that Hogan had failed to endeavor to provide a reasonable alternative. (CP 392-401)

The trial court agreed on this issue and held that no reasonable jury would find that Hogan failed to endeavor to provide a reasonable alternative to the impaired access. (Apr. 2, 2010 RP at 23; CP 513-14) The trial court, however, denied Hogan's motion to dismiss all claims by Borders, holding that it was not clear whether the lease eliminated an unspecified common law right to share in a condemnation award. (Feb. 19, 2010 RP at 23; Apr. 2, 2010 RP at 23; CP 376-78, 510-12) Thus, the matter proceeded to trial to determine Borders' share in the just compensation award.

b) The Apportionment Trial Between Hogan and Borders

At trial, Hogan presented evidence that Borders' damages—reflecting the decline in fair market value of Borders' leasehold after the City's taking—ranged from \$180,000 to \$210,000. (April 13, 2010 RP at 87, 158) This figure was based upon the expert testimony of Anthony Gibbons and Donald Palmer, both members of the Appraisal Institute. Gibbons examined comparable leases and concluded that Borders' leasehold would decline by \$1.50 per square foot as the result of the

substantial impairment of access following the City's taking. (Apr. 13, 2010 RP at 140-41) Gibbons and Palmer also limited the decline in rental value to the initial term of Borders lease (which expires in January 2016), assuming that Borders would mitigate its damages by moving or renegotiating the lease at that time. (Apr. 13, 2010 RP at 87, 140)

Unlike Hogan, Borders did not retain an expert appraiser to assess its damages. Instead, Borders offered testimony from Pamela Lent, Borders' Director of Real Estate. (Apr. 13, 2010 RP at 212) Using anecdotal data—valued not as of June 11, 2007, but as of the April 2010 trial—Lent estimated the damages to the Borders' leasehold by calculating the “net effective rent” that Borders would be able to charge if it were to sub-lease the space. (Apr. 14, 2010 RP at 247-48, 252-55) According to Lent, Borders would have to reduce the rent to \$7.00 per square foot to be able to get a reasonable return for the cost of substantial leasehold improvements that Borders claims it would be required to make in order to attract a sub-tenant to those premises. (Apr. 14, 2010 RP at 247-48)

The trial court accepted Lent's rate of \$7 per square foot, even though the court admitted “there is lots of data that was supplied by Hogan to suggest that that is not a realistic figure.” (Apr. 20, 2010 RP at 5) The trial court then extended this figure through 2040, which assumed that Borders would exercise all five of its renewal options instead of mitigating its damages by ending its tenancy at the end of the current lease term. Next, the court discounted this amount to net present value to arrive at

\$1,400,000 for Borders' damages. (April 20, 2010 RP at 5; CP at 829)
This \$1,400,000 figure amounted to 60.87% of the \$2,300,000 awarded for damages to the remainder of the shopping center and 15.47% of the \$9,050,000 damages to the remainder of the center as claimed at the first trial due to the decreased access to the center. (CP 829) Because the claimed damages (\$9,050,000) exceeded the amount awarded by the jury for damages to the remainder of the property, \$2,300,000, the court then apportioned the jury's award by taking 15.47% of the awarded \$2,300,000 to reach a just compensation figure for Borders of \$355,801.10. (CP 829) Then the court concluded that equity warranted a doubling of this amount. (CP 829). Thus, the trial court awarded Borders \$711,602. (April 20, 2010 RP at 8; CP at 829)

To this amount, the trial court added prejudgment interest (\$175,567.97) and Borders' attorneys' fees and costs in defending against Hogan's summary judgment motions (\$30,959.21). The total amount awarded to Borders was \$918,129.18. (CP 30) Judgment was entered on July 8, 2010. (CP 833-36)

Hogan timely filed his notice of appeal, challenging the orders denying Hogan's summary judgment motions, the judgment, and the trial court's Findings of Fact and Conclusions of Law. (CP 847-67)

V. ARGUMENT

A. Standards for Review

An appellate court reviews de novo a summary judgment order and engages in the same inquiry as the trial court. *Allstate Ins. Co. v. Raynor*, 143 Wn.2d 469, 475, 21 P.3d 707 (2001). Summary judgment is appropriate if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” *Vallandigham v. Clover Park School Dist. No. 400*, 154 Wn.2d 16, 109 P.3d 805 (2005). To defeat summary judgment, the nonmoving party must come forward with specific, admissible evidence to sufficiently rebut the moving party’s contentions and support all necessary elements of the party’s claims. *White v. State*, 131 Wn.2d 1, 9, 929 P.2d 396 (1997). Where reasonable minds could reach only one conclusion based on the facts, summary judgment should be granted. *LaMon v. Butler*, 112 Wn.2d 193, 197, 770 P.2d 1027 (1989).

Following a bench trial, the appellate court determines whether challenged findings of fact are supported by substantial evidence in the record, and if so, whether the findings support the conclusions of law. *American Nursery v. Indian Wells*, 115 Wn.2d 217, 222, 797 P.2d 477 (1990). 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).

B. The Trial Court Erred in Denying Hogan’s Summary Judgment Motions Because the Lease Conditions Borders’ Right To Share in the Just Compensation Award Upon Events that Did Not Occur.

Only those parties with proprietary interests in the land share in the apportionment of an award. *State v. Teuscher*, 111 Wn.2d 486, 494, 761 P.2d 49 (1988). In general, lessees have the right to share in condemnation awards. See e.g. *Spokane Sch. Dist. v. Parzybok*, 96 Wn.2d 95, 98, 633 P.2d 1324 (1981). A lessee, however, can agree *not* to share in the compensation. *State v. Trask*, 91 Wn. App. 253, 277, 957 P.2d 781 (1998).

As the *Trask* 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 support of this statement, the *Trask* court cited *State v. Farmers Union Grain Co.*, 80 Wn. App. 287, 293-94, 908 P.2d 386 (1996) (“*Farmers Union*”).

In *Farmers Union*, the court held that judicial allocation of a condemnation award is not required where the parties to a lease address condemnation:

RCW 8.04.140 provides a judicial procedure for the distribution of a condemnation award if the title to the land is "in such condition as to require that an action be commenced to determine the conflicting claims thereto...."

Such a proceeding is not necessary, however, if the parties to a lease anticipate condemnation and set out their respective rights in a condemnation clause.

Farmers Union, 80 Wn. App. at 293 (emphasis added). In that case, a lessee, Paccar Automotive Inc., claimed that it had the right to share in a condemnation award made to the lessor, Farmers Union Grain Co. *Id.* at 289. The lease in *Farmers Union* provided that the tenant could share in a condemnation award “only if specifically allocated by the condemnor.” *Id.* at 294. Because the conditions necessary to share in the condemnation award had not occurred, the Court of Appeals held that Paccar had no right to share in the condemnation award or to participate in the condemnation proceedings:

The condemnation clause negotiated by Farmers and Paccar does not contemplate judicial allocation. It awards the entire sum to Farmers and states that Paccar may only receive the value “specifically allocated by the condemnor....” Nothing in RCW 8.04 disallows the condemnor to determine that a portion of a lump-sum award is attributable to an unexpired leasehold or fixtures. The State here declined to allocate the condemnation award. It is true that condemnors do not, as a practice, apportion the awards among the various interests involved. This was a contract negotiated at arm's length, however, by sophisticated parties. Accordingly, we find that the parties must have contemplated the likelihood of such a condition precedent when they agreed to this provision.

Paccar's second argument, that its intent to share in a condemnation award was understood by Farmers throughout negotiations, fails to address the underlying issue of the contract's objective manifestation of the intent of the parties. That may have been Paccar's original intent, but it agreed to something different. . . . The final contract and the negotiations that led up to it do not show an

objectively manifested intent to provide for allocation by any entity other than the condemnor.

Farmers Union, 80 Wn. App. at 293-94.

