

**Take and Give: Condemnation Is Used To Hand One Business Property of Another
--- Tactic by Local Governments Seeking Jobs and Taxes Is Protested as Unfair ---
BMW Yes, Mitsubishi No**

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When a developer decided to bring Home Depot and Costco stores to New York's East Harlem, the state of New York had a simple message for William Minic and his cabinetmaking business: Get out.

Although Mr. Minic has operated his family firm there for 20 years, a state agency has announced its intention to condemn the building if he doesn't vacate, and then resell it to the developer.

Local and state governments are now using their awesome powers of **condemnation**, or eminent domain, in a kind of corporate triage: grabbing property from one private business to give to another. A device used for centuries to smooth the way for public works such as roads, and later to ease urban blight, has become a marketing tool for governments seeking to lure bigger business. Cities now undertake about 80 business projects a year involving condemnations, twice as many as a decade ago, says Jeffrey Finkle, head of the Council for Urban Economic Development in Washington, D.C.

It is happening nationwide. In East St. Louis, Ill., this spring, a redevelopment authority formed by Illinois law took property from an active metals-recycling business and resold it to an out-of-state motor-speedway company to serve as a parking lot. "Government is getting more brazen," fumes the recycler's lawyer, Jeff Pitzer, who is particularly irked that the speedway company paid the agency's legal costs.

That isn't unusual, says a lawyer for the redevelopment authority, Harry Sterling, who adds that the speedway, which had opened in 1997 and is drawing big crowds, is a "huge boon" to the region. The speedway operator, a unit of Dover Downs Entertainment Inc. of Dover, Del., says it needed more parking quickly. The recycler is appealing the loss of its property in a higher state court.

The U.S. Constitution endorses the taking of private property for "public use," with compensation. Lately, communities intent on creating jobs and enlarging their tax bases have stretched the meaning of "public use" to embrace a host of undertakings that promise to improve their economic or, in some cases, social well-being.

Critics complain that when governments cannibalize smaller but viable businesses, they trample property owners' rights. "Everybody is making money except the indigenous inhabitants of the redeveloped area," says Gideon Kanner, professor emeritus at Loyola Law School in Los Angeles, who calls the trend "profoundly immoral."

Critics also say condemnations sometimes are carried out to help the politically powerful at the expense of the less-well-connected. "I call it the marriage of big business and big government," says Joseph R. Borich III, a lawyer in Leawood, Kan., who represents a hotel, a convenience store and other businesses being condemned to make way for a speedway. "The little property owners get creamed."

But proponents say most condemnations bring significant benefits for struggling communities and aren't major hardships for the landowners, who receive compensation approved by a court based on appraisals. Indeed, proponents say business owners sometimes are the ones abusing the system, managing to gouge cities by resisting until they are paid more than their property is worth.

Many of the issues are on display in the village of Port Chester, N.Y., which this year told Nadel Industries Inc., a maker of cosmetics packaging that employs 200 people, to make way for a shopping center that will include a multiscreen movie theater. Mark P. Weingarten, a lawyer for the developer, G&S Investors LLC of Old Bethpage, N.Y., says the project could transform the working-class community near the Connecticut border. "It's the greater good vs. one individual interest," he says.

He adds that city officials warned Nadel when it moved from another part of town three years ago that the area could be subject to eminent domain. But Murray Nadel, the family-owned company's president, says the village did quite the opposite -- it wooed him to this spot in Port Chester by issuing \$5 million in bonds for his business. A lawyer for Port Chester, Michael Zarin, concedes that bonds were floated for Mr. Nadel's move but explains that because of economic cycles, cities don't have the luxury of choosing when to go forward with ambitious projects like the shopping center. "It's unfortunate that there are some successful businesses that get caught up in the net," he says.

Mr. Nadel will fight the looming **condemnation**, a process that, as in other cases, ultimately involves the local government's asking a state court to approve a takeover, and then compensation.

Although Port Chester isn't an especially affluent community, these days even some that are well off find themselves short of tax revenue. "A suburb cannot survive economically based on residential property taxes alone," says Mr. Finkle of the urban-development council. **Condemnation** becomes part of the quest for sizable commercial taxpayers.

With each side convinced it is right, the disputes can easily become acrimonious. In East Harlem, a Long Island developer won approval of a state redevelopment authority to build the Home Depot and Costco superstores. It will invest \$100 million and create 2,000 jobs, says Blumenfeld Development Group Ltd. of Syosset, N.Y. Most of the six-

acre plot is an abandoned wire factory, which the developer bought at foreclosure. But the site includes a few small businesses, including Mr. Minic's eight-employee cabinet shop.

