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Borders respectfully submits this reply in support of its cross-appeal on the issue of whether the trial court erred when it ruled that RCW 8.28.040's interest tolling proviso suspended Borders' right to post-judgment interest during the pendency of this appeal.

I. RCW 8.28.040's Plain Language And This Court's Decision In *Trask II* Entitle Borders To Post-Judgment Interest.

The language of RCW 8.28.040 is plain and unambiguous. It does not suspend the accrual of *post-judgment* interest; it suspends the accrual of *pre-judgment* interest where an appeal delays entry of final judgment. The statute provides that "the running of such interest shall be suspended ... 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). An appeal before final judgment is not just possible in condemnation proceedings, it is permissible as a matter of right. The rules of appellate procedure specifically permit a party to appeal, "[a]n order of public use and necessity in a condemnation case." RAP 2.2(a)(4).

As Borders pointed out in its opening brief on cross-appeal, in *State v. Trask*, 98 Wn. App. 690, 990 P.2d 976 (2000) ("*Trask I*"), the Court addressed this precise issue and expressly recognized that RCW 8.28.040 suspends *pre-judgment* interest only. The Court noted that the

statute required judgment on a condemnation award to “draw postjudgment interest until paid.” *Id.* at 698. Critically, it further noted:

Neither party relies, nor could it rely, on the proviso in RCW 8.28.040. The proviso may toll prejudgment interest when an appeal is taken *before* judgment, *see, e.g.*, RAP 2.2(a)(4), but both appeals in this case were taken *after* judgment.

Id. at 698 n. 18 (emphasis in original). Just like *Trask II*, the proviso in RCW 8.28.040 does not apply here because final judgment has been entered. CP 833-835. Indeed, this is all the more so because, as discussed below, the statute was never intended to apply to a post-condemnation apportionment proceeding that results in an ordinary money judgment, as was the case here. *Trask II* is on-point and remains good law.

Hogan does not address (or cite) *Trask II*, much less explain why this Court’s construction of RCW 8.28.040 should be abandoned. Instead, Hogan relies on a far older opinion, *State v. Wachsmith*, 4 Wn. App. 91, 479 P.2d 943 (1971), but that case does not discuss RCW 8.28.040 nor the accrual of post-judgment interest pending appeal.¹ That case, in turn, cited an even older case, *State v. Laws*, 51 Wn.2d 346, 322 P.2d 134 (1958), that did not confront the issue squarely because, there, the court held that the state waived its right to appeal—rendering the judgment “final” under

¹ Hogan also cites a non-condemnation case, *Malott v. Randall*, 11 Wn. App. 433, 523 P.2d 439 (1974), that likewise has nothing to do with RCW 8.28.040 specifically or post-judgment interest generally.

any interpretation. *Id.* at 352. This Court should follow *Trask II* and RCW 8.28.040's plain language. The trial court's refusal to award post-judgment interest may be reversed on this basis alone.

II. The Supreme Court's Decision In *Lacey* Precludes Application Of RCW 8.28.040's Interest Tolling Proviso Where The State Takes Immediate Possession Of The Property.

In any event, as Borders explained in its opening brief, RCW 8.28.040's interest tolling proviso does not apply to apportionment proceedings conducted long after the underlying condemnation action is over—where the subject property has already been taken and the owner paid in full. And, indeed, Hogan is unable to cite to even a single case in which RCW 8.28.040 was applied in the apportionment context—or where, as here, the state or municipality has paid for and taken possession of the property—and, to Borders' knowledge, no such case exists.

The Supreme Court's decision in *State v. Lacey*, 84 Wn.2d 33, 524 P.2d 1351 (1974), explains why. In *Lacey*, the Court held that RCW 8.28.040's interest tolling proviso applies only where the “owner does not surrender possession prior to trial and verdict,” because it was intended to “prevent[] financial harm *to the state* from a delay occasioned by appeal.” *Id.* at 37 (emphasis added). Conversely, where the owner agrees “to give the state immediate possession prior to verdict” under Washington's immediate possession statute then, “[t]he interest suspension provisions of

RCW 8.28.040 do not apply ... as a matter of chronology or legislative intent.” *Id.* at 37, 38. To hold otherwise, the Court concluded, would “deprive the consenting property owner of his right to interest,” and “defeat the intent of the legislature[.]” *Id.* at 38; *see also In re Anacortes*, 81 Wn.2d 166, 170, 500 P.2d 546 (1972) (interest required from date of stipulation of immediate possession despite intervening appeals).

