

In this Issue

Exclusives FEATURE **1**
Stillwater Crossing ---- SNAPSHOT **1**
Gordmans HOT SPOTS **3**
Lawrence/Johnson MEMBER PROFILES **5**
MSCA Board COMMITTEE CHAT **5**
Retail Panel PROGRAM RECAP **6**



FEATURE by Greg Brenny, Fafinski Mark & Johnson, P.A.

EXCLUSIVES – CLEARING UP THE AMBIGUITY

If you have been involved in a retail center, you likely have analyzed, negotiated, drafted or litigated an exclusive.

Exclusives, a category of restrictive covenants, prohibit certain uses for the benefit of a specific party. Unfortunately, exclusives are often ambiguous, causing unintended consequences and confusion. They can be difficult to draft and interpret and are not always easy to find. In retail centers undergoing change, they can stop change in its tracks.

If carefully negotiated and drafted, exclusives can be integral to the success of a retail center by helping to provide the correct retail mix. Exclusives should attempt to balance the interests of landlords and tenants. An exclusive may be necessary to protect a tenant's business and provide incentive for a tenant to locate at a retail center. Conversely, an exclusive should allow landlords the flexibility to create a retail mix that results in a competitive edge for the retail center. Clear exclusives can both protect tenants and provide landlords flexibility.

Underlying Law

When clear and unambiguous, Minnesota courts will generally enforce exclusives as intended by the parties who created them. However, courts are inclined to narrowly construe exclusives based on public policy against restraints on trade with all doubt resolved against enforcement. As a result, exclusives will likely be narrowly interpreted if ambiguous. Ambiguity should have the effect of limiting the protection provided by the exclusive. Often, the underlying law will work against the tenant wanting the protection of the exclusive.

Narrowly Tailor and Clearly Define

The first and one of the most important steps is to narrowly tailor the exclusive and define terms with as little ambiguity as possible. Review each word used in the exclusive to determine if it needs further definition. Define even somewhat ambiguous words and phrases so that anyone can understand what is meant. Don't rely on implied conduct and standards of the trade. When in doubt define. ➔

SNAPSHOT

STILLWATER CROSSING



Location: SEC of MN Highway 36 and Osgood Avenue, Oak Park Heights, MN
Month/Year Opened: 1965 / Renovated 2010
Owner: Stillwater Crossing LLC
Managing Agent: NorthMarq Management Services
Center Manager: Ron Vantine
Leasing Agent: Kim Meyer, Robert Muir Company, (952) 857-2805
Architect / Construction Contractor: N/A
GLA: 15,047 sf
Current Occupancy: 77%
of Stores: 5
Anchor Tenants: Carbone's Pizzeria, Metro Dentacare, Liquor Time
Market Area Served: Oak Park Heights and Stillwater
Website: www.robertmuircompany.com
Additional Facts: 2,550-sf end cap available with pylon signage on Highway 36. Drive-thru possible depending on the use. Also, 940 sf between Carbone's Pizzeria and Liquor Time is available.

Exclusives - continued

Try to give exclusive sales clauses that allow the exclusive right to sell certain products or services rather than exclusive use clauses that allow the exclusive right for a certain type of store or use. An example is an exclusive for the sale of food (exclusive sales clause) versus grocery store (exclusive use clause). Exclusive sales clauses are more precise if properly defined. Exclusive use clauses are more prone to interpretive problems. Types of stores are not easily defined and the exclusive becomes ambiguous. With so many stores selling such a variety of products, stores can be classified as many different types of stores or having many different uses. For instance, a bagel shop selling coffee could be defined as a coffee shop (in addition to a bagel shop) for purposes of a coffee shop exclusive.

Specifically list the products or services protected by the exclusive. Focus on limiting the exclusive to only include the products or services that are a tenant's primary business. Narrowly craft language that protects the primary business from competition but does not expand to secondary or complementary products or services. Never include incidental or related uses in the exclusive. Usually, the exclusive should be narrower than the permitted use of a tenant.

If a type of store or use cannot be avoided for an exclusive, try to further define the type of store or use as much as possible. Consider qualifying the type of store or use as being tenant's primary or principal business. Then further define primary or principal business as the use of a certain percent of sales floor area or a certain percent of revenue.