Because the condition necessary to share in the award had not occurred, the *Farmers Union* court held that the tenant had no right to share in the condemnation award. *Id.* at 293-94. As a result, the appellate court affirmed the trial court's summary judgment order awarding the entire condemnation award to the lessor. *Id.* at 296.

1. The Lease Between Borders and Hogan Addresses Condemnation and Sets Conditions for the Sharing of an Award.

As in *Farmers Union*, Hogan and Borders anticipated condemnation and set out their respective rights in Article 22 of the lease between Borders and Carl Hogan. (CP 129-30; Ex. 1 at 33-34) (Article 22 is set out in Appendix C to this brief.) Article 22 is entitled "Eminent Domain" and it establishes the conditions governing Borders' right to share in any condemnation award.

These conditions provide that Borders has a right to share in the condemnation award: (1) if Borders terminates the lease; (2) if the expropriating authority makes an award for the unamortized portions of the tenant's expenditures for improvements, alterations or changes to the premises; and (3) if the award is made because of the expropriation of any land or buildings constructed, made or owned by Borders:

(d) **Termination.** If this Lease is terminated pursuant to this Article 22, then any Rent paid in advance under this Lease shall be refunded to Tenant, and Tenant shall have an

additional sixty (60) days following the termination date within which to remove Tenant's property from the demised premises; provided, however, that Rent shall be adjusted from and after the date of such expropriation in proportion to the portion of the demised premises in which Tenant elects to continue operating after such expropriation occurs. **If at the time of any such termination** Tenant has any unamortized expenditures that Tenant may have made at Tenant's cost on account of any improvements, alterations, or changes to the demised premises, then Landlord shall assign to Tenant that portion of any award payable as a result of such expropriation as shall equal the unamortized portion of Tenant's expenditures. Such unamortized portion of Tenant's expenditures shall be determined by multiplying such expenditures by a fraction, the numerator of which shall be the number of remaining years of the Lease term at the time of such expropriation, and the denominator of which shall be the number of remaining years of the Lease term at the time such expenditures shall have been made, plus the number of years for which the Lease term has been subsequently extended; provided, however, **Tenant shall have such right to share in a condemnation award only if the award for such unamortized expenditures is made by the expropriating authority** in addition to the award for the land, building and other improvements (or portions thereof) comprising the demised premises, although 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.**

Article 22, subsection D (emphasis added). (CP 130)

Because Borders has not terminated the lease, it has not met the first contractual condition required to share in the condemnation award. In addition, Borders has a right to share in the condemnation award "only if the award for such unamortized expenditures is made by the expropriating

authority *in addition to* the award for the land, building and other improvements (or portions thereof) comprising the demised premises . . . if said compensation, damages or award is made by reason of the expropriation of any land or buildings constructed, made or owned by Tenant.” Borders had no unamortized expenditures and had no land or buildings expropriated by the City. (CP 91) Because the City made no award for Borders’ unamortized expenditures or for any land or buildings constructed, made or owned by Borders, the conditions imposed by the lease have not been met and Borders has no contractual basis for sharing in the condemnation award. Thus, Borders has no right to share in the condemnation award or to participate in any apportionment proceeding. *See Farmers Union, supra; Trask, supra.*

In addition to Article 22(d), subsections (a), (b) and (c) of Article 22 also address condemnation. Article 22(a) addresses impaired access following condemnation and provides that IF (a) any portion of the demised premises is expropriated OR (b) any point of ingress and egress to the public roadways is materially impaired by a public authority, AND IF *as a result* of either (a) or (b) there shall fail to exist at least one (1) point of ingress and egress between the Shopping Center and South Meridian Street, and at least one (1) point of ingress and egress between the Shopping Center and 37th Avenue Southeast, THEN Borders shall have the option to terminate this lease. (CP 129)

Even if the City eventually proceeds with the planned reconfiguration of the intersection at 39th and Meridian, Borders will have

at least one (1) point of ingress and egress between the Shopping Center and both South Meridian Street and 37th Avenue SE. (CP 91). Borders has never disputed this fact. Thus, Borders will not be able to terminate the lease under Article 22(a) because it will have the access specified in the lease even after the City reconfigures the intersection at 39th and Meridian.¹

Similarly, Articles 22(b) and 22(c) are not applicable. Article 22(b) details the parties' rights and obligations if "any portion of the demised premises is expropriated, and this Lease is not terminated." This section is not applicable because no portion of Borders' demised premises has been expropriated.

Article 22(c) addresses the parties' rights and obligations following expropriation of parking spaces and allows Borders to terminate the lease if parking falls below a certain level. This section is not applicable because the parking area remaining after the City proposed taking will surpass the levels required in Article 22(c). (CP 91)

¹ Furthermore, the last sentence of Article 22(a) provides Borders with a *contractual* remedy even where Borders does not terminate the lease, if the access provided by Hogan is not a reasonable alternative to the access in the before condition. Regardless of whether the Lease is terminated, Article 22(a) requires Hogan to "endeavor to provide a reasonable alternative to the impaired point of ingress and egress for the duration of any such expropriation or impairment." If Hogan fails to meet this standard, then Borders would have a cause of action for breach of the Lease Agreement. Because no reasonable jury would conclude that Hogan failed to endeavor to provide a "reasonable alternative," the trial court granted Hogan's summary judgment motion on this issue. (CP 513-16)

Moreover, the *only* rights that Borders has in the property it leases at Willows Shopping Center are due to its having entered into to a lease with Carl Hogan. It has no other rights in the demised premises than those granted by the lease.

Read as a whole, Article 22 fully addresses condemnation and the issues of:

- impaired access,
- unamortized expenditures resulting from any improvements, alterations, or changes made by Borders,
- reduced parking, and
- the expropriation of any land or buildings constructed, made or owned by Borders.

Because the parties have expressly addressed condemnation and have set out their respective rights and obligations in Article 22, judicial allocation applying common law principles is not indicated. If the conditions in the lease had occurred, then Borders would have had the right to share in the condemnation award. Because these conditions have not occurred, Borders has no right to share in the award.

For these reasons, the trial court erred when it denied Hogan's summary judgment motions to dismiss Borders' claims. As discussed below, this Court should reverse the entry of judgment in Borders' favor and remand to the trial court to determine Hogan's reasonable attorneys' fees and costs incurred in enforcing the lease.

2. Hogan Is Entitled to an Award of His Attorneys' Fees and Costs.

This dispute is a contract dispute, and where Hogan is entitled under the lease to reversal of the award to Borders, the award of attorneys' fees and costs incurred to Borders for its costs incurred in defending against Hogan's summary judgment motions should be reversed. In addition, Hogan should be awarded his reasonable attorneys' fees and costs incurred in its summary judgment motions, in defending against Borders' claims in the apportionment trial, and on appeal.

An award of attorneys' fees must be based on contract, statute, or recognized ground in equity. *Hertz v. Riebe*, 86 Wn. App. 102, 105, 936 P.2d 24 (1997). Washington law provides that a prevailing party in a contract action shall receive attorneys' fees and costs when the contract authorizes such an award. RCW 4.84.330. Under this statute, an award of attorneys' fees is mandatory. *Singleton v. Frost*, 108 Wn.2d 723, 729-30, 742 P.2d 1224 (1987).

In *Farmers Union, supra*, the court held that the lessor was entitled to an award of its attorneys' fees and costs under RCW 4.84.330. *Farmers Union*, 80 Wn. App. at 296. In that case, the State initiated condemnation proceedings against the lessor and lessee of certain real property. The underlying lease contained an attorneys' fees clause stating "[i]f either party brings suit to enforce or interpret any provision of this Lease....'" *Farmers Union*, 80 Wn. App. at 295. The lessor, Farmers, successfully moved for summary judgment dismissal of the entire condemnation

award. The trial court, however, denied Farmer's request for attorneys' fees and costs because neither party had filed suit. *Id.* at 294. In reversing that fee decision, the Court of Appeals held that: "By moving for summary judgment on the issue of its right to the condemnation award, Farmers was invoking the power of the court to secure its right. In effect, it 'brought' the action to enforce the agreement, and RCW 4.84.330 applies." *Id.* at 295.

