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news

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October 2005

Feature

Kelo v. City of New London: The Shot Heard 'Round the World

by Linda H. Fisher, Larkin Hoffman Daly & Lindgren Ltd.

On June 23, 2005, the United States Supreme Court fired a shot literally heard 'round the world. By a razor-thin 5-4 majority, the Court in *Kelo v. City of New London* upheld the use of eminent domain to acquire non-blighted property for economic development, even though the property would ultimately be conveyed to private developers. "They're coming to take it away" sums up the decision's extraordinary fall-out. Justice

O'Connor's blistering dissent received more attention than Justice Stevens' majority opinion. "The specter of condemnation hangs over all property," she wrote. "Nothing is to prevent the State from replacing any Motel No. 6 with a Ritz-Carlton, any home with a shopping mall or any farm with a factory." The headlines trumpeted: "Seizing Land for Private Use OK'd," "Court Backs City vs.

Kelo v. New London on page 2

Snapshot

Hayden Lake Square



Location: Champlin, MN - SW Quadrant of Highway 169 and Hayden Lake Road

Month/Year Opened: New Construction - November 2005

Owner: Engelsma Limited Partnership

Developer: Cynthia Hable

Managing Agent: Kraus-Anderson Realty Company

Center Manager: Cindy MacDonald

Leasing Agent: Doug Seward (952) 948-9405; Scott Emmack (952) 948-9398

Architect: Eric Reiners, AIA - Welman Sperides Architects, LLC

Construction Contractor: Kraus-Anderson Construction, Midwest Division

GLA: 11,369 sf (plus two pad sites still available!!)

Number of Stores: 8

Anchor Tenants: Dunn Brothers Coffee, Clean-N-Press, SuperCuts and Wireless Toyz (out for signature)

Market Area Served: Champlin, Anoka and surrounding areas

Construction Style: Masonry, decorative block and EIFS

Additional Facts/Narrative: This retail development is located in Champlin at the "Gateway of Anoka," and Dayton market. This center is close in proximity to the new SuperTarget, Lifetime Fitness, Mann Theatres and newly renovated Cub Foods. Demographics reflect 61,978 residents within three-mile radius with an average household income of \$72,931 and traffic counts of 31,000 vehicles per day. Don't miss out on this great opportunity – call now to secure a space!

KELO V. NEW LONDON *continued*

Homeowners” (USA Today), “Supreme Court Rules May Seize Homes” (Chicago Tribune) and “Eminent Domain, A Big-Box Bonanza?” (CNN On-Line). The media gave citizens the distinct impression the Supreme Court had jettisoned the Fifth Amendment in a radical departure from prior law. Even majority Justice Souter’s New Hampshire farmhouse may be on the condemnation block for a project dubbed “Lost Liberty Hotel,” as suggested in a letter sent to Weare, New Hampshire officials.

In reality, the *Kelo* decision did not expand the government’s eminent domain power. Rather, it reaffirms over fifty years of prior precedent in which the Supreme Court had largely declined to second-guess the wisdom of state and local governments’ exercise of the eminent domain power. In fact, some legal experts, including John Echevarria, maintain that while *Kelo* does not stray from the judicial road map, it “represents a change in the direction of less, not more, deferential judicial examination” of the use of eminent domain for economic development. Justice Kennedy’s concurring opinion highlights the limits placed on the economic domain power. But first, an overview of pre-*Kelo* law and the *Kelo* decision.

The Law Before *Kelo*

The Takings Clause of the Fifth Amendment of the U. S. Constitution states: “[N]or shall private property be taken for public use, without just compensation.” The Supreme Court long ago rejected any literal requirement that property may only be condemned if it is to be used by the general public. The Court has instead equated “public use” with “public purpose.” There are several pre-*Kelo* cases in which the Supreme Court upheld the use of eminent domain, even though the property acquired would not be used by the general public.

Overview of *Kelo* Decision

New London, Connecticut has long been in economic decline. In 1990, the state designated it a “distressed municipality.” In 1996, the federal government closed a large naval facility. By 1998, the city’s unemployment rate was nearly double the state’s, and its population was at its lowest since 1920.

A non-profit development agency was established to help the city redevelop the area. In 1998, Pfizer announced it would build a \$300 million research facility nearby. Hoping this would be a catalyst for redevelopment, the city held neighborhood meetings and public hearings to educate the public about the process. The state approved the “integrated development plan,” which called for a waterfront hotel, restaurants, shopping, marinas and office space. The city planned to long-term lease some of the land to a private developer. The developer would then lease the office space to tenants who were not identified when the plan was adopted. The redevelopment would create over 1,000 jobs, increase taxes, and revitalize the community.