Under *Lacey*’s clear holding, RCW 8.28.040’s interest tolling proviso does not apply here. As in *Lacey*, Hogan and the City of Puyallup invoked the immediate possession statute and entered a “Stipulation and Order for Immediate Possession and Use”—at which point the City had a right to immediate possession. CP 53-61; CP 62-66. In return, Hogan (and, by extension, Borders) received the right to recover pre- and post-judgment interest, regardless of appeal. *Lacey*, 84 Wn.2d at 37 (“purpose of [the immediate possession statute] was to make it advantageous to the owner to consent to the early loss of his property in return for receipt of interest”). Hogan ignores *Lacey*’s immediate possession rule completely, and offers no explanation why it doesn’t apply equally to Borders. It does.

To be sure, had Hogan appealed the underlying just compensation award, the *Lacey* rule would shield Hogan’s right to post-judgment interest from RCW 8.28.040’s tolling proviso. But for the same reason, Hogan cannot use the proviso as a sword to deny Borders’ right to post-

judgment interest here. In either case, the proviso's sole purpose—"to prevent[] financial harm to the state"—is not implicated. Indeed, the state has no financial interest whatsoever in an appeal from an apportionment proceeding that does not, and cannot, disturb its right to possession or the underlying condemnation award. At this point, it is just a dispute between private parties and the result is an ordinary money judgment. The trial court's ruling was contrary to the *Lacey* rule, RCW 8.28.040's purpose and, if affirmed, would result in an unwarranted windfall for Hogan.

Rather than address *Lacey's* actual holding, Hogan cherry picks language from the opinion to argue that *Lacey* stands for the proposition that RCW 8.28.040's interest tolling proviso applies whenever the "owner continues in the beneficial use of his property." *Lacey*, 84 Wn.2d at 37-38. Ignoring the immediate adverse impact of the City's condemnation on the value of Borders' leasehold (and the law, *see below*), Hogan argues that—since the City hasn't actually begun its roadway work—"Borders has not been deprived of the beneficial use of its property." Hogan Reply at 20-21. Of course, Hogan ignores that, under the very same reasoning, Hogan should not have been awarded nearly \$640,000 in pre-judgment interest in its underlying condemnation action against the City. CP 78.

Hogan is flat wrong on the law anyway. An owner's right to interest is triggered by the state's *right to possess* the property, not its

actual possession. The Supreme Court decided this very issue in *In re Anacortes, supra*—a case expressly relied upon by *Lacey* that similarly awarded post-judgment interest during appeal. The Court held:

Under the stipulations, the city was entitled to immediate possession as if a decree of appropriation has been entered on the date of the stipulations. Whether the city did or did not exercise its right to possession as given by the stipulations was its election. The condemnees had contractually given up the right to retain possession pending a decree of appropriation. We agree with the observation of the Supreme Court of Idaho which, after review of the issue, stated:

The correct rule and the one which is supported by the overwhelming weight of authority, is that the condemnee should be allowed interest upon the compensation and damages awarded from the time the condemnor either takes possession, or becomes entitled to possession, of the property.

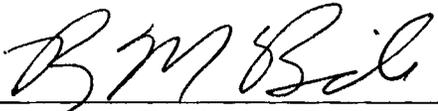
Anacortes, 81 Wn.2d at 168-169 (citation omitted). In sum, “it is the right to possession which creates the right to interest.” *Id.* at 169; *also State v. Trask*, 91 Wn. App. 253, 261, 957 P.2d 781 (1998) (“the Legislature wanted the State to pay interest from the date on which it has the right to possession, regardless of the date on which it has actual possession”). Like *Lacey*, *Anacortes* is controlling. The moment Hogan gave the City the right to possession, Borders’ beneficial use of the leasehold was impaired, entitling Borders to both pre- and post-judgment interest.

* * *

For the reasons stated above and in Borders' opening brief, this Court should affirm the judgment below, but should reverse the trial court's erroneous ruling that RCW 8.28.040 suspends the accrual of post-judgment interest during the pendency of this appeal.

RESPECTFULLY SUBMITTED this 20th day of April, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on April 20, 2011 I caused to be served a copy of the foregoing Reply Brief of Respondent/Cross-Appellant Borders, Inc. on the following person(s) in the manner indicated below at the following address(es):

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