

Public Sector Partnerships



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Mayor Frank G. Jackson

- Local Government Role
 - Convener – Bring Relevant Parties to the table
 - “Honest Broker”
 - Facilitate Transactions w/ Reluctant or Unsophisticated Sellers
 - Provide Technical Assistance throughout Assessment & Remediation Process
 - Advocate/Applicant
 - Advocate for Development w/ Financing Agencies & Regulators
 - Applicant for Public-oriented Financing



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Filling the Gaps

- Brownfield Redevelopment is Complicated!
- Numerous Issues can derail a Project if not quickly addressed:
 - Financing
 - Site Acquisition/Assembly
 - Regulatory Challenges
 - Contracting
- Public Sector Agencies need to react to any of these issues quickly and clearly

City of Cleveland

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Regulatory Risk

- Brownfield Properties Pose Financial Risk
- How clean is clean? The parts per Million argument
- Compliance hot buttons – IAQ, Pathways change the landscape.
- Unknown conditions and Clean-up coverage

Complications to Avoid

- With an “A Team” there is still no guaranty
- How much is enough test data?
- Contractual Indemnification between parties and the insurance backstop.
- Controlling the cost of insurance



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Using Public Sources to Get a Project Done

Public Incentives can be the difference between a “go” and a “no go” for a project.

Types:

- Grants (for Assessment, Remediation or both)
- Fully forgivable loans
- Low interest loans
- Tax incentives



Highlighted Project:

MidTown Tech Park,
Cleveland, Ohio

- 128,000 SF new construction
- Brownfield: contaminated soil; underground storage tanks; historic uses
- Incentive: Brownfield Assessment Grant (\$50,000); Job Ready Sites Grant (\$3.5M)
- Requirements: NFA; CNS; Prevailing Wage; Employment Requirements

Using Public Sources to Get a Project Done

Key is to identify the right source for your project and to identify its requirements to see if the cost will outweigh the benefit.

Identify requirements while still finalizing sources and uses, financing and the construction contract.

- VAP
- NFA
- Covenant Not To Sue
- Construction Hiring Requirements: Prevailing Wage; MBE/FBE
- Employment Requirements
- Deadlines

Highlighted Project:

7000 Euclid, Cleveland, Ohio

- 50,000 SF renovation
- Brownfield: contaminated soil; underground storage tanks; historic uses; hydraulic lifts; asbestos; lead paint
- Incentive: Brownfield Assessment Grant (\$10,000); County Forgivable Loan (\$500,000)
- Requirements: NFA; CNS; Prevailing Wage; Employment & Construction Requirements



Brownfield Redevelopment Legal Strategies



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Strategies to Address Environmental Liability

- I. **Contractual** (*Private Parties Only, Not Regulators*)
 - o Reps/Warranties
 - o “As Is” Clause
 - o Release
 - o Indemnification

- II. **Due Diligence** (*Bona Fide Purchaser Defense*)
 - o Only legal liability protection as to CERCLA

- III. **Regulatory Cleanup** (*Each is a Separate Program*)
 - o RCRA = Regulated Hazardous Waste
 - o UST = BUSTR Standards
 - o CERCLA = Superfund cleanup
 - o TSCA = PCB's
 - o VAP = Ohio's Voluntary Cleanup Standard



Bona Fide Purchaser Defense

- o Small Business Liability Relief and Brownfields Revitalization Act (Brownfields Act)
- o Signed into law by President Bush on Jan. 11, 2002
- o Amended CERCLA to provide liability protection
- o A buyer with “clean hands” can qualify for liability protection if it performs adequate due diligence **BEFORE** it buys or leases a property even if property is contaminated

Bona Fide Purchaser Defense

U.S. EPA's "All Appropriate Inquiries Rule"

Must perform Phase I prior to purchase

- o Meets ASTM 1527-05 (2005 Standard)
- o New ASTM Standard 1527-13
- o A Current Phase I or updated Phase I w/i 180 days of purchase

If Phase I identifies Recognized Environmental Conditions (RECs)

