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How the eminent domain bulldozer created a private-property backlash

Port Chester, New York, never set out to be a battleground in the property-rights war.

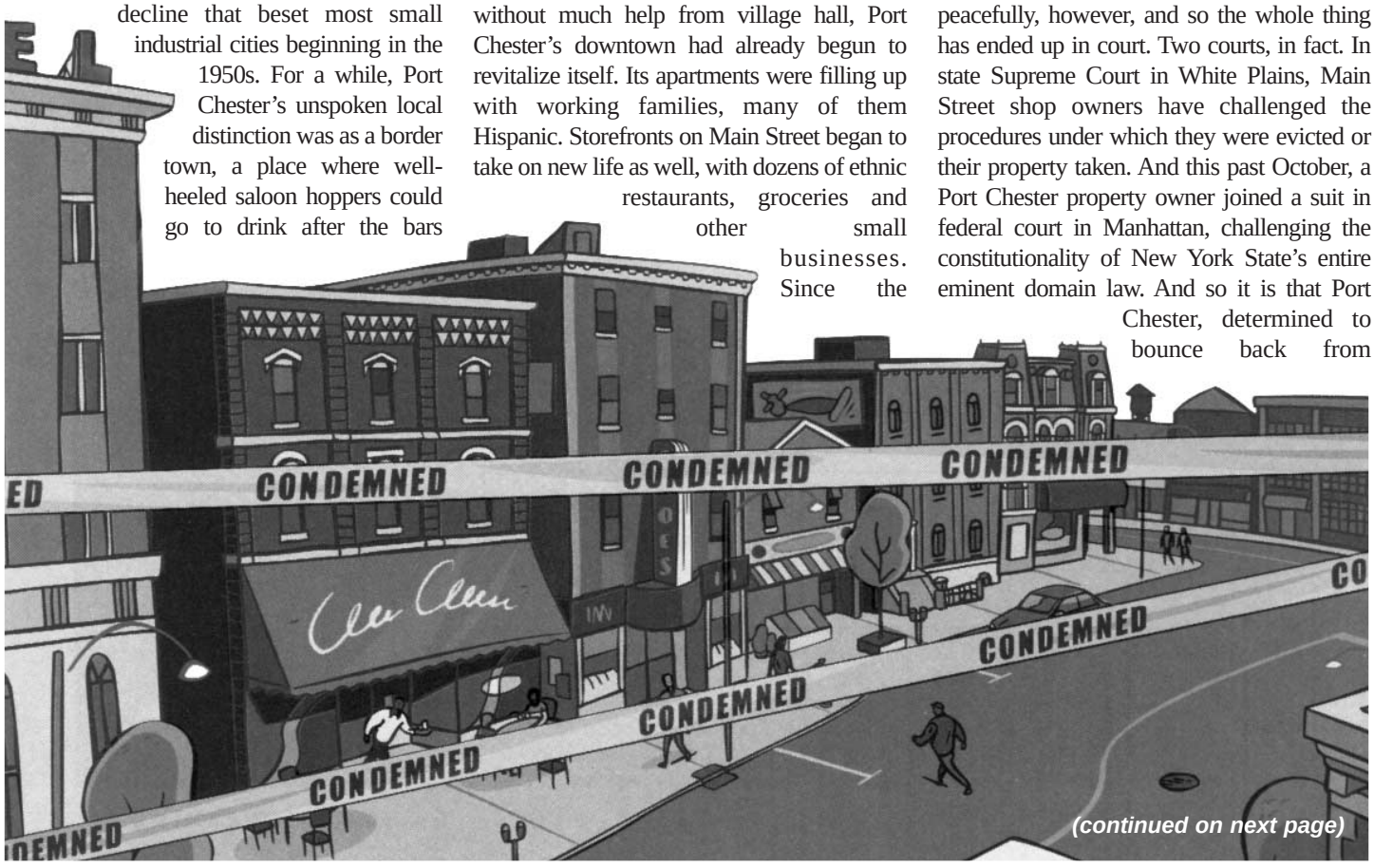
Something of a poor stepchild to its more glamorous neighbors--genteel, moneyed Greenwich, Connecticut, and the equally affluent Rye, New York--Port Chester has its share of peaceful lawns fronting elegant Tudors and Colonials, but at its heart, it is an old industrial town. Its downtown has been in trouble for decades, plagued by the factory closings, retail abandonment and overall decline that beset most small industrial cities beginning in the 1950s. For a while, Port Chester's unspoken local distinction was as a border town, a place where well-heeled saloon hoppers could go to drink after the bars closed in Greenwich.