The development agency successfully negotiated the purchase of most of the property, but nine owners refused to sell and condemnation proceedings were initiated under Connecticut law. The Connecticut Supreme Court upheld all of the takings, even though the properties were not blighted or poorly maintained.

The Supreme Court upheld New London’s use of eminent domain pursuant to a “carefully considered development plan” based on “thorough deliberation.” The Court refused to adopt a new bright-line rule that economic development takings are unconstitutional or require “heightened scrutiny.” Justice Stevens stated: “Promoting economic development is a traditional and long accepted function of government. There is, moreover, no principled way of distinguishing economic development from the other public purposes that we have recognized.” But the Court also said that states are free to further restrict eminent domain.

Post-*Kelo* Limits on Economic Domain

The Supreme Court did not give government a blank check to use eminent domain for economic development. Justice Stevens’ majority opinion notes:

- Government may not take property to confer a private benefit on a private party or “under the mere pretext of a public purpose.”
- One-to-one property transfers outside the confines of an integrated development plan” may not be valid.
- Eminent domain without comprehensive planning is constitutionally suspect.

- It’s important that the chosen developer be contractually bound to carry out the plan’s public purpose.
- Justice Kennedy provided the critical fifth vote. His concurrence stated that there might be a presumption of invalidity for some takings, such as certain one-on-one transfers. He identified factors that justified upholding New London’s takings. They include:
 - The taking occurred in the context of a comprehensive plan.
 - The plan addressed “a serious city-wide depression.”
 - The economic benefits of the project were not inconsequential.
 - The project beneficiaries were unknown when the city formulated its plans.
 - The city complied with “elaborate procedural requirements” that facilitate review of the record and the city’s purposes.

Minnesota and Federal Legislative Response

All is hardly quiet on the state and federal legislative fronts. Shortly after the *Kelo* decision, the Private Property Protection Act was introduced in the Minnesota Legislature. It proposes an outright ban on eminent domain, if the property acquired will be transferred to a private party. The post-*Kelo* political outcry in Minnesota has been so great, that many legislative watchdogs predict that some form of eminent domain restriction will pass in the 2006 session. This might include stricter standards for satisfying the state constitutional “public use” test and/or expedited review of condemnations by the state appeals court.

Four days after *Kelo* was announced, the Protection of Home, Small Businesses and Private Property Act was introduced in Congress. It prohibits eminent domain solely for private economic development and applies to all federal takings and all state and local takings using federal funds.

The eminent domain debate has been joined throughout the nation. The National League of Cities has urged Congress not to preempt state eminent domain authority. The American Planning Association (APA) supported New London before the

Member Profile

Lee Tuchfarber



Primary Career Focus: Providing retail leasing and sales services for commercial real estate owners, buyers and investors.

Company: Colliers Turley Martin Tucker (Colliers)

Title: Associate-Retail

Hometown: Raised in Columbia, Maryland until I was five, but I consider my hometown to be Hopkins, Minnesota.

Education: University of Minnesota with a degree in Philosophy.

Family: Parents, Marilynn and Chuck, and two sisters, Julie and Anne.

Hobbies: Out-of-bounds downhill skiing out west and cycling.

Job History: First job in the industry was an internship with a small commercial real estate development company.

Very First Job: Besides working for an allowance around the house, my first real job was grocery bagging at Byerly's.

Dream Job: At this point in my career, I am exactly where I would like to be.

Secret Talent: Pop balloons with darts at the State Fair.

Favorite Food: A part of me is infatuated with frozen Tombstone pizza. Another part of me enjoys nearly everything on the menu at Kincaid's.

MSCA Involvement: I am a paying member and an aspiring committee member. I look forward to taking a more active role in MSCA throughout this next year.



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Around the Marketplace

Retail Tidbits

compiled by Tim Hilger, Diversified Acquisitions, Inc.