If possible, do not adopt a tenant's standard exclusive provision without a thorough review. Although anchor and strong tenants may insist on their standard exclusive provision, it may be antiquated and broader than the current reality. For instance, if you are dealing with a grocery store exclusive that prohibits the sale of groceries, there are two elements being protected. Groceries are defined as "articles of food and other goods sold by a grocer." Since a grocer is commonly defined as a dealer in staple food stuffs and many household supplies, this means that both food and non-food items qualify as groceries. The non-food items prohibited from being sold could be virtually limitless (e.g. soap, paper towels and aspirin). Many grocers realize that such a broad protection is not beneficial to their business. In these situations, a well reasoned revision to a tenant's standard exclusive provision may be acceptable.

Exceptions to the Exclusive

Exceptions to the exclusive are important. Exceptions also need to be clearly drafted so that they are proper in scope. Overbroad and unclear exceptions can cause an exception to swallow the exclusive and make it moot. Some exceptions to consider are as follows:

Incidental Sales Exception - An incidental sales exception allows for the incidental sales of protected products that would otherwise be prohibited by an exclusive. Without an incidental sales exception, an exclusive will often extend farther than anticipated. For the incidental sales of protected products, try to define the allowed incidental sales area by square feet rather than a percent of sales. A square foot standard is easier to review for compliance. Percent of sales is difficult to review for compliance because other tenants subject to the exclusive would need to report sales to the landlord by the category of the protected product. Such categories are rarely available to third parties and may not even be tracked by the tenant subject to the exclusive.

Using square feet to calculate the allowed incidental sales area of protected products requires further definition. Make sure to include whether the allowed incidental sales area is for all protected products in the aggregate or for each protected product. Also, make sure to clearly state how to measure the allowed incidental sales area for the protected products. While measuring the square feet involved seems straight forward, landlord and tenant may have vastly different methods of measuring the allowed square footage. A suggestion is to measure using fixtures/gondola area.

Existing Tenant Exception - Another exception to consider is an existing tenant exception. Without such an exception, conflicts will likely arise between the exclusive being granted and the permitted use clauses of existing tenants. Ideally, to avoid any issues with existing tenants, an exception to an exclusive should be made for all existing tenants operating as permitted under their lease. However, this is a large exception to an exclusive, because broad permitted uses under existing leases that are freely assignable may lead to changes in use that pose direct competition threats to a tenant. One way to slightly limit this exception is by adding language that if a landlord's consent is required for a use change, then landlord shall not consent to a change that will violate the exclusive.

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continued on page 7 →

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Target Corporation

To be the best company ever for our guests, team members, shareholders and communities.

on classmates and teachers, and \$3.41 on co-workers. ♥ Greeting cards will be the most popular gift option (52.1%) followed by jewelry, clothing, dining out, flowers and candy. ♥ The average man plans to shell out more than twice as much (\$158.71) as the average woman (\$75.79). ♥ Discount stores (36.6%) will be the most popular shopping destination, but department stores (30.5%), specialty stores (19.4%) and online (18.1%) will share much of the holiday traffic as well. Others will check out their local florist (16.8%) and jewelry store (9.5%). ♥ Source: National Retail Federation

HOT SPOTS

by JoAnn Maloney, Fredrikson & Byron, P.A.

GORDMANS - SOMETHING UNEXPECTED

Gordmans stores, an Omaha-based apparel and home fashions retailer, will be entering the metro retail marketplace this spring by opening two stores. One of these stores will be located in the former Steve & Barry's space at Burnsville Center which had most recently been occupied by Becker Furniture Liquidation Superstore. According to Finance & Commerce, the second store will be located in the former Cost Plus World Market and Bed Bath & Beyond spaces at Tamarack Village. Both stores will contain approximately 50,000 sf which is the typical prototype for this retailer.

Gordmans currently operates one store in Minnesota located across from Riverdale Center in Mankato. Its national portfolio includes 68 locations in 16 states in the Midwest and over 1/3 of those stores were opened since 2004. All of its stores are leased and can be found in regional enclosed shopping malls, lifestyle centers and power centers. The company has an aggressive growth plan of a 10% increase in store locations per year.