So, in the late 1970s, Port Chester declared a big chunk of its downtown to be a renewal area. In the years after that, plan after plan came and went, with developers announcing their intentions and then abandoning the cause. Then, in 1999, the village approved a megaplan--an ambitious $120 million effort to remake its waterfront along the Byram River, which runs into Long Island Sound--with a 27-acre entertainment and retail complex. Finally, its mayor declared, Port Chester was "turning the corner."

There was just one problem. Quietly, without much help from village hall, Port Chester's downtown had already begun to revitalize itself. Its apartments were filling up with working families, many of them Hispanic. Storefronts on Main Street began to take on new life as well, with dozens of ethnic restaurants, groceries and other small businesses. Since the mid-1990s, downtown Port Chester has even been a magnet for shoppers and diners from Greenwich and Rye who want something a little more exotic than their local mall.

Village leaders, however, weren't content with this; they wanted their retail and entertainment complex. So Port Chester exercised its right of eminent domain. Over the past year, many of the families, restaurants and stores that had brought a measure of life back to downtown have been evicted to make way for the wrecking ball and, in the end, the retail giants who will define Port Chester's new downtown.

Not all of them have been willing to go peacefully, however, and so the whole thing has ended up in court. Two courts, in fact. In state Supreme Court in White Plains, Main Street shop owners have challenged the procedures under which they were evicted or their property taken. And this past October, a Port Chester property owner joined a suit in federal court in Manhattan, challenging the constitutionality of New York State's entire eminent domain law. And so it is that Port Chester, determined to bounce back from



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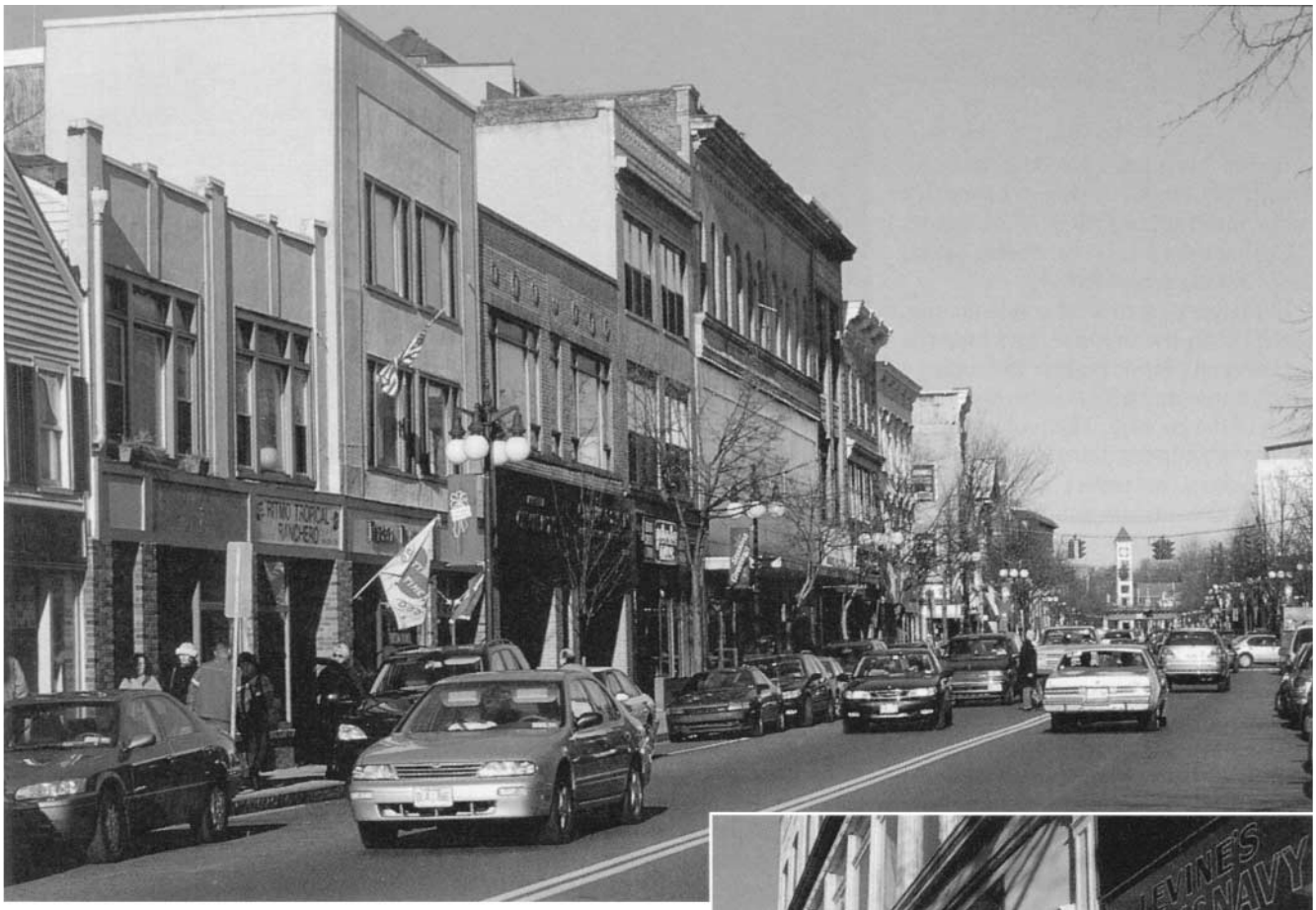