- If you have to cover the cost of your own car expenses, the IRS will soften the burden for you. As gas prices have crossed the \$3-a-gallon mark, the IRS has updated its mileage reimbursement rate from 40.5 cents a mile to 48.5 cents a mile until the end of this year.
- It appears that Chicago is becoming America's preferred city to try new products and store concepts such as **Gap**, **Best Buy** and **Costco**.
- **Target Stores** announced they will open 32 regular stores and 17 **SuperTargets** in October 2005.
- **Kohl's** announced that within the next 10 years they will add another 550 stores bringing their store count to a projected 1,232 stores, a 68% growth over the present store base.
- **Golf Galaxy** IPO hits a sweet spot by taking its first swing as a publicly traded company in September. The opening day trading price was anticipated to be between \$11 and \$13, but ballooned to \$17 and swelled later to just under \$20.
- **H & M** at the Mall of America, opened the end of September. Based in Sweden, it offers cool, Euro design for women, men, and kids.
- Look for **KB Toys Inc.** to come out of bankruptcy just in time for the 2005 holiday selling season.
- **J. Jill**, a women's clothing retailer, is going up on the sale block, and there is speculation that Urban Outfitters could be a potential buyer.
- The SEC approved the proposed merger of video-game retailers **GameStop Corporation** and **Electronics Boutique Holdings Corporation** and will be brought to shareholders this month.
- **Chico's FAS** is investing \$10 million in privately owned women's active wear chain **Lucy**, which operates on the West Coast. Chico's says the brand appeals to their company because of the management team and its emerging product category.



ICSC/MSCA 2005 North Central States Retail Real Estate Forum

by Ferne L. Sofio, Paster Enterprises, LLC

Synopsis: The joint ICSC/MSCA North Central States Retail Real Estate Forum event on September 13th featured three keynote speakers, round table discussions and a deal making opportunity at the end of the program.

Wal-Mart Store Highlights:

The Wal-Mart presentation focused on the process of overcoming the barriers of entering a new market, particularly rural markets.

- Wal-Mart educated the city and community.
- These opportunities included economic impact, annual savings per year on groceries estimated at \$1,000 per family, creating 300 to 500 jobs in a community of 27,000 residents, the ability to find employment with one's community rather than move to a larger city for employment,

community involvement through donations and increased tax revenues.

- They draw additional businesses who position themselves near Wal-Mart.

Mall of America Highlights:

Since opening in 1992, MOA has drawn over 400 million visitors. The plans for the 5.6 million sf Phase II consist of upscale retailers with an architectural style intended to feel like Rodeo Drive. They also include an entertainment center, theatres, hotels, office space and condos. The goal of Phase II is to compliment Phase I and attract an older demographic – families with teens, baby boomers, generation X and affluent adults.

- Visits to Phase I are 65% local and 35% of visitor and 50% of sales come from beyond 150 miles.

- 10,000+ employees
- Tentative Phase II ground breaking is planned for May 2006, slated to open by 2009.
- The 11 stories: 3 levels of unique retail (less than 50% of the project) 4-story atrium, and 6 levels for entertainment venues.
- Double the parking available, which includes underground parking.

Retail Landscape 2025 Highlights:

The population within the metropolitan area is experiencing slowed growth. The north, south and southwest corridors have the greatest potential for retail and housing development.

Committee Profile

Membership Committee



HABLE



SMOLLEY



JENSEN



KROLCZYK



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NORMAN



SCHOENBAUER



STREED

The MSCA Membership Committee, chaired by Cynthia Hable and Sam Smolley, is responsible for overseeing, promoting and expanding MSCA membership. Currently, there are over 640 members of MSCA. One of the committee's goals for 2005 is to add 75 new members and keep membership retention at 89%. As of September 1, 2005, there were 649 total members of MSCA; 93 new in 2005 – exceeding the current goal. In addition to building membership, the committee is focused on welcoming new members and assisting them to start networking. The committee also creates a target list for potential new member solicitations. Pursuing those leads, the committee promotes the benefits of membership in MSCA which include: valuable networking, a monthly newsletter, continuing education credits, legislative representation and the latest happenings in the retail real estate industry. Membership rates for 2006 will stay the same - \$295 for the first member of each company (General Member), \$130 for each additional member from the same company (Affiliate Members) and \$130 for Greater Minnesota/ Outstate memberships. 2006 Membership renewal forms and invoices will be mailed out soon, so please renew early to continue enjoying the many benefits and privileges of MSCA.

Co-Chairs:

Cynthia Hable (Co-chair), *Kraus-Anderson Companies*
Sam Smolley (Co-chair), *Smolley Consulting Group*

Members:

Bobby Jensen, *Outdoor Environments*
Kevin Krolczyk, *Dalbec Roofing*
Bill McCrum, *RSP Architects Ltd.*
Mark Norman, *Park Midwest Commercial Real Estate*
Laura Schoenbauer, *Gray Plant Mooty*
Todd Streed, *Pinehurst Bank*

October Member News

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

Architectural Consortium LLC

Architectural Consortium LLC recently completed the design and construction documents for the extreme makeover of Burnside Plaza in Burnsville. Consolidated Investment Properties Inc. is the owner/developer and Benson-Orth was the general contractor.