Gordmans was acquired by Sun Capital in 2008 and then went public in August 2010. The company's prospectus described its business as "an everyday low price retailer featuring a large selection of the latest brands, fashions and styles at up to 60% off department and specialty store prices



every day in a fun, easy-to-shop environment." In addition to shopping brand name merchandise at low prices, the fun involved in shopping at a Gordmans includes a visit to the Gordmans Giggles children's theatre and relaxing in the sports-themed television viewing area. With entertainment thrown into the shopping experience, Gordmans indeed does live up to its moniker of "Something Unexpected."

www.gordmans.com

MSCA "THIRD THURSDAYS"

Who: MSCA members and their colleagues

What: Casual networking hosted by MSCA members

When: Third Thursday of every month from 8:30-9:30 am

Where: Different locations throughout the Twin Cities—watch the MSCA newsletter and website for locations

Why: Create synergy in the commercial real estate industry—share ideas and stories and make new effective relationships

Next meeting: **Thursday, February 17, 2011** at **Caribou Coffee - City Centre Drive**, 8320 City Centre Drive, #B, Woodbury 55125. MSCA member host is **Ryan Burke, Kraus-Anderson Companies**. Please join us for this fun and casual way of networking around the Twin Cities.

There is no fee for this event. Food and beverage are not included. RSVP to Stacey at sbonine@msca-online.com is preferred, but not required. Hope to see you there!

FEBRUARY 2011						
SUN	MON	TUES	WED	THURS	FRI	SAT
		1	2	3	4	5
6	7	8	9	10	11	12
13	14	15	16	17	18	19
20	21	22	23	24	25	26
27	28					

Click for directions

LOVE IS IN THE AIR

♥ The average person will shell out \$116.21 on traditional Valentine's Day merchandise this year, up 11% over last year's \$103.00. ♥ Total Valentine spending is expected to reach \$15.7 billion. ♥ The average person will spend \$5.04 on pets, up from \$3.27 last year. ♥ Consumers will also spend on average of \$6.30 on friends, \$4.97

EVENTS

- Feb 17 **Third Thursdays Networking**
- Mar 2 **Trends**
- Mar 16 **Business Day at the Capitol**
- Mar 17 **Third Thursdays Networking**
- Apr 6 **Economic Outlook**
- Apr 21 **Third Thursdays Networking**

For more info, please log on to
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Will Matzek, Kimley-Horn & Associates

Cindy MacDonald, Kraus-Anderson Companies

Newsletter

Andy McDermott, Shea, Inc.

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Golf

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Cindy Weber, Engelsma Construction

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Shelly Muelken, Marketplace Commercial

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MN MARKETPLACE

Press releases are printed based upon availability of space and relevance to the local market.

- **Shakey's Pizza** is returning to Minnesota after a 10-year absence. With five locations slated for the Twin Cities area, the first is expected to land in Plymouth around April.
- After a fire that destroyed the building that housed **Blackbird** and **Heidi's** in South Minneapolis, both businesses have relocated and reopened. Blackbird's new home is at 3800 Nicollet Avenue S., and Heidi's opened in January at 2903 Lyndale Avenue S.
- Several restaurants have closed in the last few weeks, including the **501 Club**, **OM**, **Ringo**, **Palomino** and **Kieran's Old Pub**.
- **Turtle Bread Co.** is opening a new location in the Longfellow neighborhood of Minneapolis.
- The new Ellipse apartment complex at the corner of Excelsior Boulevard and France Avenue just announced that a new restaurant has signed a lease on its ground level. The concept, **Mill Valley Kitchen**, is projecting an early summer opening.
- **Cocina del Barrio**, an Edina-based offshoot of the wildly popular Barrio tequila bars in Minneapolis and St. Paul, opened in December in the 50th and France retail development.
- **Little Caesars Pizza** will open a 1,485-sf store in the Eden Prairie Prairieview Center. **Hirschfield's Paint** has also signed a 4,248-sf lease at Prairieview Center.
- **Pinstripes** opened for business in 32,000 sf of space in Centennial Shops on France Avenue in Edina with their bowling, bocce ball, restaurant and bar concept.
- The Excelsior and Grand development in St. Louis Park has recently signed several new tenants including **CVS/pharmacy**, **Bubbly Paws**, **Gourmet Oil & Vinegar** and **Get In Shape For Women**. Three current tenants including **Max's**, **Ocean's Spa & Nail** and **The Hair District** are expanding into larger spaces.
- Randolph Hill Shopping Center in St. Paul has just signed two new tenants: **Rusty Taco** and **LA Nails**.
- **The Refinery Salon & Day Spa** has recently expanded their Dinkytown location.
- Construction has begun on **Smashburger** in Eden Prairie in a newly constructed 7,625-sf shopping center at 8045 Flying Cloud Drive. The other tenants will include **Verizon Wireless** and **Sports Clips**.

