

Cities Use Eminent Domain To Clear Lots for Big-Box Stores Small business owners often the victims of corporate power

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Big-box retailers have a message for local landowners: Move.

And the command has the force of law, much to the dismay of Darrell M. Trent, a part-time developer in Pittsburg, Kan. Mr. Trent thought he scored a coup this year when he leased part of a seven-acre parcel his family had owned since the 1960s to a local plumbing supplier.

But the city took the property this spring through its powers of eminent domain and handed it to a developer with a different tenant: Home Depot Inc.

Says Mr. Trent: "After having carried it all this time, for them to step in and take it away from me -- it really denies me my corporate livelihood," Mr. Trent says.

Desperate for tax revenue, cities and towns across the country now routinely take property from unwilling sellers to make way for big-box retailers. Condemnation cases aren't tracked nationally, but even retailers themselves acknowledge that the explosive growth of the format in the 1990s and torrid competition for land has increasingly pushed them into increasingly problematic areas -- including sites owned by other people.

The village of Port Chester, N.Y., is clearing an entire business district -- including a marina, a housewares importer, an antiques store and several other businesses -- to make way for Costco Wholesale Corp., Bed Bath & Beyond Inc. and others. Costco took over another site after the city of Cypress, Calif., condemned a vacant lot as a "public nuisance" to stop a Christian group from building a religious center there. After a public uproar, the city found another site for the church, which says it is satisfied with the ultimate outcome.

The township of North Bergen, N.J., moved to condemn a store in a shopping center occupied by Kmart Holding Corp. in favor of a developer who plans another Home Depot. When the city of Maplewood,

Mo., invited retailers to compete for a chunk of choice land, developers for Costco and Wal-Mart Stores Inc. fought a nasty legal and political battle. Wal-Mart's developer won -- and 150 homes and businesses were condemned.

Next spring, Costco will face its second shareholder resolution in two years asking the company to "adopt a policy for land procurement and use that incorporates social and environmental factors," particularly, the wishes of local property owners and community groups. The resolution was brought by Christian Brothers Investment Services Inc., New York, which says its concerns include "reputational risk" from eminent-domain use. "If the company continues to operate in this manner, with the amount of publicity and protests, this could end up impacting shareholder value," says Julie Tanner, a Christian Brothers spokeswoman.

Property-rights advocates say the use of condemnation for big boxes is an abuse of government power that subsidizes big retailers at original landowners' expense. "They're the new generation of robber barons, like the railroads of the 19th century" says Gideon Kanner, a professor emeritus at Loyola University Law School in Los Angeles. "They look upon this as the new way of doing business."

The U.S. Constitution and most state constitutions allow the government to take private property, with compensation, for a "public use." But courts over the years have allowed cities and towns to stretch the definition to include economic-development projects, on the principle that one private owner can better create jobs and increase tax revenue than another.

Retailers say they're doing nothing wrong. Costco, based in Issaquah, Wash., is the most outspoken of the big retailers in defense of the practice. In a candid letter to a concerned shareholder two years ago, the company's senior vice president for legal and administrative affairs, Joel Benoliel, acknowledged that "probably dozens" of its projects involved eminent domain "or the threat of it." He wrote that if Costco didn't do the deals, "our competitors for those sites, like Target, Home Depot, Kmart, Wal-Mart, BJ's, Sam's Club and many others, would ... and our shareholders would be the losers."

Mr. Benoliel says the practice doesn't violate laws or any rules of the free-market economy and rejects as "simplistic" libertarian arguments that condemnations should be confined, as some property-rights advocates argue, to roads, bridges and purely public uses. He says communities, balancing their fiscal needs against the rights of a few, often clamor for a Costco store. "We are viewed as a

solution to a problem," he says.

Whether condemnees get full value for their property is a matter of bitter debate. Property owners invariably complain they are strong-armed into accepting low-ball offers. In New York's Port Chester, a working-class city on Long Island Sound, developer Bart Didden says that village redevelopment officials this year offered him \$250,000 for a lot that a separate local taxing authority assessed last year at \$560,000. He is challenging the village's condemnation in federal court in White Plains, N.Y.