The state development authority has approved a plan that includes the Minic property in the area subject to **condemnation**, and says it will ask a court to take it as a last resort unless the Minics can come to terms with the development company. The developer and Mr. Minic see the issues in starkly different terms. "This project brings a sense of faith and a sense of improvement to an area that has sorely lacked self-confidence," says a development-company official, David Blumenfeld. Says Mr. Minic: "What really bothers me is the special favors these guys get."

Although the cabinetmaker is fighting the takeover of his property, U.S. law doesn't make his task easy. The power of government to take private land for the public good is as old as the Bible and dates in this country to colonial times. Courts let Revolutionary-era farmers build private roads across neighbors' land, reasoning that they would help establish a road system for the nation. However, other state courts sometimes blocked projects, such as a 1918 plan for a California irrigation ditch to benefit a private farm.

In the past half century, the Supreme Court has been clear on the issue. In two key decisions, it gave legislatures a virtually free hand in deciding what is a public use. In 1950s, the court allowed the taking of a viable department store in a blighted area of Washington, D.C., for a commercial development. And in 1984, it unanimously allowed a Hawaiian housing agency to force large landholders to sell to people leasing from them in a land-redistribution program.

In the Hawaii case, the court said eminent domain had traditionally been permitted if it related to any "conceivable public purpose." Some constitutional scholars lamented that sweeping language. But cities have taken advantage of it, stretching the term to cover privately owned shopping malls, racetracks, luxury condominiums, offices and casinos.

And car lots. In 1967, William Gross and his wife, LaVerne, started a Toyota dealership on a busy corner overlooking Interstate 35 in Merriam, Kan. "We borrowed the money and worked our butts off," Mr. Gross says. In later years, the lot, expanded to nine-tenths of an acre, was leased to a rug vendor and various used-car dealers.

Surrounding Johnson County is now one of the most affluent in the nation, and the high-altitude corner commands a strategic spot within an easy drive of most of the area's 1.7 million residents. Mr. Gross, 75 years old, counted on renting out the lot for his retirement.

Trouble is, it has all but slipped from his grasp. In September, the city won a **condemnation** order for his lot and intends soon to resell it to his next-door neighbor-a BMW dealer. "Everybody I talked to wants to know how the hell they can do that," he says.

In 1995, the city signed an agreement giving the neighbor, Baron Automotive Group Inc., exclusive rights to come up with a redevelopment plan for an area that included Mr. Gross's property. The deal lapsed but was revived last year, and in April the city signed a final deal agreeing to condemn Mr. Gross's lot in exchange for Baron's building an expanded BMW dealership and adding a Volkswagen franchise.

Afraid he would lose his land if he didn't offer an alternative plan, Mr. Gross signed a deal with another car retailer who agreed to open a Mitsubishi dealership on the property. That dealer, Mitchell Morse, says he could have generated about the same sales tax for Merriam as the Volkswagen franchise.

Merriam's mayor, Irene B. French, defends the move against Mr. Gross's property. She says small cities like Merriam, population 13,000, have few revenue options, but one they do have is a share of sales tax on goods sold in their community. They need to maximize it. She says Mr. Gross wouldn't improve his property to increase the tax, nor negotiate with his BMW-dealer neighbor. "He just didn't want to do anything," she says. As for his plan for a Mitsubishi dealership, she says that came too late and wasn't as credible as the BMW dealer's plan.

By contrast, the BMW dealer is offering to spend \$8 million to enhance its dealership and Mr. Gross's lot, says Larry Winn III, a lawyer for the dealer. "The ability to assemble the entire parcel was important to us," he says. "We're not going to spend \$8 million and hide it behind a used-car lot."

The city sought a **condemnation** of Mr. Gross's lot, which a state court in Olathe, Kan., granted. A three-member appraisal panel named by the court set Mr. Gross's compensation at \$880,000, an amount he says is too low because he could rent the lot for \$10,000 a month. He says he intends to seek a trial over the amount.

Occasionally, a court will block a **condemnation** on the ground that the public use is too minor and the private gain too great. An Indiana state judge did that in September when he stopped the city of Indianapolis from taking a tomato packer's warehouse for new quarters for Anthem Inc., a mutual insurance company.

The judge later vacated his ruling after the agency agreed to pay the tomato company, Ray & Mascari Inc., more money. The city agreed to a price of \$2.1 million. That was six times what an agency appraisal said it was worth.

(See related letter: "Letters to the Editor: The Need for Eminent Domain" -- WSJ Dec. 22, 1998)