MEMBER NEWS

Zelm Forms New Company. Linda Zelm, formerly Senior Vice President of Coldwell Banker Commercial Griffin Companies, has formed a new real estate services firm, Small Business Real Estate Advisors. The firm provides commercial real estate agency representation and consulting for companies with fewer than 500 employees.

Stafford Joins Arthouse. Arthouse announced that Sara Stafford has joined their team as Project Manager. Arthouse creates custom merchandise and apparel for promotions, events, and retail. Sara has over 25 years marketing, communications and sales experience in the commercial real estate industry.

Do Your Property Taxes Deserve a Closer Look?

The deadline to
appeal your 2011
property taxes is
April 30, 2011.



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For more information, contact Judy Engel at 612.492.7118, Thomas Wilhelmy at 612.492.7058, JoAnn Maloney at 612.492.7380, Jennifer Kitchak at 612.492.7342, or Christopher Stafford at 612.492.7426.

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MEMBER PROFILES

Judy Lawrence

Kraus-Anderson Companies



Primary Career Focus: Construction Coordination & Management

Hometown(s): Grew up in Fridley and spent 20 years in Bemidji

Education: Bemidji State University and masters work at Metropolitan University

Family: Husband, Bob, two grown sons who live in Atlanta and Brooklyn, and two cats

Hobbies: Reading and cooking...more reading than cooking now!

Very First Job: I worked at a soda fountain at Bridgemans, and no, you really don't get sick of the ice cream!

Dream Job: At this age, it would have to be a secure retirement!

Secret Talent: I do a fabulous impression of a lizard

Favorite Food: Rogan josh (Indian lamb dish)

Favorite Quote: Grandmother to granddaughter: "To lose a husband or two in one's lifetime can be quite dreadful. To lose your teeth is a disaster!" ~from *A Little Night Music*

Mentors: Robin Keyworth and Terry Hodder

Favorite Place Traveled: Paris

MSCA Involvement: Newsletter Committee

Steve Johnson

Solomon Real Estate Group, Inc.



Primary Career Focus: To develop a full range of product types committed to providing intelligent real estate solutions with creativity, flexibility and integrity

Education: Mankato State University. Majors in Marketing and Finance with minors in Speech and Economics

Family: Wife Laurie, son Eric (22), daughter Krista (18)

Hobbies: Pheasant hunting, fishing

Very First Job: Chopping celery for a local Chinese take-out for \$0.75 a crate

Dream Job: Canadian fishing guide

Secret Talent: Cooking

Favorite Food: It doesn't seem fair to limit myself to just one dish, so I love seafood

Favorite Book: All of the Vince Flynn novels

Favorite Movie: *The Shawshank Redemption*

Mentor: My Dad

Favorite Place Traveled: Alaska

MSCA Involvement: Past Board of Directors, STARRSM Awards Committee, Networking Committee

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CBL & Associates Properties, Inc.

COMMITTEE CHAT

by Peter Berrie, Faegre & Benson LLP

This monthly column is dedicated to providing information to members regarding MSCA's committees to help you decide how to become more involved. This month we focus on the ULTIMATE COMMITTEE—the Board of Directors. (Actually it's not a committee, but humor me.)

MSCA BOARD

The Board strives to continue the MSCA's past success in providing networking opportunities, industry-specific information (through the newsletter, monthly programs, and periodic small-group learning sessions) and a strong voice at the state legislature. The Board helps establish the strategic vision for the MSCA and determine any new opportunities or services that the organization can provide to its members. The full Board meets quarterly, with the smaller, executive committee meeting during each of the other months of the year. Each Board Member is a dedicated MSCA member that cares deeply about the strength of the MSCA and its members. If you have any suggestions or comments on ways to improve the MSCA, or want to share any concerns (or compliments), please reach out to any of the Directors or MSCA staff.