Here, Article 50 of the lease agreement provides that: "If either party brings an action or proceeding to enforce the rights hereof . . . , the prevailing party . . . shall be entitled to recover its costs, including reasonable attorneys' fees, . . ." (CP 149-50) The attorneys' fees clause here is similar to the clause in *Farmers Union*. Because summary judgment dismissal is warranted, Borders' attorneys' fees and costs should not be allowed and Hogan should be awarded his attorneys' fees and costs under RCW 4.84.330.

Alternatively, even if this Court were to hold that the trial court correctly denied Hogan's summary judgment motions, the trial court's award of \$711,602 should be reversed for the reasons discussed in the following section.

C. Neither the Law nor the Facts Support the Trial Court's Award of \$711,602 to Borders.

Several Washington cases provide guidance regarding the apportionment stage of the compensation portion of Washington's condemnation process. After the first trial, where the jury has determined

the amount of just compensation that the condemnor must pay for the land as a whole (the “lump-sum” award), the case proceeds to the second trial, where “the object is to apportion the amount paid by the [Condemnor] among the various condemnees, in such a way that the [Condemnor’s] money fairly substitutes for the interest of which each condemnee has been deprived.” *Trask*, 91 Wn. App. at 279; *accord*, *State v. Spencer*, 90 Wn.2d 415, 418-20, 583 P.2d 1201 (1978); *see also* RCW 8.12.150 (“the jury shall ascertain the entire compensation or damage that should be paid for the property and the entire interests of all the parties therein, and the court may thereafter require adverse claimants to interplead, so as to fully determine their rights and interests in the compensation so ascertained.”).

Spencer’s discussion of the apportionment process is especially helpful because it addresses a tenant’s right, in certain circumstances, to share pro rata in a lump-sum award paid over in eminent domain proceedings. *Spencer*, 90 Wn.2d at 420. For guidance as to a determination of a tenant’s share in the lump-sum award, the *Spencer* court quoted from the Restatement (Second) of Property:

(2) **Except to the extent the parties to a lease validly agree otherwise**, the tenant is entitled to share in a lump-sum award made in the eminent domain proceedings, which lump-sum award is for his and other interests in the property condemned, and the tenant’s share in the lump-sum award is:

...

(b) if the lease is not terminated by the taking, that proportion of the lump-sum award which corresponds to the proportion of the total value of the several interests in

the property condemned, valued separately, that represents the value of a lease of the part of the leased property taken for the unexpired period of the original lease at a rent equal to the difference between the rent reserved in the original lease and the rent payable by the tenant under the original lease after the taking.

Spencer, 90 Wn.2d at 420 (quoting Restatement (Second) of the Law of Property § 8.2 (1977)) (emphasis added). As noted by the *Spencer* court, “This approach has been used pursuant to state statute and has been suggested by various courts as a solution to distribution when the amount of an award is disproportionate to the total value of the interests.” *Spencer*, 90 Wn.2d at 420.

In a footnote, the *Spencer* court provided an example of the application of this method of determining a tenant’s share in the lump-sum award:

For example: When a lump-sum award is \$400,000 and the only two interests in realty to be compensated are separately valued at \$50,000 and \$150,000, each would take its proportional share of \$400,000, $1/4$ ($50/200$) and $3/4$ ($150/200$) respectively, *i.e.*, \$100,000 and \$300,000. If, on the other hand, the lump-sum award was only \$100,000 and the respective interest values were the same as indicated above, the proportional shares would be \$25,000 and \$75,000.

Spencer, 90 Wn.2d at 416, n. 1.

1. The Two-Step Process for Valuing and Apportioning the Property Interests Requires a Court to Determine the Decline in Fair Market Values of the Property Interests and Then Apply a Pro-Rata Apportionment of These Damages to the Jury’s Lump-Sum Award.

Applying the *Spencer* method requires that a court first determine the total value of the separate interests in the property condemned. This initial determination is the difference in the fair market value before and after the condemnation for both the landlord’s interest and the tenant’s interest, and is made without regard to the total actually awarded (that adjustment comes at a later step in the apportionment process). *See, e.g.*, WPI 150.06; 8A *Nichols on Eminent Domain* § G30.04[4][a] (3d Ed. 2009); *see also Eminent Domain: Measure and Elements of Lessee's Compensation for Condemnor's Taking or Damaging of Leasehold*, 17 A.L.R.4th 337 (2009) at § 6[a]. Also, in an eminent domain action, a business’ lost profits are typically not recoverable. *State v. McDonald*, 98 Wn. 2d 521, 531, 656 P.2d 1043 (1983).²

Once the “damages” have been determined—once the Court has determined separately the change in the fair market value of both Hogan’s property and Borders’ property as a result of the condemnation—then the next step in the *Spencer* formula is to calculate a proportional distribution of the lump-sum, just compensation award based on the ratio each such separately-valued interest bears to the total of all separately-valued

² The court in *McDonald* described this rule as a necessary corollary to the principle that the difference in the market value before and after acquisition is the measure of just compensation.

interests. In other words, Borders' damages must be added to Hogan's damages so that the ratio of each of their separately valued interests can be calculated relative to the whole. Only after those ratios are determined can they properly then be applied against the lump-sum award to determine the proportional distribution of the total amount awarded.

Here, the trial court applied the correct formula. (CP 828-29) The trial court also correctly determined *Hogan's* damages stemming from the diminution in fair market value caused by the City's taking: \$11,900,000 (of which the jury awarded \$5,150,00). *See* Finding of Fact No. 6 and Conclusion of Law No. 4. (CP 827-828)

However, the trial court's valuation of *Borders'* damages is not supported by substantial evidence or Washington law. As explained in the following section, the trial court erred in inflating Borders' damages.

2. The Trial Court Erred in Valuing and Apportioning Borders' Damages.

There are three bases upon which the trial court improperly valued Borders' damages. First, substantial evidence did not support the trial court's Finding of Fact No. 6 that the value of Borders' leasehold would diminish by \$7.00 per square foot as a result of the condemnation. (CP 827) Second, the trial court's valuation assumed that Borders' would automatically renew the lease for all five option periods—until 2040—even though Washington law requires a party to mitigate its damages in this case either by renegotiating the lease or moving at the end of the initial lease term (January 2016). Third, the trial court incorrectly

apportioned Borders' damages by declaring that non-existent, equitable factors warranted a doubling of Borders' just compensation to \$711,602 as Borders' share of the lump-sum award.

- a) **The trial court's finding that the value of Borders' lease would diminish by \$7.00/sq. ft. is not supported by substantial evidence.**

At trial, two expert appraisers, Anthony Gibbons and Donald Palmer, 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).

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.* Thus, the testimony presented by both appraisers supports a valuation of Borders' damages of at most \$1.50 per square foot.

