CHAPTER EIGHT

WORKING WITH THE PRIVATE SECTOR TO REDEVELOP BROWNFIELDS

Most brownfield sites ultimately are developed privately or through a public-private partnership. Municipal brownfields programs can facilitate private-sector redevelopment by taking steps to address the unique challenges and opportunities that exist in securing private financing for brownfields development.

In addition to the economic considerations inherent in all real estate development transactions, brownfields redevelopment presents economic risks that financing particularly challenging. The most significant risk is posed by the potential environmental contamination at the site. Where there is uncertainty over the extent and nature of the contamination, there is also uncertainty about liability and about the cost and timing of the cleanup. These uncertainties may deter traditional lending institutions from becoming involved in the early stages of a brownfields redevelopment project or may result in financing terms that make a project unfeasible or create significant financing gaps.[65] Potential developers may be unwilling to pursue a brownfields project in the face of the greater financial risks and uncertainties over returns on their investment.

Real Estate *Pro Formas*: The Financial Bottom Line

A real estate *Pro Forma*, or financial statement, is a tool that is used to communicate all the relevant information about a real estate development project. It balances the costs of a project against the flow of income which the project will produce. The pro forma represents the basic financial analysis that developers use to decide whether to move forward with a project, and it is through the pro forma that municipalities and private developers work out the details of a brownfields redevelopment partnership.

The preceding chapters of this handbook have discussed actions that municipalities can take to reduce the risks and uncertainties of brownfields redevelopment – both to advance public sector redevelopment projects and to create a stronger foundation for facilitating private redevelopment.

- *Working with community stakeholders* throughout the process to create a broad base of support for redevelopment;
- *Coordinating among local government agencies* to solidify government support and streamline municipal and state decision-making;
- *Developing a vision* for site reuse to help guide the project and ensure that community needs will be addressed; and

[65] For more detailed information on lending institutions and the risks posed by brownfields, see the New Jersey Institute of Technology's Technical Assistance for Brownfields website, http://www.njit.edu/tab/managing/brownfield/index.php.

- *Assisting in assessment and cleanup activities* at brownfields to clarify cleanup costs or to address cleanup before financing is pursued.

There are a number of other steps that municipal agencies can take to spur private redevelopment of brownfield properties that are publicly or privately owned.

Strategic Considerations for Facilitating Private Investment in Brownfields Redevelopment

►**Educating developers about federal and state financial assistance programs.** In many cases, private parties will be eligible for federal and state grants, loans, tax credits, and other forms of financial assistance for brownfields assessment, cleanup, and redevelopment. For properties that present significant risks and obstacles to redevelopment, combining different financing mechanisms from the public and private sectors can help build an economically sound project. Municipal agencies can spur redevelopment by providing owners and developers with timely and practical information about how to access key federal and state programs that are targeted to the private sector. These programs are highlighted at the end of the chapter and included in Appendix B.

►**Leveraging municipal funds to facilitate private financing of brownfields redevelopment.** In some cases, a small amount of public funding can make the difference in whether a private redevelopment project goes forward. In addition to linking developers with federal and state programs, local governments in New Jersey can create financial incentives for redevelopment. Municipalities can, for example, target fees, fines, or other local revenues for redevelopment projects.

Another type of local financing tool available for brownfields projects is *tax increment financing*. As part of the New Jersey Economic Stimulus Act of 2009, the state legislature established the Economic Redevelopment and Growth (ERG) Grant Program. The program is similar to tax increment financing, whereby estimated incremental tax revenues derived from qualified redevelopment projects are redirected to developers to defray a portion of the project costs. The program provides incentive grants to redevelopment projects in "qualifying economic redevelopment and growth grant incentive areas" to fill in financing gaps for the projects. Developers can apply for an incentive grant up to 75% of the annual incremental state tax and/or local tax revenue. (See http://www.njeda.com/web/Aspx_pg/Templates/Npic_Text.aspx?Doc_Id=1186&menuid=1424&topid=718&levelid=6&midid=1175.)

Any New Jersey municipality that has designated a redevelopment area may also (either directly or through application to the NJEDA) issue tax-exempt bonds to fund the infrastructure and remediation portion of a redevelopment project. The municipality may provide a tax abatement and establish a *payments in lieu of taxes* agreement with the developer to pay the debt service on the bonds.[66]

[66] N.J.A.C. 40A:12A-66.

Working with Private Developers through Redevelopment Agreements

As noted earlier, New Jersey municipalities are authorized under state law to designate Redevelopment Areas and to promote redevelopment in those areas through actions including the exercise of eminent domain. Certain state and local financing mechanisms are specifically designed for Redevelopment Areas, as described at the end of this chapter and in Appendix B. The *Redevelopment Agreement* is a contract between the designated municipal redevelopment authority and a developer to implement all or part of the Redevelopment Plan. The agreement details the responsibilities of the municipality and the developer, as well as the timing and oversight mechanisms for carrying out the project.