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Jeff Wurst, Caribou Coffee Company, Inc.

Immediate Past President (as Director):

Stephen Eggert, Target Corporation

RETAIL BROKER PANEL 2011: DEALS, TRENDS AND OUTLOOK

This month's panel was comprised of four well-respected individuals from the local retail community. Tricia Pitchford, Vice President of Retail for NorthMarq, Mike Sims, Principal for Mid-America Real Estate Group – Minnesota, LLC, Richard Jahnke, Senior Leasing Representative for Paster Enterprises, and John Johansson, Senior Vice President for Welsh Companies.

Who are the retailers doing deals?

Over the past couple of years we've seen a lot of activity in the consignment and thrift store categories. Now we are seeing some movement towards more traditional users.

Tricia indicated that she was seeing some new yogurt and sub sandwich concepts coming to life. Richard said that his centers catered to smaller shops and he was seeing activity in cell phone users and Little Caesars. John is seeing activity in some mid-box users such as Staples, T.J. Maxx, Best Buy and Bed Bath and Beyond. Mike suggested that activity in mid-box sized stores started coming back after the ICSC conference in June. It seemed that all panelists agreed that Walmart was the most aggressive and active retailer at the moment.



January speakers l to r
Mike Sims, Mid-America Real Estate – Minnesota LLC
Bruce Carlson - Mid-America Real Estate – Minnesota LLC (moderator)
Tricia Pitchford – NorthMarq
Brent Anderson – Stewart Title (moderator)
Richard Jahnke – Paster Enterprises
John Johansson – Welsh Companies

What is happening to the length of time it takes to do a deal? Mike stated that because there is not much in the pipeline, the approval time is fluid, whereas Tricia pointed out that everything is now being negotiated from CAM rates to co-tenancy clauses and that this could drag out the process. She also noted that tenants aren't dragging their heels at all, but much of the prolonged process was due to the lenders' requirements.

What is happening to store size requirements? Although Richard noted that both ALDI and Anytime Fitness were increasing their footprint, he felt that overall it seems that retailers are reducing their size whenever possible. John cited that this might be due to the efficiencies developed in the delivery systems and that national retailers no longer need to stockpile merchandise, because as soon as an item is sold, the distribution center is sending a replacement. Examples of reductions in size include Bed Bath and Beyond's prototype which is going from 45,000 sf to 36,000 sf and Walmart's reduction in size by 60,000-70,000 sf.

What is happening to rental rates? Tricia seemed to think that although the rates had bottomed out, they wouldn't go much higher in the near future. On the brighter side, she anticipates a reduction in concessions. She noted that there seems to be less free rent and lower tenant-improvement money required to close a deal.

John stated that we were back at 1999 rates and that tenants had become "addicted" to rates in the \$11 or \$12 range and would find it hard to commit to the \$18 rate associated with new development until all of the current inventory is leased.

Richard reminded the group that the landlord could do lower rents and shorter terms on deals that required little or no landlord investment.

Why aren't deals getting done? When asked this question by an audience member, two reasons were given: 1) The attorneys on both sides seem to be drawing out the process and it was felt that this could be improved if the two attorneys would simply talk to each other instead of exchanging comments. 2) The lack of financing available to smaller retailers is a severe problem. Typically a small retailer could use the equity in their house to finance the venture, but now, with housing values declining, that is not a viable option. The other source for funding has been SBA loans and those no longer seem to be available.

JANUARY 2011 PROFESSIONAL SHOWCASE



DLR Group KKE

DLR Group and KKE Architects joined forces to increase service and expertise in the retail and development markets. Together, they provide the same high level of service you are accustomed to and offer new expanded expertise from across the country.

SMALL TALK

NETWORKING TIP



Networking Tip #2

Ask yourself what your goals are in participating in networking meetings so that you will pick groups that will help you get what you are looking for. Some meetings are based more on learning, making contacts and/or volunteering rather than on strictly making business connections.

