



## Freeborn & Peters LLP

### Trend Report: Issues Our Clients Are Talking About

**Lifestyle Centers** -- Enclosed malls are quickly becoming a thing of the past. In their place, a growing number of developers are undertaking new projects called "lifestyle centers" an industry buzzword coined about 15 years ago. The International Council of Shopping Centers (ICSC) defines lifestyle centers as open-air shopping centers with at least 50,000 square feet of space dedicated to upscale national chain specialty stores. They feature fountains, park benches and greenery in a retail setting designed to look like an old-fashioned American Main Street. Lifestyle centers have entertainment venues and quality restaurants, and usually include multiplex movie theaters. These open-air centers have become so popular that owners of enclosed malls are tearing off their roofs and giving their properties a new look and service as multi-purpose, leisure-oriented destinations. Major retailers are quickly adapting to lifestyle centers, which tend to generate higher sales and cost less to operate.

**Form-Based Codes** -- Recently, several communities in various parts of the United States have adopted the latest iteration of "new urbanist" land development regulations -- "form-based codes." These new regulations are designed to support mixed-use neighborhoods by focusing more on the size, form, and placement of buildings and parking, and less on land use and density. According to planner Paul Crawford of the California planning firm of Crawford Multari & Clark Associates, form-based codes strive to address the details of relationships between buildings and the public realm of the street, the form and mass of buildings in relation to one another, and the scale and type of streets and blocks. Form-based codes are based on specific urban design outcomes desired by a community that may be identified through an inclusive, design-focused public participation process. In short, they focus primarily on the form of development, with use of land as a secondary concern. Until recently, the form-based approach to new urbanist land use regulation has been applied mainly in private-covenanted regimes -- Kentlands, Seaside, and their progeny -- a legal atmosphere quite different from the public regulatory sphere.

**"Exclusive" Nightmares** -- Every shopping center developer knows the potential nightmare of coordinating exclusive and prohibited use restrictions among tenants. For example, if a furniture retailer wants the exclusive right to sell "furniture and related furniture items," can the developer put a retailer into a center that sells picture frames and mirrors? To make retailers happy and ensure the viability of your center, there are certain steps each developer should take to clarify these rights and restrictions. First, some developers with high demand centers may refuse to grant exclusive rights at all and will rely on their reciprocal easement agreement to encumber the property with prohibited uses. However, this approach is rarely adopted. Instead, on a more practical level, exclusive rights should be narrowed to their most reasonable level. Recalling our furniture example, an outright furniture exclusive would be understandable. Eliminating the ancillary or incidental sales items as exclusively protected rights is a step in the right direction. Second, in multi-phase developments, exclusive and prohibited use restrictions should be limited to a particular parcel. For example, outlot users should not be entitled to encumber the uses of inline major tenants with restrictions. Third, major tenants (that is, those tenants occupying in excess of 50,000 square feet of space) should be excepted from all use restrictions. This exception will permit a developer to welcome tenants such as Target, Kohl's, Home Depot, Menards, Meijer and others without fear of restriction. Next, all use restrictions should be subject to the terms of existing leases which are in place at the time the restriction encumbers the center. Finally, use restrictions should be granted only to the extent the tenant who desires to enforce the same is open and operating for business in the center. Following these steps will ensure that your center has a better chance to excel without fear of use violation claims.

**Eminent Domain** -- This summer, the United States Supreme Court released its decision in the eminent domain case *Kelo v. City of New London*. The Court, in a 5-4 vote, upheld the action of the City Council of New London, Connecticut, to (i) condemn land on which existing private homes were located and (ii) thereafter transfer the property to a private nonprofit development company to build offices, a hotel, conference center, and marina as part of a redevelopment plan for an area of the City. The law of eminent domain is rooted in the Fifth Amendment to the U.S. Constitution, which permits the taking of private property for a public use upon payment of just compensation. Usually, eminent domain battles are fought on the "just compensation" side of the equation, but here the Court was presented with differing interpretations of the "public use" requirement. The majority reasoned, in part, that the "public use" clause of the Fifth Amendment was satisfied by the "public purpose" of economic development, i.e., the creation of new jobs and increased tax revenue that would flow from new development occurring in an area that the

State had declared to be economically distressed. The strongly-worded dissents, particularly Justice O'Connor's, lamented that the majority decision would permit the taking private homes by the government for any economic improvements that would be implemented by a private party, all while the property taken was not itself blighted. Published commentary on the case has been fast and furious. Much of the more vocal commentary so far has been in line with the dissents, claiming that this decision seems to violate the fundamental understanding that citizens have held about their own homes as the cornerstone of their lives. On the other hand, many have commented that without this power, governments would be without one of the most practical tools to foster growth that is beneficial to the whole community. As a result of this case and the high level of interest in this issue across the U.S., there will likely be a marked increase in legislative initiatives at the local and national level -- in fact, bills have already been introduced in Congress in response to this case, and several state statutes governing the power of eminent domain have been amended. There may also be more challenges to the exercise of eminent domain, especially given the unique joining of governmental and development interests on the one hand and community groups and private property rights advocates on the other. While the revitalization of areas based on economic development purposes may now be easier to plan for and get approved, the very close decision of the Supreme Court, the strong dissents, and the passionate commentary appear to also demand a close examination of each situation on its merits, in particular the degree of distress of the property involved and the public benefits of the proposed redevelopment.

**Condo Converters and Other Developers Embrace Tax Planning to Reduce Costs** -- The trend of converting existing apartment buildings, warehouses and other structures into residential condominiums continues throughout the country. In fact, this trend has evolved in many areas to also include office and commercial condominiums as well as residential redevelopments. As demand, as well as development costs, increase for these projects, our tax and real estate attorneys have worked together to help tax-savvy developers increase their project returns by adopting a tax-favored structure that preserves some portion of its gain as capital gain. In the right circumstances, we have seen instances in which the adoption of a capital gain preservation structure has reduced the client's effective tax rate by up to 200 basis points.

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