Gibbons and Palmer are professional appraisers and members of the Appraisal Institute who are prohibited from acting as advocates for a party or an issue.³ Unlike Hogan, Borders did not offer expert appraisal testimony to support its damages claim. Instead, the only testimony

³ See the Ethics Rule of the Uniform Standards of Professional Appraisal Practice ("USPAP"). (CP 567-70) The USPAP are also the standards of practice governing real estate appraisal activities in the State of Washington. WAC 308-125-200. The USPAP addresses the ethical and performance obligations of appraisers; The current USPAP is available at: <http://www.uspap.org/2010USPAP/toc.htm>.

offered by Borders to support its position was provided by Ms. Lent, an employee of Borders. (Apr. 13, 2010 RP at 212)

Lent testified that the value of Borders' leasehold would be cut in half, from \$14 per square foot to \$7 per square foot, after the City's taking. (Apr. 14, 2010 RP at 247-48). Initially, Lent relied upon a single "comparable" transaction to support her opinion, the Dick's Sporting Goods lease. (Apr. 14, 2010 RP at 246). This transaction, however, was not pending in June 2007 (the date for valuing damages to Borders and Hogan) and was not consummated until two years later. When Hogan objected to using the Dick's Sporting Goods lease as a comparable, the court granted Hogan's motion to exclude the transaction. (Apr. 12, 2010 RP at 6, 23)

Instead, Lent subsequently based her opinion on the "net effective rent" that allegedly would make a sublease of Borders' premises financially viable. (Apr. 14, 2010 RP at 247-48). This calculation assumed that Borders would have to expend \$7 per square foot to re-let the premises if it left the Willows Shopping Center. Implausibly, Lent's net effective rent reduction of \$7 per square foot equaled precisely her prior calculation that was based on a single, improper, "comparable" transaction. Apart from Ms. Lent, Borders presented no testimony to support its claim that the value of its leasehold would be cut in half following the City's taking.

Moreover, Lent's "net effective rent" approach is contrary to law. The measure of a lessee's damages is the decrease in fair market value of the lease before and after a taking. *See, Spencer*, 90 Wn.2d at 421 n.2

(“Damages are based on fair market value.”) Factors unrelated to market value should not be used to determine damages. As the Ninth Circuit explained:

Since market value does not fluctuate with the requirements or equities of the condemnor or condemnee, but is governed by what is the general demand for the property on the open market, evidence of loss of profits, damage to goodwill, the expense of relocation and other such consequential losses are not to be considered.

See also United States v. 87.30 Acres of Land, 430 F.2d 1130, 1132 (9th Cir. 1970); *see also McDonald*, 98 Wn. 2d at 531 (lost profits not recoverable in condemnation cases); M.S. Dennison, *Condemnation of Leasehold Interests*, 96 Am. Jur. Trials 211 (2007) at § 25 (“Almost all of the courts that have considered a lessee's claim of compensation for lost business goodwill or profits have ruled that such losses are not recoverable as a separate item of damages for the taking of a leasehold.”) Because Lent’s “net effective rent” testimony does not provide evidence of the difference in the before-and-after fair market value of the leasehold, the trial court improperly relied upon Lent’s testimony in determining Borders’ damages.

In addition, the trial court acknowledged in open court and in its Conclusions of Law, 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) Despite this lack of credibility, the trial court used this admittedly unrealistic figure in computing Borders’ damages. (CP 828-30) Because substantial evidence does not support the trial court’s use

of a diminution in value of \$7 per square foot, the trial court committed reversible error.

The trial court then compounded its error by applying the \$7 per square foot diminution in value not just through the initial term of the lease, but throughout all five options to renew. (CP 829) Applying Borders' damages over a period that stretches five renewal terms of five years each, from 2016 to 2040, while disregarding Borders' duty to mitigate its damages, is reversible error.

- b) The trial court improperly extended Borders' damages through 2040 because Borders' duty to mitigate limits its damages to the initial lease term.**

Washington courts have recognized that the duty to mitigate damages applies in condemnation cases. *State v. Wandermere Co.*, 89 Wn. App. 369, 949 P.2d 392 (1997), *rev. den.* 135 Wn.2d 1012, 960 P.2d 939 (1998). In that case, the condemning authority submitted the following proposed jury instruction:

You are instructed that the Wandermere Company and Acme Materials and Construction Company have an affirmative duty to take every reasonable means at reasonable expense to reduce or avoid any damages that may result in their property in the after situation. You may consider this duty in arriving at your verdict of just compensation.

Id., 89 Wn. App. at 376. The trial court did not allow the State's proposed instruction to go to the jury, so the State appealed, arguing,

among other things, that the trial court erroneously refused its proposed instruction on mitigation of damages. *Id.* at 377.

In its decision, the Court of Appeals acknowledged that “[o]ther jurisdictions have approved the concept of mitigation of damages in eminent domain cases.” *Id.* at 384. The Court noted, however, that it could not find a reported decision in which the refusal to give a mitigation instruction was prejudicial error. *Id.* For this reason, and because it found that other instructions given by the trial court permitted the State to argue its theory that the condemnees could have mitigated their damages, the *Wandermere* court found that the trial court’s refusal to give the instruction on mitigation of damages was not prejudicial and affirmed. *Wandermere*, 89 Wn. App. at 384.

The case cited by *Wandermere* when it acknowledged that mitigation of damages has been approved by other states is *State v. Weiswasser*, 693 A.2d 864 (N.J. 1997). In that case, the Supreme Court of New Jersey approved the use of the doctrine of mitigation of damages, holding that a condemnee seeking severance damages in a partial-taking condemnation action has a duty to mitigate those damages, and that the court, in determining just compensation, may consider evidence of availability and use of similar replacement property when such property would reasonably affect fair market value of remainder property. *Weiswasser* is highly instructive.

As in this case, *Weiswasser* involved a partial taking and the valuation of severance damages to the property not taken. Because the

issue before the New Jersey Supreme Court was one of first impression, that Court engaged in an extensive review of the doctrine of mitigation of damages and its application in condemnation cases from many different jurisdictions. *Weiswasser*, 693 A.2d at 868-73. In so doing, *Weiswasser* observed that the doctrine of mitigation of damages has been applied to condemnation actions, and, in that context, is sometimes referred to as the “cost of cure” or the doctrine of avoidable costs. *Id.* 149 N.J. at 330, citing 4A *Nichols on Eminent Domain* § 14A.04 (Sackman & Van Brunt eds., 3d ed. rev. 1997). *Weiswasser* also observed that “most cases that have considered mitigation of damages in a partial-taking condemnation action have done so where the cost of cure is based on actions that can be taken by the owner-condemnee relating directly to the remaining property.” *Weiswasser*, 693 A.2d at 869.

The *Weiswasser* court ultimately concluded:

[W]e now hold that a condemnee seeking severance damages in a partial-taking condemnation action has a duty to mitigate those damages. The court may consider evidence of the availability and use of similar replacement property, when, under all of the surrounding circumstances, such property would reasonably affect the fair market value of the remainder property. Such evidence may be used in mitigation of damages in determining just compensation in a partial-taking condemnation case.

Id. 149 N.J. at 337. In reaching this decision, the *Weiswasser* court observed how mitigation of damages affects the determination of the fair market value of the remaining property:

Market value is determined by what a willing and reasonable buyer and seller, both unconstrained, would agree is the fair price of the property. What should be critical in that determination is not whether a property owner may be compelled to acquire substitute property, but whether, under all of the surrounding circumstances, reasonable and willing parties would consider the availability and use of such property as bearing on the market value of the owner's remaining property. * * * The availability and use of replacement property can be a material consideration that is relevant to market value as the basis for just compensation, just as it can be a factor that informs the negotiations between a willing buyer and seller. . . . Further, the failure to consider the availability of replacement property when it would otherwise be reasonable to do so might in fact distort the actual damages resulting from a partial taking.

Weiswasser, 693 A.2d at 871.

The reasoning employed by *Weiswasser* directly applies to this case. When assessing damages—measured as the change in the fair market value of Borders' leasehold—a court should ask whether, under all of the surrounding circumstances, reasonable and willing parties would consider the availability and use of substitute property as having a bearing on the market value of the owner's remaining property. The court's determination of damages should reflect that availability. If Borders has the option of moving to another location that would not suffer from impaired access (or the prospect of such), those facts act as a mitigating, or limiting, factor when the Court is evaluating Borders' damages.

Borders might argue that imposing such a duty to mitigate its damages ignores the fact that a lease option period is compensable in an eminent domain action. A lessee's option to renew a lease, however,

should be considered compensable only “to the extent that the option enhances the value of the leasehold.” *San Francisco Bay Area Rapid Transit Dist. v. McKeegan* (1968) 265 Cal. App.2d 263, 272, 71 Cal. Rptr. 204 (1968).

