

Tenants may get paid when property is 'taken'

By JANIS G. WHITE

Special to the Journal

What rights do tenants have in an eminent domain proceeding?

It has been established law in Washington that tenants have the right to share in a condemnation award to their landlord. The tenant is generally entitled to recover for loss or damage to the tenant's leasehold interest.

In a recent case, *City of Puyallup v. Hogan*, the Washington Court of Appeals explained how that works in practice. The court in that case affirmed the trial court's judgment that the tenant, Borders Group, Inc., was entitled to share in a condemnation award to its landlord and affirmed the trial court's judgment that Borders was entitled to damages in the amount of \$918,129. The Court of Appeals also awarded Borders post-judgment interest and attorneys' fees on appeal.

In 2007, Puyallup condemned a small portion of Carl Hogan's shopping center for a road construction project. Borders was the anchor tenant in the shopping center. Even though the city was not taking any of the property that was part of the Borders store, the condemnation was going to significantly reduce access to the shopping center.

After the road construction, the main entrance and exit will be reduced to a much narrower entrance only, and the road will be within a few feet of the Borders store, instead of having a parking lot between the road and the Borders store.

At the condemnation trial between Puyallup and Hogan, Hogan argued that even though the city was only taking a small piece of the property, the loss of access to the Borders store, as well as the changes to ingress and egress,

would devastate the entire shopping center. The jury awarded Hogan just compensation of \$5,125,000, instead of the much smaller amount offered by the city. With attorneys' fees and prejudgment interest, the total award to Hogan was \$5,788,959. Borders then petitioned the court for apportionment of the award to recover damages to its leasehold interest caused by the condemnation, and Hogan, reversing position, argued that Borders was not damaged and was not entitled to share in the award.

On appeal, Hogan argued that in its lease Borders waived its right to share in a condemnation award, except in narrow circumstances. The Hogan-Borders lease included a complex provision about Borders' right to share in a condemnation award. The Court of Appeals recognized the well-established rule that a tenant has the right to share in a condemnation award to its landlord. After reviewing the lease provision, the court found that despite its length, it was neither clear nor comprehensive and that it did not clearly waive Borders' right to share in a condemnation award. Thus, Borders was entitled to recover a portion of the condemnation award to its landlord.

Next, the court reviewed and approved the trial court's decision about how much of the condemnation award should be paid to Borders, the tenant.

Because the city's taking did not terminate the Borders' leasehold, the court applied a formula to determine how to apportion the award between the landlord and the tenant. First, the court determined the total value of the property interests that were condemned. Then, it calculated the ratio of each of those separately valued property interests to the total value of the condemned property. The court then applied those

ratios to the total amount awarded to determine the proportional share of the award for each property interest. Significantly, the court held as a matter of first impression under Washington law that Borders had no duty to mitigate its damages by not exercising any of its five options to renew the lease. The court also approved the trial court's equitable doubling of Borders' apportionment award. Here, the court looked at a number of variables and based on its discretion, decided that the award to Borders should be doubled to satisfy all the equities of the situation.

The opinion makes the following points clear: 1) the importance of drafting lease provisions regarding condemnation that clearly articulate the parties' agreement with respect to sharing of a condemnation award; 2) absent a clear lease provision to the contrary, courts in Washington will enforce tenants' rights to share in condemnation awards; and 3) a tenant's right to share in a condemnation award is not limited by a duty to mitigate.

Whether you are a landlord or a tenant, you should review your lease provisions regarding condemnation, if any, and determine whether they accurately and completely reflect the parties' agreement. Also, if you have an interest in a property that is being condemned, you should carefully analyze whether the tenant's leasehold interest will be damaged by a taking and if so, how to value that damage.

Janis G. White is a shareholder at Lane Powell and focuses her practice on complex commercial litigation, including banking, condemnation, real estate, fiduciary litigation, contracts, unfair competition and general commercial cases.