Main Street in Port Chester, New York. Does it look blighted? It did to the city government.

decades of decline, has unwittingly helped open up the newest front in the national battle over property rights.

For the most part, this battle has focused on "takings"--that is, on the loss in value a property owner suffers from government regulations or land-use decisions. Eminent domain, the procedure under which a government body can condemn property it wants for a "public use," has never been that much of an issue. In this country, eminent domain authority dates back to colonial times, and derives its current legitimacy from the 5th Amendment to the U.S. Constitution, which states clearly that private property must not "be taken for public use without just compensation." Eminent domain "is a critical power that the framers of the Constitution carefully preserved, and that even the most conservative members of the Supreme Court have been reluctant to narrow," says Doug Kendall, executive director of Community Rights Counsel, a public interest law firm in Washington, D.C., that helps local governments defend their land-use regulations.

But opposition to local condemnation powers is on the increase, and over the next several years it is likely to become a significant issue for local governments in much of the country. The problem is not the use of eminent domain to take land for a school or library or road; that remains uncontroversial. But local governments such as the one in Port Chester are now employing eminent domain to hasten redevelopment, essentially taking one private owner's land and handing it to another private owner whose plans the local government happens to prefer.

Governments have condemned tracts of housing to make way for plant expansions, taken land from a viable business and resold it to a motor speedway to use as a parking lot, taken private homes to make way for hotels and big-box retail centers, and even condemned property owned by one prospective hotel owner to make it available for a different hotel. "We've gotten into this situation where private business is looking at government as their real estate agent, and government is looking at itself as a private deal broker, except that it has the power to force someone to sell their land," says Dana

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Berliner, an attorney with the Institute for Justice, a Washington, D.C., law firm that litigates property-rights cases on behalf of property owners. It was Berliner's firm that filed the lawsuit challenging New York State's eminent domain statute.

Using eminent domain to switch private owners is not, actually, a new strategy for cities. The right of local government to clear "blighted" areas is legally well established, and was used extensively in the 1950s and '60s for inner-city slum clearance. These days, though, states define "blight" so broadly that it has lost much of its meaning. A commercial area can be condemned for blight even though its only serious problem is inadequate parking. A neighborhood can be declared blighted because of its "unusual topography." Both of those conditions can actually be found in state blight statutes.