Here, Borders’ options to renew the lease are not compensable because exercise of those options would not enhance the value of the leasehold. On the contrary, if Borders elects to exercise one or more of those options, Borders would decrease the value of the leasehold by extending the period of time during which Borders would be required to pay contract rent that is higher than what would be market rent for the space, adjusted for the impact of the prospective (or actual) impairment of access. Borders should not be rewarded for refusing to mitigate its damages. All that Borders would have to do to stop its damages at the end of the current lease term is to decline to renew its lease and thereby end its duty to continue to pay contract rent double the then-market rent.

Nevertheless, the trial court rewarded Borders for ignoring its duty to mitigate. In effect, the trial court has increased Borders’ share of the just compensation award by allowing Borders to extend its lease through 2040, even though Borders claims that the contract rate is double the market rate for the lease. Because Borders has a duty to mitigate, applying Borders damages over the 25-year period is untenable and unwarranted by Washington law.

c) **Equitable factors do not warrant a doubling of Borders' just compensation.**

Not only did the trial court incorrectly use \$7 per square foot through 2040 to measure Borders damages at \$355,801.10, the trial court then declared that equitable factors warranted a *doubling* of this amount, to \$711,602, as Borders' share of the just compensation award. (CP 828-30) Even if this Court were to hold that substantial evidence supports the trial courts' use of \$7 per square foot through 2040 to measure Borders' damages, the equitable factors identified by the trial court do not warrant the trial court's doubling of this amount.

On the contrary, the equitable factors identified by the trial court actually support *decreasing* Borders' share of the just compensation award. In Conclusion of Law No. 5, the trial court stated:

5. The following factors **require** equitable adjustment of the calculation 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).

There are several reasons why the trial court erred in entering this conclusion of law. First, the trial court is not *required* to equitably adjust a just compensation award. As Division One of the Court of Appeals stated in *State v. Spencer*, 16 Wn. App. 841, 845, 559 P.2d 1360 (1977): “The only way for the court to equitably apportion the proceeds of the condemnation is to ascertain the fair market value of each interest in the property and give each owner his proportionate share.” No Washington case authorizes further adjustment beyond this apportionment.

Second, the five factors listed in Conclusion of Law No. 5 do not justify an *increase* in the apportionment award. Instead, many of those factors warrant a reduction, rather than a doubling, of the apportionment award.

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 under *Spencer* and RCW 8.12.150. Under the statutory scheme, the jury determines “the total amount of the damage to said land and buildings and all premises therein, estimating the same as an entire estate and as if the same were the sole property of one owner in fee simple.” RCW 8.12.150.

In condemnation cases such as this, 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 to the court in the apportionment phase.

Moreover, it is immaterial how the jury might have apportioned the award as between the various parties because 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. (See page 41 below) When such an apportionment is made, only \$2.3 million remains to be divided between the remaining parties, Borders and Hogan.

The second equitable factor identified by the trial court admits that “there was evidence presented at trial that \$7 per square foot diminution in value is not a realistic figure.” The trial court’s apportionment of \$355,801.10 to Borders has been calculated assuming damages of \$7 per square foot, which the trial court then doubled. If the \$7 per square foot is not “a realistic figure,” then Borders’ damages have been overstated. Doubling that figure only compounds this overstatement.

The third equitable factor listed by the trial court is that Borders could mitigate its damages by electing not to renew its lease when the initial term of the lease expires after 2015. Borders’ apportionment was calculated based on a net present value that included damages spanning 33 years. If Borders’ were to terminate its lease at the end of 2015, the net present value of Borders’ damages (at \$7 per square foot over the Initial

Term only) would drop to \$190,000 and that decline in damages would result in a corresponding decline in Borders' apportionment. (CP 555)

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—also works as a mitigating factor that would warrant a reduction rather than an increase in Borders' apportionment. First, the uncertainty of whether and to what extent impairment of access to the center and to Borders will actually occur was factored into the drop from fair market value *before* the taking of \$14 per square foot to the *after* fair market value of \$12.50 per square foot. It would be improper to then assign an additional value for the issue of uncertainty and thereby increase the award to Borders. If the Project remains unconstructed, access to the Willows Center will remain unimpaired, and Borders will not experience any condemnation-related decline in traffic or sales. The uncertainty is the only basis for the award of any just compensation to Borders, since no physical impact or taking has or will result to Borders from the City's condemnation. 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, merits a reduction in Borders' share of the condemnation award rather than an increase. 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 valuation trial, she made no reference at all to the \$3.4 million in damages to which she so testified at the apportionment trial. (Apr. 14, 2010 RP at 279, 282-83) If the jury had heard from Ms. Lent that Borders would suffer such damages as a result of the impairment of access resulting from the City's Road Project, it may well have increased the amount of damages it awarded in the condemnation trial—to the benefit of both Borders and Hogan. Borders should not receive an equitable adjustment increasing its apportionment where it failed to provide testimony that could have resulted in a larger jury award.

The equitable factors listed by the trial court in Conclusion of Law No. 5 do not support an increase in Borders' apportionment, let alone a doubling of that amount.

D. Applying *Spencer* and Using a Diminution in Value of \$1.50 Per Square Foot Over the Initial Term of the Lease Results in the Proper Valuation of Borders' Damages.

At both the 2009 condemnation trial and the apportionment trial, Hogan's appraiser Gibbons testified as to Hogan's damages—the change in the fair market value of the Willows Shopping Center before and after the City's exercise of eminent domain—and concluded that the decline in value totaled \$11.9 million. (CP 827; Apr. 13, 2010 RP at 143) There was no evidence or testimony presented at this trial that contradicted this opinion.⁴

⁴ In fact, Borders relied on Gibbons' testimony and conclusions as support for its own damage claims. (Apr. 12, 2010 RP at 7; Apr. 13, 2010 RP at 244-45, 247-48) The only part of Gibbons' testimony that Borders

As part of that opinion of value, Gibbons testified that approximately \$2.2 million of the \$11.9 million in damages to the Willows Center resulted from the City's taking of Hogan's land, the KeyBank building, and the leasehold associated with KeyBank's tenancy at the Willows Center (the "take" damages). (Apr. 13, 2010 RP at 142) In addition, Gibbons testified that Hogan would incur \$615,000 in repair costs (revisions to internal driveways, parking, striping, surface-water drainage, etc.) resulting from the need to conform the Willows center to the new road plan, for a total takings damages of \$2.85 million. (Apr. 13, 2010 RP at 137, 150) Gibbons noted that the City's appraiser had valued the take damages at approximately the same amount, although the City's appraiser had testified that there were no damages arising from any impairment of access to the Willows Center in the after condition. (Apr. 13, 2010 RP at 150-51) Thus, there was undisputed testimony at both the condemnation trial and the apportionment trial that the Willows Center had incurred "take" damages of at least \$2.85 million—damages that were not related in any way to the impairment of access that Borders claims as the basis for its damages. (CP 828)

Because there was undisputed testimony at trial that there was at least \$2.85 million in damages that did not arise from any impairment of access to the Willows Center, the trial court correctly deducted that amount from the jury's lump-sum award of \$5.15 million to arrive at \$2.3

disputed was Gibbons' opinion of the diminution in the fair market value of Borders' leasehold.

million as the amount of “access damages” to be apportioned as between Hogan and Borders. (CP 829)

The next step in the apportionment process required the court to determine the value of the separate interests for Hogan and Borders. For Hogan, there was uncontroverted evidence at trial that the value of the Willows Shopping Center decreased by \$11.9 million as the result of the City’s taking. (CP 827; Apr. 13, 2010 RP at 142-43)

To determine the value of Hogan’s separate interest for purposes of apportionment, the proper formula—and the formula used by the trial court—calls for the value of Borders’ damages and the amount of take damages to be deducted from the \$11.9 million. (CP 828) The amount of the take damages (\$2.85 million) should be deducted from the lump-sum award because the take damages do not stem from any impairment of access and because these damages have already been “apportioned” between Hogan and KeyBank, the only parties that have a legitimate claim to share in those take damages.

