

## Spring Preview

### By Terri Smith, Environmental Liability Management Inc.

# What is in store for brownfield revitalization efforts in 2007?

In 2005/2006, there were a number of court decisions at the federal and state level, changes to implementing agencies policies, as well as a decrease in appropriated federal and state funding for brownfield related activities that could impact brownfield redevelopment efforts in 2007 and beyond. What the cumulative impact or consequence these actions will have on the future redevelopment of brownfield properties is still to be determined.



Terri Smith

For example, one such Federal court decision was *Kelo vs. New London*, (Kelo decision). The Kelo decision ruled in favor of a town using eminent domain on property owners to allow for private redevelopment efforts to be undertaken. This decision's impact has had a rippling effect on redevelopment efforts in states across the country regarding the use of eminent domain. Many states are now reviewing and passing their own eminent domain laws and policies. In the past, eminent domain was most often used by governments to complete public projects such as infrastructure improvements, or for the construction of public buildings. However, more recently, it has been used as a means to facilitate economic redevelopment in towns throughout the United States. Due to the Kelo decision, it was estimated in 2006 that over 30 State legislatures were evaluating the powers of

governments to condemn private property to facilitate economic growth.

In NJ, the end of Dec. 2006 brought about a New Jersey Supreme Court ruling in the *Mount Laurel Township v. MiPro Homes, L.L.C.* (MiPro) case regarding a NJ municipality's right to condemn land in order to preserve open space. The interesting aspect of this case is that the property owner (MiPro) had received its approval to build homes on the property. Subsequent to MiPro receiving its approvals, the Township filed a declaration of taking on the property for open space purposes. This State Supreme Court decision gives municipalities the authority to condemn land for recreational and conservation purposes.

Both of these decisions, Kelo and MiPro could have an impact on a developer's willingness to invest in brownfield and other properties for redevelopment. One impact that has already been felt is banks re-evaluating lending money to developers who acquire property through the use of eminent domain. It is anticipated that the impact of the use of eminent domain will be played out throughout 2007.

In addition to the court related decisions, some federal brownfield program related decisions could also have an impact on the future development of brownfield properties. These program related decisions include a reduction in appropriated funding levels by Congress to the U.S. Environmental Protection Agency (EPA) and the U.S. Housing and Urban Development (HUD) for their brownfield grant programs. These programs supplied the

necessary "seed" money to communities that is often required to get brownfield projects started in some of the less than desirable locations throughout the country. This reduction in allocation will mean less money to the states for the administration of the state brownfield program and less money to the participating communities for the implementation of their brownfield redevelopment programs. The Federal transportation funding to brownfield redevelopment has also been reduced. This reduction of federal transportation funding could impact the ability to build the necessary infrastructure to support planned redevelopment efforts.

Individual states are also re-evaluating their current brownfield and economic related policies and programs. These re-evaluations could lead to the implementation of regulatory and policy changes that may also impact brownfield redevelopment efforts. One such policy change that was implemented in 2006 concerns the NJ Department of Community Affairs (DCA) prohibition of the sale of residential units until a site wide no further action letter is issued by the NJDEP. Developers often times build in phases that allows revenue to be generated from the first phase to be used for the build out of later phases. The policy shift may seriously impact the economic feasibility of projects moving forward. Other issues that are impacting the reuse of brownfield properties include vapor intrusion and contaminated fill.

Anticipated changes to land use laws, state regulatory policy changes, agency understaffing

to handle newly implemented program initiatives, new laws, new and amended regulations all provide the potential to impact the private sector and add to the current challenges for completing a successful brownfield redevelopment effort in 2007.

The items outlined above, when taken individually, may not have a substantial impact however, when looked at as a whole, could have an unintended impact on future brownfield related redevelopment efforts. These items could cause additional costs and/or add time for the completion of agency reviews and could unintentionally make the cleanup of formerly contaminated properties less certain and more expensive and, in turn, impact the intent of brownfield reuse program.

No one would argue that the cleanup of contaminated properties is a responsibility that is undertaken to ensure that the new reuse is protective of human health and the environment. However, that being said, the brownfield program should be evaluated as a whole before making additional changes that, on face value, may seem of little consequence but when looked at in the context of other policy shifts have unintended consequences. At a time when green space is at a premium and being preserved, there needs to be an evaluation of ways to encourage the cleanup and reuse of brownfield sites in a timely and cost effective manner.

**Terri Smith is redevelopment coordinator for Environmental Liability Management Inc. headquartered in Princeton, NJ. ■**