John Watkins, a special counsel for the village, says all offers were based on "highest approved appraisals," as required by state law. He says he understands Mr. Didden's reaction, but adds that tax assessments and appraisals serve different functions -- "apples and oranges," as he puts it.

Also in Port Chester, property owners and tenants alleged in several suits filed since 2000 in state court in White Plains, N.Y., that G&S LLC, the town-appointed developers, tried to prod them into settling pending condemnation suits by, among other things, removing sidewalks in front of a restaurant and filling its parking lot with rubble; tearing out street lights around an antiques store and shearing off the roof of a still-operating coin laundry.

Doug Riley, a partner with closely held G&S, Port Chester, says the allegations are both untrue and "100% frivolous." He says that under its agreement with the town, the firm was required to proceed with the project, while working around certain properties still the subject of litigation. "We were proceeding in due course with the project as we were required to do by the village," he says. Suits involving the restaurant, the antiques store and laundry are pending.

Lately, cities' power to condemn property has come under increased legal scrutiny. In August, the Michigan Supreme Court reversed a landmark 1981 ruling, widely cited by other states, that effectively barred condemnations for purely economic purposes in that state.

Then, in September, the U.S. Supreme Court agreed to hear a suit brought on behalf of New London, Conn., property owners challenging the city's plan to clear nonblighted homes and businesses to make way for an office-and-research park. The case, brought by Institute for Justice, a Washington, D.C., property-rights law firm, is the first the high court has heard on economic-development condemnations since the 1950s.

Last year, a federal judge sharply criticized Target Corp. for its role in a condemnation of a St. Louis site. The case began after Target, which was already renting a store on the site, asked its landlord for permission to knock down the store and build a larger one. When the landlord asked for higher rent, Target never called back and turned to a local alderman, who started condemnation proceedings, according to an opinion by Judge Charles A. Shaw in U.S. District Court, St. Louis.

Judge Shaw also found that Target "falsely" threatened the city that it would abandon the store if the condemnation didn't take place. He also found that the Minneapolis retailer and the city commissioned a "blighting study" that found the store's electrical and heating systems had indeed deteriorated -- but failed to note that Target itself was responsible under the lease for keeping the systems up. Finally, the judge found, when the city scheduled a public hearing on the condemnation, in November 2002, it sent notice to Target, but not to the landlord -- a trust representing the Aaron family of New York and others -- which didn't learn of the hearing until a month later.

Judge Shaw issued a temporary order halting the taking. Earlier this year, the Eighth Circuit U.S. Court of Appeals reversed the order, ruling the case should have been heard in state court. Edward M. Goldenhersh, a St. Louis lawyer for the landlord said the family was disappointed with the appeals-court ruling because the court "ducked the issue." The two sides settled afterward.

A Target spokeswoman declined to comment. A spokesman for Mayor Francis Slay didn't return telephone calls.

Mr. Trent, the Kansan, had a special hardship fighting his case: When it was filed, he was serving as a U.S. ambassador with the Coalition Provisional Authority in Iraq. He says the case began after he rejected a "low-ball" offer from Home Depot's developer, then flew to Baghdad. His lawyer tried to fend off the taking, but a state court in Pittsburg let it go forward this spring. Mr. Trent is challenging the compensation. That case is pending.

Allen Gill, Pittsburg's city manager, says Mr. Trent was well compensated, receiving more than \$1 million for his property -- a large sum for rural Kansas. He also says Mr. Trent and another owner's opposition blocked a badly needed project that has already sparked other development in town.

"Does the greater good outweigh the inconvenience to the two?" Mr. Gill asks.

In a statement, Atlanta-based Home Depot said the project would bring "good paying jobs and economic development," adding that "the City of Pittsburg identified this site as an area in need of redevelopment, and the Home Depot was receptive to working with the developer who was negotiating with the city."