►**Understanding the role of insurance in facilitating brownfields redevelopment.** Environmental insurance can help satisfy regulatory responsibilities, minimize liability for contamination, and facilitate brownfields acquisition or sales. Insurance can also help procure loans by providing lenders with the certainty that borrowers will have enough money to pay back the loans. Types of insurance for brownfields projects include: (1) *environmental remediation insurance***,** to protect against releases that took place before the writing of the policy, but are discovered afterwards; (2) *stop-loss or cleanup cost-cap coverage*, to protect against cleanup costs that far exceed the estimated cleanup costs; (3) *pollution legal liability insurance*, to protect against migration of contamination to other sites or against third-party and property injury claims, and (4) *secured creditor insurance,* to insure the balance of loans when the borrower defaults and there is an environmental condition on the property.[67] Municipalities can help private developers by providing information about the types of insurance and by linking small developers or site owners with insurers.

►**Clarifying the liability considerations for developers who acquire brownfield sites.** Under New Jersey law, an entity that is "in any way responsible" for hazardous substances is strictly liable for all cleanup and removal costs.[68] As noted in Chapter Six, local governments may be eligible for relief from liability under both state and federal law where there is an "involuntary acquisition" or other acquisition to promote redevelopment. The law also provides certain defenses to liability for private parties. . For example, those who acquire property subsequent to the discharge and are not in anyway responsible for the contamination may qualify for an innocent landowner exception to liability if they meet detailed requirements set out in the law, including the completion of the preliminary assessment (PA), and, if necessary, a Site Investigation (SI) at the time of purchase.[69]

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[67] See National Association of Local Government Environmental Professionals and Northeast-Midwest Institute, *Unlocking Brownfields: Keys to Community Revitalization* 123-124, available at: http://www.resourcesaver.com/file/toolmanager/CustomO93C337F65023.pdf; Env. Law Inst., *A Guidebook for Brownfield Property Owners* 15, available at: http://www.elistore.org/reports_detail.asp?ID=459.

[68] N.J.S.A. 58:10-23.11g(c)(1).

[69] N.J.S.A. 58:10-23.11g (d).

The law also provides relief from liability for the payment of natural resource damages and restoration of natural resources, for an owner who acquired the real property after the hazardous substance discharge, was not in any way responsible for discharge, and has not contracted to pay the damages or to restore lost or damaged natural resources.[70] Additionally, lenders who do not participate in the management of a project will generally not be deemed a responsible party (and thus liable for cleanup) solely by virtue of their security interest in the project.[71]

Federal law also provides defenses to Superfund liability in certain circumstances. Entities that acquire property and had no knowledge of the contamination at the time of purchase may be eligible as an *innocent landowner* if they conducted all appropriate inquiries (AAI) prior to purchase and complied with other pre- and post-purchase requirements, as discussed in Chapter Five. A *bona fide prospective purchaser* defense is available to persons who acquire property, even if they know or have reason to know of contamination on the property, provided they meet eight threshold criteria (including AAI) spelled out in the federal regulations, comply with ongoing obligations, and do not impede the performance of a response action or natural resource restoration. The *contiguous property owner* defense applies to those who own property that may be contaminated but is not the original source of the hazardous substance contamination, provided the landowner does not know (or have reason to know) prior to purchase, that the property is or could be contaminated.[72]

►**Working with Community Development Entities.** Community Development Corporations (CDCs) play an important role in neighborhood revitalization, which may include the purchase and redevelopment of brownfield properties. Municipalities can work with CDCs to help build their capacity and to connect them with federal, state, and other brownfields resources. Many of the financial resources listed in Appendix B and at the end of this chapter are available to nonprofit corporations. In addition, CDCs can seek technical support from non-governmental organizations in New Jersey. Some of the organizations described in Chapter Two – in particular the Housing and Community Development Network of New Jersey and the National Center for Neighborhood and Brownfields Redevelopment – help build capacity of CDCs and other community-based organizations. Another organization, the Local Support Initiatives Coalition (LISC) has an office in Newark & Jersey City that provides technical assistance to CDCs, helps guide CDC projects through city and state processes, and creates opportunities for public and private sector lenders to support the work of CDCs. (See http://www.lisc.org/content/offices/detail/609/.)

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[70] N.J.S.A. 58:10-23.11f.22 (a).

[71] N.J.S.A. 58:10-23.11g5. A holder of a security interest is considered to be actively participating in the management, while the borrower is still in possession, only if the holder exercises decision making or managerial control over the enterprise as described in state law. N.J. Stat. Ann. 58:10-23.11g4.

[72] See CERCLA Sec. 107, 42 U.S.C. 9607; U.S. EPA, "Landowner Liability Protections," available at: http://www.epa.gov/oecaerth/cleanup/revitalization/landowner.html.