Next, the formula calls for Hogan’s separate interest in the remainder damages to be added to Borders’ damages to arrive at “the total value of the several interests in the property condemned.” *Spencer*, 90 Wn.2d at 420. Then the ratio of each of Hogan’s and Borders’ separately-valued interests as compared to the total value of their interests must be calculated and applied to the \$2.3 million in actually-awarded access damages left in the jury’s lump-sum award to arrive at an apportionment amount for each party. (CP 828-29)

Here, the trial court's application of the above formula is correct *except* for the trial court's valuation of Borders' damages at \$1.4 million. This amount is incorrect because it is based upon an unrealistic decline of \$7 per square foot in Borders' leasehold through 2040. As discussed above, substantial evidence does not support the use of \$7 per square foot as a measure of Borders' damages and the extension of these damages until 2040 contradicts Borders' duty to mitigate its damages.

Instead, the proper measure of Borders' damages (if the Court should hold that the lease does not prohibit Borders from sharing in the award at all) requires that a decline in value of \$1.50 per square foot be used over the initial term of the lease. Using these values and applying the 12% discount rate used by the trial court results in \$190,000 as the net present value for Borders' damages. (CP 555, 571)

When that amount is added to Hogan's separately-valued damages of \$8.86 million (which are calculated by subtracting Borders' damages, \$190,000, and the damages not related to impaired access, \$2.85 million, from the total damages to the Willows Center, \$11.9 million), the total of Hogan's and Borders' separately-valued interests is \$9.05 million. (CP 571)

According to the *Spencer* apportionment formula, Hogan's separately-valued interest (\$8.86 million) represents 97.9% of that \$9.05 million total, while Borders' separately valued interest (\$190,000) represents approximately 2.1% of that total. (CP 571; Ex. 68) When those same ratios are then applied to the severance damages remaining in the

lump-sum award (\$2.3 million), Borders' apportionment share is \$48,287.29. (CP 571) And as noted above, the trial court identified no equitable factors that warrant increasing this share.

Even if this Court holds that Borders has no duty to mitigate its damages and instead calculates Borders' damages through 2040, using a decline in Borders' leasehold value of \$1.50 per square foot over that time period, results in \$300,000 for Borders' damages. (CP 572; Ex. 68) Applying the *Spencer* apportionment formula to this amount results in Borders' apportionment share totaling \$76,243. (CP 572)

E. The Trial Court Erred in Awarding \$175,567 in Prejudgment Interest.

Following the apportionment trial, the court awarded Borders \$175,567.97 in interest. (CP 830) This award was based upon a prorated share of the interest awarded to Hogan after the just compensation trial in the amount of \$88,304.13, plus prejudgment interest from June 10, 2009 until June 18, 2010 in the amount of \$87,263.84. (CP 830)

If the Court should hold that the lease does not prohibit Borders from sharing in the award, then Hogan acknowledges that Borders is entitled to its pro rata share of the \$638,959 in prejudgment interest awarded as part of the judgment following the condemnation trial in 2009. The trial court, however, erred in awarding Borders prejudgment interest from June 10, 2009 to June 18, 2010 because Borders' apportionment was not a liquidated amount prior to April 20, 2010 (the date of the trial court's oral ruling.)

Under Washington law, a party typically is entitled to prejudgment interest as a matter of right when the claim is liquidated. *China Imports v. Car/ton Northwest, Inc.*, 83 Wn. App. 229, 245, 921 P.2d 575 (1996). A claim is liquidated where “the evidence furnishes data which, if believed, makes it possible to compute the amount with exactness, without reliance on opinion or discretion.” *Car Wash Enters., Inc. v. 4 Kampanos*, 74 Wn. App. 537, 548-49, 874 P.2d 868 (1994).

Here Borders did not state the exact amount of its claimed damages until the April 2010 trial. For example, when Hogan asked in an interrogatory for Borders to state the amount of its damages, Borders responded: “We currently estimate the net present value of the diminution of Borders leasehold interest at \$1.5 – 4.0 million.” (Ex. 11, at p. 7) Because Borders’ claim was not liquidated until April 20, 2010, it is not entitled to interest prior to that date.⁵

In addition, the trial court’s grant of Borders’ pro rata share of the \$638,959 in prejudgment interest awarded as part of the judgment following the condemnation trial in 2009 is incorrect because it is based upon the trial court’s doubling of an inflated determination of just compensation for Borders. Because the trial court’s award of \$711,602 is not supported by substantial evidence or the law, any award of prejudgment interest should be according to the following scenarios:

⁵ Since the full amount of the judgment is on deposit in the registry of the court pending appeal, no interest accrues currently. (CP 845-46)

If this Court holds that the amount of Borders' apportionment is \$48,287.29 (as Hogan contends), Borders' apportionment represents 0.94% of the total condemnation award of \$5.15 million. When that ratio is applied to the prejudgment interest award of \$638,959, Borders' pro rata share of the interest should be \$6,006.21.

If this Court holds that the amount of Borders' apportionment is \$76,243, Borders' apportionment represents 1.48% of the total condemnation award of \$5.15 million. When that ratio is applied to the prejudgment interest award of \$638,959, Borders' pro rata share of the interest is \$9,456.59.

If this Court holds that the amount of Borders' apportionment is \$355,801.10 (as the trial court held), but that the trial court erred in doubling this amount, Borders' apportionment of \$355,801.10 represents 6.91% of the total condemnation award of \$5.15 million. When that ratio is applied to the prejudgment interest award of \$638,959, Borders' pro rata share of the interest is \$44,152.07.

VI. CONCLUSION

Article 22 of the lease demonstrates that Borders and Hogan have anticipated condemnation and have set out their respective rights following condemnation. If the conditions in the lease had occurred, then Borders would have had the right to share in the condemnation award. Because these conditions have not occurred, Borders has no right to share in the award. Thus, this Court should hold that the trial court erred when it

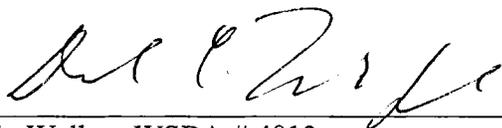
denied Hogan's summary judgment motion and that Hogan is entitled to an award of his attorneys' fees and costs incurred in enforcing the lease.

Alternatively, Hogan requests that the Court hold that the award of \$711,602 is not supported by substantial evidence or Washington law. Instead, Hogan requests that any award to Borders be based upon a diminution in leasehold value of \$1.50 per square foot, applied only over the initial term of the lease. Using these realistic figures would result in a damage award to Borders of \$48,287.29, plus prejudgment interest in the amount of \$6,006.21.

DATED this 21ST day of December, 2010.

VANDEBERG JOHNSON & GANDARA, LLP

By



G. Perrin Walker, WSBA # 4013

Daniel C. Montopoli, WSBA # 26217

Scott D. Winship, WSBA # 17047

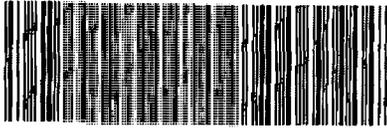
Attorneys for Appellant/Cross-Respondent

Carl Hogan

APPENDICES

- APPENDIX A: Revised Findings of Fact and Conclusions of Law, filed July 8, 2010 (CP 826-32)
- APPENDIX B: Diagram of Willows Shopping Center with Proposed Inbound Only 5th Leg Entrance (Ex. 38, admitted April 13, 2010 RP 157)
- APPENDIX C: Article 22 (“Eminent Domain”) of the Lease Between Hogan and Borders (Ex. 1, pp. 33-34, admitted April 13, 2010 RP 154)

APPENDIX A



05-2-05211-8 34633761 ORRE 07-12-10

HONORABLE THOMAS J. FELNAGLE

FILED
DEPT. 15
IN OPEN COURT
JUL 08 2010
By *[Signature]*
DEPUTY

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

CITY OF PUYALLUP, a municipal corporation,)

Petitioner,)

v.)