Source:
www.strategiesforchange.com

Exclusives - continued from page 2

To clarify the scope of the exception for existing tenants, consider limiting the exception to a list of permitted uses of the existing tenants attached to the lease. A benefit of this approach is that the tenant can review the permitted uses and analyze the potential for competition from existing tenants. A drawback is that it can be administratively burdensome for the landlord. Also, since the language of the permitted use attached should be exactly as set forth in the lease of the existing tenant, definitions can pose challenges that make the permitted use unclear.

Major Tenant Exception - An exception for major tenants occupying more than a certain square footage of space at that center should also be considered. The definition of "major tenant" depends on the size of the retail center and the realistic possibility of the size retailer that may lease space at the center. Generally, major tenants will not be willing to modify their operations for a particular retail center and will be reluctant to consider a center that requires modification. This exception can be especially important for a retail center that is evolving and changing its focus.

Small Tenant Exception - For tenants leasing larger areas who want an exclusive, consider carving out a small tenant exception. This could allow smaller in-line tenants to sell competing products that do not pose significant competition to the larger tenant.

Specific Tenant Exception - Always carefully analyze both existing and potential future permitted uses that may be problematic with an exclusive. If a potential future permitted use is contemplated that may conflict with an exclusive,

consider adding a specific exception to the exclusive for the potential future permitted use. For instance, an exclusive for massage services may need to carve out a potential future permitted use of massages by a chiropractor or medical clinic. Also, if the permitted use of an existing tenant may conflict with an exclusive, then consider adding a specific exception to the exclusive for the permitted use of the existing tenant. While adding a specific tenant exception may be duplicative, the specificity should eliminate any potential conflict or inconsistency between the permitted use and an exclusive. In addition, pre-approval of a potential future permitted use is often easier to get from tenants at lease execution than a subsequent lease amendment.

Conclusion

Clear exclusives avoid conflict and benefit both landlords and tenants. Careful drafting and analysis of an exclusive is critical. Exclusives need to be narrowly tailored and include appropriate exceptions. Not included in this article because of space limitations, but also very important to clearly define in exclusives, are the additional elements of geographic scope, duration and remedies.

To view the entire unabridged version of this article, which includes a discussion on geographic scope, duration and remedies and thoughts on avoiding conflicts between exclusives and permitted uses with other tenants, please click [here](#) or [email the author](#).

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LEGISLATIVE UPDATE

by **Sonnie Elliott, Faegre & Benson LLP**

The 2011 session began on January 4th. The 2010 election dramatically changed the political landscape at the Capitol. The House and Senate went from strong DFL majorities to Republican control. The Republicans now have a 72–62 majority (formerly 67–87) in the House and 37–30 majority (formerly 21–46) in the Senate. There are 60 new legislators out of a total of 201. DFL Governor Mark Dayton replaced Republican Tim Pawlenty. Dayton is the first DFL governor since Rudy Perpich.

The new legislature faces a \$6.2 billion projected deficit for the 2012–13 biennium. Minnesota's constitution requires a balanced budget. Lawmakers will need to cut approximately 16% (\$1 of every \$6) in state spending, increase revenues by that much through taxes and/or fees, or some combination of spending cuts and revenue increases.

These are the specific issues on the 2011 Legislative Agenda for MSCA:

- **Statewide Property Tax.** Lawmakers may increase the statewide property tax levy to help solve the budget problems.
- **Sales tax expansion.** Expansion of the state's sales tax base has already been discussed as a way to increase revenue collections. An expansion could include clothing, tax preparation, advertising and legal services and other services.
- **Transportation utility fee and other impact fees.** Proposals to allow local units of government to impose fees on property owners could be seen as a way to mitigate other cuts to local governments.
- **Variance fix.** A recent Supreme Court decision has meant cities must meet a much stricter standard in the granting of variances than has been used historically. MSCA will be working with the League of MN Cities and others to clarify the law.

SMALL TALK

STATS: Top Cities by Units Built

Top 5 Cities ranked by units built
from 2000 - 2010

	Total 2000-2010	2010
St. Paul	11,667	20
Woodbury	6,214	517
Blaine	6,152	331
Lakeville	5,815	135
Shakopee	5,783	186
Total for metro area:	73,545	3,128

Source: Keystone Report