In other words, a practice that was once used to try to reverse economic decline in desperate instances of market abandonment is being wielded more and more by local governments to compel private owners to comply with whatever officials think is the best use for a piece of land. "The public-purpose test has been so watered down over two generations that it can mean almost everything," says Bob Denlow, a St. Louis lawyer who chairs one of the American Bar Association's condemnations committees. "The courts have allowed economic development to be a legitimate justification for the public-purpose requirement in eminent domain cases, even if in layman's terms, the area isn't blighted."

For local officials and others concerned about a city or town's vitality, there's nothing wrong with this, argues Jeff Finkle, executive director of the Council for Urban Economic Development, in Washington, D.C., an organization of economic development professionals. "Eminent domain, in my opinion, is the most important redevelopment and revitalization tool available to downtowns, central cities and inner-ring suburbs," he says. "Let's say somebody is carrying on business as a small printer, they're making money, they've been there 30 years, but they're in the way of a new convention center/hotel. The property-rights people go ballistic when a business is acquired to make a profit-making activity for someone else; they see that as unnecessary government intrusion. But the reality is, the government has bigger responsibilities. It has a responsibility to create jobs for people in the community. It has a responsibility to the quality of life. Communities have to be able to use eminent domain wisely and appropriately to allow future economic development to occur."

Slowly, however, skepticism is growing about just how wisely and appropriately local officials do, in fact, use their condemnation powers. The doubts arise because, when it comes to economic development, local governments feel compelled these days to violate the advice delivered to them by John Maynard Keynes in 1926: "The important thing for government," Keynes said, "is not to do things which individuals are doing already, and to do them a little better or a little worse, but to do those things which at present are not done at all." In places such as Port Chester, government is stepping in with its condemnation powers to take on functions that private individuals not only are performing but in many cases are performing quite well. The result is that the first signs of an eminent domain backlash are starting to appear.

In 1998, for instance, the town of Merriam, Kansas, which sits in the Johnson County suburbs of Kansas City, Missouri, condemned close to an acre of land owned by a local businessman. The property was not vacant--the owner had rented it to some used-car dealerships. But the land sits on a hillside overlooking the interstate and a major local thoroughfare, and the city considered it prime development material. So the city council struck a deal with a neighboring BMW dealership: If the land was made available to them, the dealership would expand and open up a Volkswagen agency as well.

Eminent domain was invoked, and the owner lost his property. But the public at large considered the move excessive, and in the ensuing political controversy four city council members--half the council--lost their seats. Local government in Merriam is still riven by the question of how assertive the city should be in pursuing development--and whether it is fair to take land away from one business to transfer it to another business that sells the same kind of product.

In Maryland last November, voters overwhelmingly turned down two moves to expand counties' eminent domain powers. In Prince George's County, in the suburbs of Washington, D.C., a proposed constitutional change would have authorized the county council to use an aggressive "quick take" approach to property it wanted for redevelopment, allowing the county to gain ownership simply by paying what it considered fair market value--and letting the courts sort out later whether that value was actually fair. The change was voted on statewide, and got only 38 percent of the vote.

Nearby, in Baltimore County, County Executive C.A. Dutch Ruppersberger was handed what the Baltimore Sun called "the worst defeat of his career" when voters in his own jurisdiction trounced a measure giving the county the right to use eminent domain for economic development projects. Although the measure had passed the state's General Assembly last year, opponents in Baltimore County portrayed it as a naked power grab by Ruppersberger, and voters evidently agreed: Not only was the question defeated by better than a 2-to-1 margin, it lost in all but four of the county's 187 precincts.

Legislators in a few states, galvanized by specific eminent domain cases, are starting to look at narrowing the circumstances under which the concept can be used. In Colorado, Representative Andy McElheny, a Colorado Springs Republican, successfully sponsored legislation in 1999 making it more difficult for cities to use "blight" as a rationale for condemning land. A commercial real estate broker, McElheny was reacting in particular to a case in suburban Denver in which a Ford dealership sat on land that, if made available to a developer, would vastly increase the value of a neighboring parcel the town had already declared blighted.

