

# Financing Brownfield and Sustainable Projects

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# Brownfields Are Complicated

## ■ Liability

- Insolvent Liable Parties
- Environmental Litigation
- Toxic Torts

## ■ Environmental

- Uncertain cleanup costs
- Regulatory Uncertainty
- Post-Remedial Obligations

# Brownfield Complications

- Complicated land assembly
- Numerous stakeholders
- Use Restrictions vs Highest and Best Use

# Seller Concerns

- Purchaser Environmental Experience
- How Will Purchaser Finance Project
- Development Experience/Reputation

# Common Owners/Investors

- Corporations (43%)
- Partnerships (25.6%)
- Not For Profits (10.5%)
- Institutions (7.6%)
- Government (6%)
- REITs (4.1%)
- Individuals (2.4%)
- Others (0.7%)

# Sources of Financing/Capital

## ■ Debt

- commercial lenders
- Mezzanine Loans

## ■ Equity

- Private Equity
- Opportunity Funds
- REITs
- High Net Worth Individuals

# Know Your Lender

- Mortgage Lender
- Community Bank
- Agency (Fannie/Freddie/HUD)
- Asset-Based Lender
- Private Equity
- REIT
- Distressed Debt Purchaser

# Type of Loan

- Senior Lien
- Subordinate Lien
- Loan Participant
- Mezzanine Lender
- Seller Financing
- Joint Venture



# Loan Disposition

- Whole Loan on Books
- Sell Pieces
- Securitization
- Refinance vs. New Loan

# Typical Bank Concerns

- Credit Risk-
  - Borrower Ability to Pay Loan
  - Value of Collateral
  - Carry Risk
  - Construction Risk
  - Real Estate Risk
  - Delays

# Bank Concerns

- Direct Liability
  - Cleanup costs
  - Toxic Torts
  - Take-Out Risk or Exit Strategy
- Reputational Risk

# Lender Liability

- Secured Creditor Exemption
  - CERCLA/RCRA Only
  - State Lender Liability Rules
- Common Law
  - PD/BI
  - Nuisance
  - strict liability
  - trespass
  - negligence

# Workouts and Foreclosure

- Heightened risk
- Reevaluate Environmental Issues
  - status of cleanup
  - stockpiled soils
  - stormwater and dust
- Review Federal and State Requirements
- Security and Auctions

# Loan Documentation

- Loan Covenants to Perform Cleanup
- Loan Guaranty
- Loan Indemnity
  - Free-standing
  - Survive Loan Payout

# Risk Minimization Tools

- Regulatory Signoff
- Remedial Action Plan (RAP)
  - Quantifies Cleanup Costs
  - Shows Site Fully Characterized
- Escrow/Holdbacks
- Indemnity
- Insurance
- Guaranteed Remediation Programs

# Risk Minimization Tools, cont.

- Brownfield Financing
  - grants
  - tax credits
- UST and Dry Cleaner Funds
  - eligibility
  - Covered costs (cleanup, PD,TP)
  - Limits liability to deductible
  - assignment of rights



# Insurance

- PLL or Cost Cap Insurance
  - Lender as additional insured
  - Severability
  - Retroactive date
  - Disclosed Document Endorsement
- Insurers want:
  - Site characterization or RAP
  - Affirmative covenant
  - Escrow, holdback or financial assurance

# Land Use Controls (LUCs)

- Long-term maintenance
- Funding Concerns
- Some states require subordination

# Sustainable Development

- Traditional Lenders
- Private Equity
- Agency Lenders
  - HUD
  - SBA
- Government Owners
- Government Tenants