

Insights

Why Smart Lenders Are Betting on Brownfields

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An increasing number of developers and expanding companies across Indiana are turning to contaminated properties, commonly called “brownfields.” These sites provide ideal locations for urban infill projects as well as existing improvements and infrastructure for rural developments that can often be acquired at a substantially discounted price. As a result of this demand, some lenders have become more comfortable with the management and resolution of environmental risks, affording them a competitive advantage. There are several reasons why Indiana offers a uniquely favorable environment for lending on brownfield redevelopment projects:

Lender Liability Protections

Lenders are insulated from liability for contamination under federal and state law. The federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) imposes strict environmental liability on owners and operators but expressly excludes lenders who hold “indicia of ownership primarily to protect [their] security interest.” 42 U.S.C. §9601(20)(A). State laws similarly exclude lenders from liability for contamination from hazardous substances (I.C. §13-25-4-8), petroleum facilities (I.C. §13-24-1-10), and above or underground storage tanks (I.C. §13-23-13-14). Even if a lender forecloses on a contaminated property, the lender may still maintain business activities, wind up operations, address environmental contamination, sell or liquidate the facility, and take actions necessary to protect and preserve the property without risk of environmental liability. Borrowers and buyers of foreclosed properties can also limit their liability for contamination by conducting standard Phase I Environmental Site Assessments to qualify for bona fide prospective purchaser and similar defenses. This network of exemptions and defenses, which has been well-established for decades, is designed to encourage lending for brownfield redevelopment.

Environmental Cost Recovery

Indiana law provides multiple options for defraying the costs of environmental investigations and cleanups, protecting lenders and their borrowers. Starting with the Indiana Supreme Court’s 1996 decision in *American States Ins. Co. v. Kiger*, there have been a series of state court appellate rulings that have made Indiana the most favorable state in the country for insurance recovery for environmental losses. Under these cases, the standard pollution exclusions used in commercial general liability policies were determined to be ambiguous and interpreted in favor of coverage. As a result, there are decades of insurance policies under which insurers are obligated to pay for environmental investigation and remediation. Contamination discovered during standard transactional due diligence can trigger a seller’s liability policies providing millions of dollars in coverage. In these instances, contaminated collateral can be restored to full value without any material risk or cost to the lender or its borrower.

In addition to options under federal statutes (e.g., 42 U.S.C. §9607), Indiana's Environmental Legal Action statute (ELA) provides for the recovery of environmental investigation and clean-up costs from anyone who "caused or contributed to the release of a hazardous substance or petroleum." I.C. §13-30-9-2. These statutory claims can be used to target former owners and operators as well as offsite polluters and trigger their historic insurance policies. The ELA provides for the recovery of attorney fees and employs a favorable rolling statute of limitations that allows for costs to be pursued anytime within 10 years after they were incurred. Lenders and their borrowers should take full advantage of this unique combination of caselaw and statutory protections to ensure that the cost of environmental cleanups do not hinder brownfield redevelopment projects.

Public Funds

Brownfield redevelopment projects, directly or through partnership with governmental units, can also qualify for a variety of public funds to address environmental costs. Each year, communities across the State are awarded federal Brownfields Assessment Grants that can be used for investigations at potentially contaminated sites. These assessments help to reveal the extent of existing contamination so that the cost to reach regulatory closure can be more accurately determined. They also provide valuable information about potentially responsible parties for cost recovery actions.

A variety of other funds can provide for clean-up costs at qualifying sites. The Excess Liability Trust Fund pays for the remediation of releases from registered underground storage tanks and certain above-ground tanks. The Revolving Loan Fund facilitates brownfield redevelopment through low interest loans to eligible borrowers for environmental costs. The Petroleum Orphan Site Initiative, which was originally developed to address petroleum contamination from leaking underground storage tanks, has expanded to address hazardous substances at these sites. While each of these public funding sources has its own limits and qualifications, coordination with local governments and the Indiana Brownfields Program can provide access to substantial additional funds to resolve environmental concerns.

Brownfields Present Opportunities

Due to this combination of protections and incentives under federal and state law, brownfields in Indiana should no longer be viewed for their risks, but instead for their upside potential. Lenders can finance below-market acquisitions of brownfields in desirable locations with development potential, manage the attendant risks with the tools outlined above, and benefit from the substantially appreciated value of collateral after regulatory closure is achieved. While not all brownfields are created equal, experienced environmental attorneys and consultants can help identify sites where the potential rewards outweigh the risks and are worth the lender's investment.

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