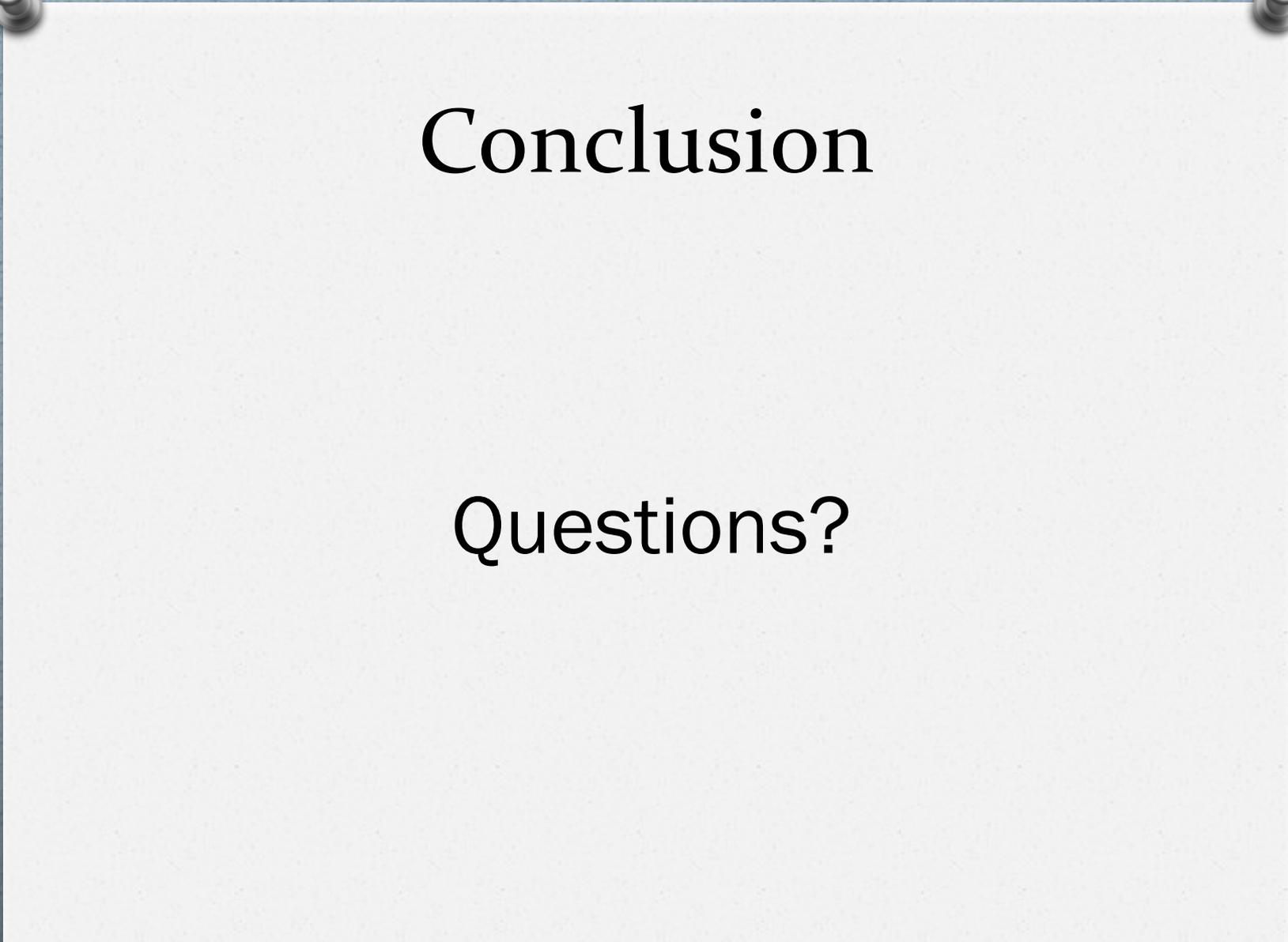
- o ASTM doesn't require sampling if RECs identified
- o Case law indicates Phase II is prudent if REC identified

Phase II (sampling of the property/RECs)

- o If contamination identified, then AAI requires purchaser to meet "continuing obligations" (i.e. due care with regard to contamination)

Due care does not mean full clean up (prevent exposure or release)

- o Maintain barriers (parking lots, floors, etc.)
- o Stop continuing releases



Conclusion

Questions?