CARL R. HOGAN, et al., et ux.,)

Respondents.)

CARL R. HOGAN, et al., et ux.,)

Respondents,)

v.)

BORDERS, INC.,)

Respondents.)

NO. 05 2 05211 8 *287*

REVISED [PROPOSED] FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER

THIS MATTER having come before the court on a trial beginning on Monday, April 12, 2010; respondent Carl R. Hogan ("Hogan") being represented by his counsel, G. Perrin Walker and Scott D. Winship of Vandenberg Johnson & Gandara, LLP; respondent Borders Group, Inc. ("Borders") being represented by its counsel, Michael M. Fleming and Janis G. White of Lane Powell PC; and the Court having heard the testimony of the witnesses, reviewed the exhibits admitted into evidence, reviewed the briefing of the parties, and having heard argument of counsel, and the parties having rested following the presentation of

REVISED [PROPOSED] FINDINGS OF FACT AND CONCLUSIONS OF LAW AND FINAL JUDGMENT - 1

1 evidence, and the Court having made an oral ruling on April 20, 2010, the Court hereby enters
2 the following findings of fact and conclusions of law.

3 **FINDINGS OF FACT**

4 1. The City of Puyallup commenced eminent domain proceedings in February
5 2005 as part of the 39th Avenue SE Extension Project (the "Project"), naming Hogan, Borders
6 and others as respondents to acquire a portion of the property owned by Hogan known as the
7 Willows Shopping Center (the "Center").

8 2. Borders is the largest, or "anchor," tenant in the Center.

9 3. On May 20, 2009, a jury trial commenced before this Court to determine the
10 amount of just compensation to be paid by the City.

11 4. At the 2009 trial, both the City and Hogan presented evidence that the "take"
12 damages and costs to cure totalled approximately \$2,850,000. Hogan also presented evidence
13 that he would suffer damages to the remainder of his property due to changes in access as a
14 result of the Project.

15 5. Hogan presented evidence at the 2009 trial that Borders would likely terminate
16 its lease and/or leave the Center as a result of the condemnation.

17 6. At the 2009 trial, Hogan presented evidence that his total damages were
18 \$11,900,000.

19 7. On June 10, 2009, the jury returned a verdict in the amount of \$5,150,000.

20 8. The Court also awarded Hogan \$638,959 in prejudgment interest, \$719,331 in
21 attorneys' fees and \$321,777 in costs for a total recovery of \$6,830,067.

22 9. On August 18, 2009, Borders filed a Notice of Claim that it sought to recover a
23 portion of the just compensation award.

24 10. Borders presented credible evidence at trial that the value of its leasehold
25 interest would diminish by \$7 per square foot as a result of the condemnation.

26
REVISED [PROPOSED] FINDINGS OF FACT AND
CONCLUSIONS OF LAW AND FINAL JUDGMENT - 2

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1420 FIFTH AVENUE, SUITE 4100
SEATTLE, WASHINGTON 98101-2338
206.223.7000 FAX: 206.223.7107

1 11. Borders' initial lease term will expire on January 31, 2016. Borders has five
2 five-year options to renew its lease.

3 12. The Borders store is very profitable.

4 13. The City has not commenced construction of the Project and there is no date
5 scheduled for the commencement of construction of the Project.

6 14. Article 50 of the Lease between Hogan and Borders provides as follows:

7 If either party brings an action or proceeding to enforce the terms hereof or
8 declare rights hereunder, the prevailing party in any such action, proceeding,
9 trial or appeal, shall be entitled to recover its costs, including reasonable
attorneys' fees, from the losing party as determined and fixed by the court.

10 15. Borders has incurred \$1,026.71 in costs and \$29,932.50 in reasonable
11 attorneys' fees opposing three motions for summary judgment filed by Hogan, all of which
12 the Court denied.

13 **CONCLUSIONS OF LAW**

14 1. Borders is entitled to share in the just compensation award pursuant to the
15 terms of the lease between Borders and Hogan.

16 2. The net present value (using a 12% discount rate) of the diminution in value of
17 Borders' leasehold value (valued at \$7 per square foot per year through 2040) is \$1,400,000.

18 3. Equitable apportionment of the \$5,150,000 just compensation award is
19 appropriate under the facts and circumstances of this case.

20 4. The following calculation sets out an initial or starting point calculation for the
21 equitable apportionment of the just compensation award:

22 Willows Center Damages (total diminution in FMV due to the condemnation, presented by Hogan at the 2009 trial)	\$11,900,000.00
23 - Less NPV of Borders' Value (valued at \$7 per square foot per year through 2040)	(\$1,400,000.00)
24	
25 Hogan's Fee Valuation (less any apportionment to Key Bank)	\$10,500,000.00
26 - Less Damages Not Related to Impaired Access (the "take" damages and costs to cure)	(\$ 2,850,000.00)

REVISED [PROPOSED] FINDINGS OF FACT AND
CONCLUSIONS OF LAW AND FINAL JUDGMENT - 3

113731.0008/1852696.1

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1	Valuation of Hogan's Remainder Damages	\$ 7,650,000.00
2	NPV of Borders' Leasehold Value (valued at \$7 per square foot per year through 2040)	\$ 1,400,000.00
3		
4	Total of Hogan's & Borders' Separate Remainder Damage Valuations	\$ 9,050,000.00
5	Proportion of Total Remainder Damage Valuations:	
6	Borders	15.47%
	Hogan	84.53%
7	Just Compensation (Jury Award)	\$ 5,150,000.00
8	- Less Damages Not Related to Impaired Access (the "take" damages and costs to cure)	(\$ 2,850,000.00)
9	Just Compensation for Access Damages (amount to be apportioned)	\$ 2,300,000.00
10		
11	Apportionment of Just Compensation for Access-Related Damages:	
12	Borders	\$ 355,801.10
	Hogan	\$ 1,944,198.90

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5. The following factors require equitable adjustment of the calculation 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.

REVISED [PROPOSED] FINDINGS OF FACT AND
CONCLUSIONS OF LAW AND FINAL JUDGMENT - 4

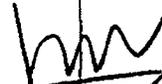
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DONE IN OPEN COURT this 8th day of July, 2010.


HONORABLE THOMAS J. FELNAGLE
JUDGE THOMAS FELNAGLE
DEPT. 15

FILED
DEPT. 15
IN OPEN COURT
JUL 08 2010
BY 
DEPUTY

Presented by:

LANE POWELL PC

By /s/ Michael M. Fleming, Janis G. White
Michael M. Fleming, WSBA No. 06143
Janis G. White, WSBA No. 29158
Attorneys for Respondents, Borders, Inc.