"This dealership was huge and thriving," says McElheny, "there was no way you could consider it blighted, but the community was going to condemn it anyway." Under Colorado law, there are eight conditions that define blight, including deteriorating structures, inadequate street layout, unsanitary or unsafe conditions, and defective titles. Until McElheny came along, only one of the eight was necessary for property to be condemned; now that his measure is law, four of the eight conditions must be present before property can be declared blighted and taken away. "We didn't want to interfere with urban renewal in blighted areas," he says, "but at the same time, we wanted to try to stop local government from condemning unblighted areas simply for the convenience of private developers."

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In Pennsylvania, the move to tighten up eminent domain laws is being led by Bill Robinson, a Democrat who represents downtown Pittsburgh in the state House of Representatives. For the past two years, the city has been mired in controversy over the plans of Mayor Tom Murphy to raze a somewhat down-at-the-heels--but still vibrant--downtown retail stretch and replace it with a $480 million retail and entertainment center. Robinson, who as a city council member in the 1970s supported the use of "blight" designations and eminent domain for revitalization, now stands foursquare against the practice.

Not only hasn't it worked in Pittsburgh, Robinson argues, but it places the government in a position where it does not belong. "It's an obvious example," he says, "of where government is leveraging its power on behalf of one individual against another. And it puts the individuals being leveraged against at a decided disadvantage." The aim of his proposal, according to Robinson, "is to make it impossible for government to take property from one individual and turn it over to another, plain and simple. And I want to change the definition of blight, to come up with a more precise definition so that when it is used, it's for a clearly identifiable purpose." So far, the legislature has not acted on the measure.

If the legislative climate is shifting in a direction favored by property-rights advocates, though, public sentiment on eminent domain is likely to change very slowly, on a case-by-case basis. "It's not something people want to read about in the National Enquirer or their local newspaper," Robinson concedes. "It usually affects people only when the government comes and wants to take their property and turn it into a Kmart parking lot."

And no one actually has a clear grasp on how commonly the issue crops up. Jeff Finkle, of the Council for Urban Economic Development, estimated a couple of years ago that eminent domain authority might be exercised by larger cities roughly 80 times a year. He insists, however, that this was only a gross approximation. "No organization I know of," he says, "keeps track of this stuff."

The absence of hard data hasn't stopped property-rights advocates from pursuing the issue in court. Their first success came in 1999, when the New Jersey Supreme Court ruled that the state's Casino Reinvestment Development Authority could not condemn a home and two businesses in Atlantic City so the Trump Hotel and Casino could build a parking lot there. "It was through working on that case that I became aware of the incredible abuse of eminent domain all across the country," says Dana Berliner, of the Institute for Justice. Since then, Berliner and her colleagues have taken on several eminent domain cases and made themselves available in Pittsburgh, where the city hasn't yet exercised its authority for the downtown entertainment center, but still might do so.

The legal strategy here is clear. It has been 16 years since the U.S. Supreme Court last ruled on eminent domain, in a case from Hawaii in which the justices sided with a state housing agency pursuing land reform by forcing large landowners to sell to their tenants. Writing for a unanimous court, Justice Sandra Day O'Connor--not always a fan of activist government--declared that attacking "certain perceived evils of concentrated property ownership" was clearly a legitimate "public use."

Even though this decision gave state and local governments great leeway in the ways they use eminent domain, Berliner argues that it is time for another look. "Since that time, courts' jurisprudence on property rights has changed dramatically in other areas, yet we haven't seen another eminent domain case come down the pike," she says. "So I think the time is right for a shift in the way the Supreme Court and other courts treat the issue."

All of this has defenders of government land-use authority urging that public bodies use eminent domain cautiously. In instances where they have delegated the authority to developers, as they're allowed legally to do in Missouri, and as they have, in effect, done in other places, communities are "on a little thinner ice," says Community Rights Counsel's Doug Kendall. And in every case, he warns, "a local government has to be careful that they've made the findings that justify this as furthering an important public interest." The question of whether that interest includes trading in one property owner for another, more upscale owner, will undoubtedly get its day in court sometime soon.