

## Construction Law Update

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### **Washington Court of Appeals Upholds the Rights of Tenants to Share in Condemnation Awards**

What rights does a tenant have in an eminent domain proceeding? In *City of Puyallup v. Hogan*, the Washington Court of Appeals recently confirmed the right of a tenant, Borders Group, Inc., (“Borders”) to share in a condemnation award and held that tenants do not have the duty to mitigate damages in condemnation proceedings. The court affirmed the trial court’s judgment that Borders was entitled to apportionment of a condemnation award to its landlord in the amount of \$918,129. In addition, the Court of Appeals awarded Borders post-judgment interest and attorneys’ fees on appeal.

In 2007, the City of Puyallup condemned a small portion of Carl Hogan’s shopping center for a road construction project that will significantly reduce access to the shopping center. Borders was the anchor tenant in 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.

At the condemnation trial between City of Puyallup and Hogan, Hogan argued that the loss of access to the Borders store, as well as the changes to ingress and egress, would devastate the center. The jury awarded Hogan just compensation of \$5,125,000. 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, 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 Court of Appeals recognized the common law rule that a tenant has the right to share in a condemnation award to its landlord. The court held that the Hogan-Borders lease did not clearly manifest the parties’ objective intent to waive Borders’ right to share in a condemnation award.

Next, the court reviewed and approved the trial court’s apportionment of the condemnation award, finding there was substantial evidence to support the trial court’s findings of fact. 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 based on the court’s “thoughtful analysis” of multiple factors and exercise of its equitable discretion.

Last, the court approved the trial court's award of prejudgment interest, rejecting Hogan's argument that Borders' apportionment was not a liquidated amount, reversed the trial court's denial of post-judgment interest and awarded Borders its attorneys' fees on appeal.

The opinion makes clear the importance of drafting lease provisions regarding condemnation that clearly articulate the parties' agreement with respect to sharing of a condemnation award. And, the opinion makes clear that, absent a lease provision to the contrary, courts in Washington will enforce tenants' rights to share in condemnation awards. Further, according to this opinion, 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. Lane Powell represented the tenant, Borders Group, Inc., in the case *City of Puyallup v. Hogan*.

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