Barna, Guzy & Steffen

The shareholders of Barna, Guzy & Steffen announce that Kristi R. Riley was voted to become the 19th Shareholder of the firm effective July 26, 2005. Kristi joined Barna, Guzy & Steffen in 1995 as a Law Clerk, and became an attorney with the firm following her admission to the bar in 1997. Kristi's practice now includes Commercial Real Estate, Commercial Leasing and Retail Leasing, Condominiums & Cooperatives and Conveyancing.

Griffin Represents Walleye's Bar and Grill

Griffin recently represented Walleye's Bar and Grill, an expansion of Fox's Pizza Den, in their new 6,038 sf in Rosemount.

Opus Northwest LLC

Opus Northwest LLC and RED Development LLC cut the ribbon on Woodbury Lakes, the newest lifestyle center in Woodbury in September, which consists of 398,000 sf.

Westwood Relocates Corporate Office

On September 19, the corporate offices of Westwood Professional Services moved one block to their new Eden Prairie location. Please make note of Westwood's new address: 7699 Anagram Drive, Eden Prairie, MN 55344. All other contact information will remain the same.

Bookmark

These reads won't lower your gas bill, but may give some insight on the latest rollercoaster of oil barrel prices.

The End of Oil: On the Edge of a Perilous New World by Paul Roberts. An introduction to the coming depletion of fossil fuels, the dependence of modern and modernizing society on them, the impact of their disappearance and some measures that might be taken to ease the transition.

Twilight in the Desert: The Coming Saudi Oil Shock and the World Economy by Matthew Simmons. "The entire world assumes Saudi Arabia can carry everyone's energy needs on its back cheaply. If this turns out not to work, there is no Plan B," says Simmons, explaining Saudi secrecy and policies.

The Prize: The Epic Quest for Oil, Money and Power by Daniel Yergin. A historical look at the oil industry – and the struggle for wealth & power that has always surrounded oil, shaking the world economy & dictating outcomes of wars and countries.

Contact Deb Carlson at dcarlson@northstarpartners.net with your reading recommendation.

Rising Star Cabela's Superstore

by Lisa Diehl, Steiner Development

Cabela's superstore, known as the World's Foremost Outfitter® of hunting, fishing and outdoor gear, is about to open its largest outdoor sports store in the state, on Friday, October 14 in Rogers, Minnesota. More than six million visitors are expected to visit the Rogers store annually, making it the second largest tourist attraction in the state, only to the Mall of America.

Cabela's 185,000 sf store was built on approximately 40 acres of a 55-acre site near the intersection of I-94 and Highway 101.

A typical Cabela's store boasts a two-story Conservation Mountain, Big Game African diorama, 45,000 cubic-foot aquarium with freshwater fish, laser arcade, furniture department, gun library, restaurant, general store, fly fishing shop, bargain cave and gift shop. Some stores even have a wildlife museum and boat showroom.

Cabela's Incorporated, headquartered in Sidney, Nebraska, is the nation's largest direct marketer, and a leading specialty retailer of hunting, fishing, camping and related outdoor merchandise. The company was founded in 1961. The Rogers store will be the company's 14 retail location. Other locations in Minnesota are Owatonna and East Grand Forks, which opened in 1998 and 1999 respectively. The company has announced plans to open at least five stores nationally in 2006.

The typical timeline required to build such a comprehensive structure is 12-14 months, but the Rogers Cabela's was completed in a record time of just eight months. Kraus-Anderson Construction Company was the general contractor for the project.

www.cabelas.com ■

MSCA's "Bring a Friend" Program

MSCA will allow members to bring a guest once at the member walk-in rate of \$35 to introduce them to the organization. Book a spot for your guest(s) today for upcoming monthly programs by calling (952) 888-3491.

Halloween 2005

Halloween is the busiest candy-buying season of the year. One quarter of all candy sold each year is purchased between September 15 and November 10, making candy sales for Halloween higher than any other holiday, nearly two billion in sales.

Enough candy corn will be produced this year to circle the moon four times if laid from end to end. Get your share on October 30, National Candy Corn Day.

Market Update

Lake Street Retail Revolution



by Terry R. Smith, TRS Commercial Real Estate, Inc.

Remember when Lake Street was the king of retailing for Minneapolis? Well, times have changed, and Lake Street, which has long been in a retail decline, is showing signs of a retail revolution into a multinational retail destination.