Approved as to Form:

VANDEBERG JOHNSON & GANDARA

By 
G. Perrin Walker, WSBA No. 4013
Scott D. Winship, WSBA No. 17047
Attorneys for Respondent Carl R. Hogan

REVISED [PROPOSED] FINDINGS OF FACT AND
CONCLUSIONS OF LAW AND FINAL JUDGMENT - 6

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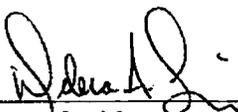
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CERTIFICATE OF SERVICE

I hereby state that on July 7, 2010, I caused to be served a copy of the foregoing on the following person(s) via Electronic Filing Notification at the following address(es):

G. Perrin Walker
Vandeberg Johnson & Gandara
1201 Pacific Avenue, Suite 1900
P.O. Box 1315
Tacoma, WA 98401-1315

Dated: July 7, 2010



Debra A. Smith

REVISED [PROPOSED] FINDINGS OF FACT AND
CONCLUSIONS OF LAW AND FINAL JUDGMENT - 7

113731.0008/1852696.1

LANE POWELL PC
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APPENDIX B

E
EXISTING ACCESSSES
AT 37TH AVE. TO
REMAIN

C
RELOCATE EXISTING
RVRO ONE AISLE
SOUTH

INTERNAL STOP
CONTROLS (3)

D
IN-BOUND FIFTH LEG
ENTRANCE TO SITE
WITH 150' STACKING
PER WSDOT

A
TEMPORARY ACCESS
TO CENTER DURING
CONSTRUCTION

B
TEMPORARY CONSTRUCTION
ACCESS THEN - PERMANENT
SHOPPING CENTER ACCESS

F
3RD STREET EAST

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EXISTING
ACCESSES ON
3RD STREET
EAST. TO
REMAIN

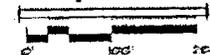
H
3RD STREET EAST
NOT IMPROVED

LAND USE	SQUARE FOOTAGE	PARKING NEED (4/1000)
PAV' 10'	7,036 SF	37 STALLS
PAV' 5'	4,160 SF	10 STALLS
TENANT 'A'	733 SF	75 STALLS
TENANT 'B'	16,200 SF	65 STALLS
TENANT 'C'	21,813 SF	86 STALLS
SCORERS	28,716 SF	100 STALLS
WILLOWS OPTICAL	3,750 SF	8 STALLS
DOLLAR TREE	10,465 SF	43 STALLS
STARBUCKS	1,154 SF	11 STALLS
LIQUOR STORE	4,358 SF	11 STALLS
HAIR TONIC	1,236 SF	5 STALLS
SMOKE CURS	1,140 SF	5 STALLS
CASH II	830 SF	4 STALLS
TRAVEL	1,540 SF	6 STALLS
TUX SHOP	755 SF	4 STALLS
TACED DEL. HAN	978 SF	4 STALLS
TOTAL	112,644 SF	445 STALLS
PARKING PROVIDED:		41 STALLS

Willows Shopping Center
PUYALLUP, WASHINGTON

Re-align Serpentine Road

Proposal 19-4



Partners
Architectural Design Group, Inc.

PROJECT: WILLOWS SHOPPING CENTER
LOCATION: PUYALLUP, WA
DATE: MARCH 26, 2008

APPENDIX C

Store Number: 417
Date of Lease
(Effective Date): April 11, 2000

LEASE AGREEMENT

Between

CARL R. HOGAN,
a married man dealing with his separate estate,
dba Willows Capital,
as Landlord

And

BORDERS, INC.,
as Tenant

Property:

Willows Shopping Center
Puyallup, Washington

Tenant at the time of the loss, and Tenant was required pursuant to Article 20(a)(ii) to maintain all risk property insurance on all or any portion of the demised premises, then Tenant shall reimburse Landlord or Landlord's mortgagee, if any, as their interest may appear, for an amount equal to the insurance proceeds that would have been paid had property insurance commensurate with Tenant's obligations under Article 20(a)(ii) been in force (except to the extent such insurance would have covered the items referred to in Article 20(d), in which items Tenant has the sole insurable interest). If this Lease is terminated pursuant to the terms of Article 21(c), then all unearned Rent paid in advance shall be refunded to Tenant.

(e) **Other Structures**. If at any time during the Lease term any building or buildings (or portions thereof) owned by Landlord within the Shopping Center, other than the demised premises, are damaged or destroyed (partially or totally) by fire, the elements or any other casualty, then Landlord shall use best efforts to promptly and with due diligence repair, rebuild and restore the same as nearly as practicable to the condition existing just prior to such damage or destruction, or, in the alternative, Landlord shall use best efforts, promptly and with due diligence, to raze the fire damaged buildings, structures or areas, and to clean, clear, pave for parking or landscape such areas.

22. **EMINENT DOMAIN.**

(a) **Demised Premises/Ingress and Egress**. If (i) any portion of the demised premises is expropriated, or (ii) any point of ingress and egress to the public roadways, substantially as depicted on Exhibit B, is materially impaired by a public or quasi-public authority and if as a result there shall fail to exist at least one (1) point of ingress and egress between the Shopping Center and South Meridian Street, and at least one (1) point of ingress and egress between the Shopping Center and 37th Avenue Southeast, so as to render, in Tenant's sole reasonable opinion, the demised premises unsuitable for the operation of Tenant's business in the normal course, then Tenant shall have the option to terminate this Lease as of the earlier of (i) the date Tenant is deprived or denied use thereof, or (ii) the date the condemning authority requests early possession. The option shall be exercised by Tenant giving at least ten (10) days prior notice to Landlord of such election. During any expropriation or impairment, regardless of the length of time of such expropriation or impairment or whether or not this Lease is terminated as a result of such expropriation or impairment, Landlord shall endeavor to provide a reasonable alternative to the impaired point of ingress and egress for the duration of any such expropriation or impairment.

(b) **Restoration of Demised Premises**. If any portion of the demised premises is expropriated, and this Lease is not terminated as provided above, then this Lease shall continue as to that portion of the demised premises that has not been expropriated or taken. In such event, at Landlord's sole cost and expense Landlord shall promptly and with due diligence restore the demised premises, as nearly as practicable, to a complete unit of like quality and character as existed just prior to such expropriation. Rent shall abate during

the period of demolition and restoration to the extent the demised premises are unused and unusable. Following Landlord's restoration, Rent shall be reduced in the proportion the gross leasable area of the portion of the demised premises so expropriated bears to the total gross leasable area of the demised premises prior to such expropriation.

(c) **Parking Areas**. Without limiting the foregoing, if any of the parking area depicted on Exhibit B is expropriated by public or quasi-public authority, then Landlord shall make every effort to substitute equivalent and similarly improved lands contiguous to and properly integrated with the remainder of the site depicted on Exhibit B. If Landlord is unable to substitute such lands, and if following any expropriation, the aggregate area provided for the parking of automobiles on the Land shall not be sufficient to accommodate at least three and two-tenths (3.2) automobiles per one thousand (1,000) square feet of gross leasable area existing upon the Land, then Tenant shall have the option to terminate this Lease at any time within six (6) months after such deprivation becomes effective by giving at least ten (10) days prior notice to Landlord.

(d) **Termination**. If this Lease is terminated pursuant to this Article 22, then any Rent paid in advance under this Lease shall be refunded to Tenant, and Tenant shall have an additional sixty (60) days following the termination date within which to remove Tenant's property from the demised premises; provided, however, that Rent shall be adjusted from and after the date of such expropriation in proportion to the portion of the demised premises in which Tenant elects to continue operating after such expropriation occurs. If at the time of any such termination Tenant has any unamortized expenditures that Tenant may have made at Tenant's cost on account of any improvements, alterations, or changes to the demised premises, then Landlord shall assign to Tenant that portion of any award payable as a result of such expropriation as shall equal the unamortized portion of Tenant's expenditures. Such unamortized portion of Tenant's expenditures shall be determined by multiplying such expenditures by a fraction, the numerator of which shall be the number of remaining years of the Lease term at the time of such expropriation, and the denominator of which shall be the number of remaining years of the Lease term at the time such expenditures shall have been made, plus the number of years for which the Lease term has been subsequently extended; provided, however, Tenant shall have such right to share in a condemnation award only if the award for such unamortized expenditures is made by the expropriating authority in addition to the award for the land, building and other improvements (or portions thereof) comprising the demised premises, although 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.

23. **USE; ASSIGNMENT AND SUBLETTING; PERMANENT CESSATION OF BUSINESS.**

(a) **Permitted Use**. The demised premises may be used for any lawful purpose, except for (i) prohibited Shopping Center uses set forth in Article 24, and (ii) any use exclusively