►**Creating a strong marketing campaign to reach developers**. Marketing is a key step for municipalities that own brownfield sites and wish to make the sites available for redevelopment in the private sector. The focus of a marketing campaign will vary depending on the characteristics of the site, the stage at which the municipality is seeking to transfer the site, and the actions that have been taken to address site conditions. In all cases, marketing efforts will benefits from a clear vision for the property, developed in concert with a broad range of community stakeholders. Local and state economic development officials can bring important experience to the marketing effort, including contacts with key business associations and groups whose members may be interested in the properties. For large projects, the municipality may consider hiring a consultant or attorney to assist in preparing detailed materials to explain the site conditions and context.[73]

There are a variety of avenues for disseminating marketing materials for brownfield sites. The New Jersey SiteMart provides a free listing of brownfields. Many municipalities have developed web pages that highlight available brownfield properties. A municipality can also create a list of tax-delinquent brownfield properties subject to municipal foreclosure and publicize the list to potential developers. The city of Milwaukee created such a list and provides the public with basic information about the process through which the properties could be foreclosed and then transferred to a private developer.[74] Marketing of brownfield sites can be done through a formal municipal procurement process via a Request for Proposals.

Key Resources for Facilitating Private Financing

Appendix B contains a listing of the key state and federal financial assistance programs that are available to fund various stages of brownfields redevelopment initiatives. The following programs provide financial assistance directly to *private* entities in the form of general project financing or grants and loans for specific aspects of brownfields redevelopment, such as site cleanup.

- *Brownfields and Contaminated Site Remediation Reimbursement Program*. Through this program, developers enter into a Redevelopment Agreement with the NJEDA and are eligible for up to 75% reimbursement of approved remediation costs. The developer must be a non-responsible party agreeing to undertake and complete the environmental clean up of the site.
- *Hazardous Discharge Site Remediation Fund* (HDSRF). Innocent parties who meet the criteria spelled out in the program may be eligible for up to 50% of costs for PA, SI, RI, and RA activities, not to exceed $1 million. The HDSRF is jointly administered by NJDEP and NJEDA.
- *Brownfields Revolving Loan Fund.* Developers in selected municipalities may apply to NJEDA for low-interest loans for brownfields remediation activities. Funding comes from an initial $2 million grant capitalized by the U.S. EPA.

[73] See generally, Commonwealth of Massachusetts, *Smart Growth/Smart Energy Toolkit*, at: http://www.mass.gov/envir/smart_growth_toolkit/pages/mod-brownfields.html.
[74] See City of Milwaukee, How to Purchase a Tax Delinquent Brownfield in Milwaukee, at http://www.mkedcd.org/brownfields/bfhowpurch.html.

- *Economic Redevelopment and Growth (ERG) Grant Program.* The ERG program provides incentive grants to developers worth up to 75% of the incremental state tax and/or local tax revenue associated with the project. In addition to applying for a local government grant, developers can apply for a state grant from the NJEDA.
- *Fund for Community Economic Development.* NJEDA provides loans to stimulate real estate-based economic development projects in urban and smart growth locations. Loans up to $50,000 are available for feasibility studies and other pre-development costs. Loans up to $1.25 million are available to fill financing gaps in the development of community facilities and other projects, including associated environmental remediation costs.
- *Urban Site Acquisition Program.* This is a revolving loan fund administered by the NJRA for the acquisition, site preparation and redevelopment of properties that are part of a larger urban redevelopment plan in NJRA-eligible communities.
- *Environmental Equity Program* (E^2P). Private and nonprofit developers can apply to the NJRA for loans to help fund planning, site acquisition, remediation, and demolition activities associated with brownfields redevelopment projects in NJRA-eligible municipalities. The site must be part of a broader redevelopment plan and the scope and timeline of remediation must be known.
- *New Jersey Pre-Development Fund.* This fund supports pre-development activities in NJRA-eligible urban communities. The fund covers feasibility studies, architectural costs, environmental and engineering studies, legal and other related soft costs needed for development to proceed.
- *New Jersey Redevelopment Investment Fund***.** This program provides a flexible investment fund for business and real estate ventures in NJRA-eligible urban communities. The program makes available direct loans, loan guarantees, and other forms of credit enhancements.
- *NJRA Bond Program*. NJRA issues bonds for making long-term loans at below-market interest rates to qualified businesses and non-profit organizations for redevelopment projects in NJRA-eligible urban communities. Proceeds from tax-exempt bonds may be used for land and building acquisition, new construction or expansion, purchase of new equipment, and debt/refinancing and working capital.
- *Municipal Landfill Closure and Remediation Reimbursement Program.* NJEDA reimburses eligible developers up to 75% of the closure or clean up costs associated with the remediation and redevelopment of a municipal solid waste landfill. Reimbursement moneys are derived from one-half of the sales tax revenues generated from any business located on the site.
- *New Markets Tax Credit Program.* This U.S. Department of the Treasury Program permits taxpayers to receive a tax credit for making qualified equity investments in approved Community Development Entities, who in turn use the funds to provide investments in low-income communities.