Lake Street West is anchored by Calhoun Commons, an upscale neighborhood center containing 66,150 sf and anchored by Whole Foods and Calhoun Village, and an 85,000 sf neighborhood center anchored by Applebee's and Walgreens. Current activity in the area includes: The Edgewater, a new residential complex under construction and the opening of Amour Victoria Restaurant with one other vacant space. The Ackerberg Group also has announced the new Uptown City Apartments and a two level multi-use street-front space with rear parking. The redevelopment and expansion of Calhoun Square Shopping

Center is by Solomon Real Estate Group, Inc. This redevelopment includes expanding the retail area, office space, parking capacity and adding a multi-level residential component.

Lake Street Central offers The International, Mercado Center with Sullivan's SuperValu Foods and Big K, and numerous retail spaces available along both sides of Lake Street, Cedar and Midtown, the Sears Redevelopment project. Mixed-uses will include the Abbott Northwestern Hospital expansion, Allina Hospital & Clinic Corporate Offices, hotel, office, residential and retail including a Global Marketplace.

Lake Street East, the major retail area at Lake Street and Highway 55 includes a light rail station at Lake Street. The existing retail includes Hi-Lakes Center, which is currently under construction and being redeveloped by Wellington

Management, is anchored by Savers.

At Lake Street and Highway 55 is Minnehaha Center, anchored by Target, Cub Foods, Fashion Bug and MTS Technological High School with Rainbow Foods nearby. Traveling east on Lake Street from Highway 55 to the river, the street is a mixture of mainly freestanding service retail. A new mixed-use development called West River Commons offers a mixture of residential apartments and first level retail with tenants that include Longfellow's Grill, Dunn Bros Coffee, Papa Murphy's and Clean'n'Press. This area is heavily saturated with single family residential and mainly middle income.

When traveling Lake Street from the west end to the east end, one realizes the vast changing face of Lake Street and the diverse income, population and cultural evolution. ■

Thank You!

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Minnesotans have welcomed several hundred Gulf coast evacuees over the course of the last several weeks. Let's continue our generosity to assist the families by making a generous contribution to the survivors and their families. Our local charities have provided assistance and will need to replenish their supplies. Here are just a few of the charitable organizations:

Twin Cities:

- Second Harvest Food Bank
www.seconddharvest.org ■
- Catholic Charities
www.catholiccharitiesusa.org ■
- Minnesota Legal Aid
www.lawhelpmn.org ■
- Employment
www.mnwfc.org ■
- Housing
www.housinglink.org ■
- United Way Twin Cities
www.unitedwaytwincities.org ■

KELO V. NEW LONDON *continued*

Supreme Court and opposes pending federal legislation to prohibit economic development takings. APA advocates integrating eminent domain and land use planning and requiring additional compensation beyond the constitutional minimum in certain cases.

Property rights groups, such as the Institute of Justice, support a federal statutory check on state eminent domain power. They claim that regardless of the "incidental" public benefits associated with economic development takings, the monetary gains favor the private party transferee. As Justice O'Connor's *Kelo* dissent noted, the danger is that those with disproportionate political influence will be the primary beneficiaries while the victims may be the elderly and minorities. History has shown, however, that the disputants in an economic development taking may both be significant, influential business entities.

Thoughts on the Post-Kelo World

Unless and until Congress, the Minnesota Legislature, or Minnesota courts change the rules, the local land use record is the key to a valid economic development taking. The record must be transparent to avoid the appearance of impermissible favoritism to private parties. The record should include:

- A comprehensive development plan documenting the public need for the redevelopment project.
- Evidence that the city reviewed a variety of development plans and chose a private developer from a group of applicants, rather than picking out a particular transferee before the process began.
- Substantial public participation in approval of the redevelopment plan and selection of the developer, including but not limited to citizen task forces, neighborhood meetings and public hearings.
- Documentation, preferably through an independent consultant, of the substantial projected public benefits of the redevelopment project. ■

- Documentation that the city considered alternatives to use of eminent domain, such as relocating or scaling back the project.

Stay tuned for more developments in the coming year!

2005 Event Schedule

Our monthly program meeting date is the first Wednesday of every month. All meetings will be held at 8:00 a.m. (registration at 7:30 a.m.) at the Sheraton Bloomington Hotel unless otherwise noted or publicized before the program. Program topics and location are subject to change.

Wednesday, November 2 – Retail Report (afternoon program)

Tuesday, December 6 – Year End Ceremonies/STARRSM Awards/Holiday Party *Midland Hills Country Club* (afternoon program)

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invites you to our
**Table Top
Trade Show**

Wednesday, November 16, 2005
11:30 a.m. – 1:30 p.m.
Windows on Minnesota
IDS Center, 50th Floor

The MNCREW trade show is an ideal marketplace for new ideas and services in commercial real estate. Attend and take advantage of this unique opportunity to network with one of the most dynamic industry associations in the Twin Cities.

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