

Building the Due Diligence Team and New Redevelopment Trends

Presented by:

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Due Diligence Overview from a Planning-Grounded Professional

- Process Overview, Multidisciplinary and Process/Product Backdrop
- The Changing Role of the Lawyer as Team Member, Today's Focus on Redevelopment and Constrained Site, Case Studies

Due Diligence

- Definition: “The process of investigation into the details of a potential investment”
- Land use and environmental regulation but a piece of the puzzle

Due Diligence Should Be:

- Efficient and cost-effective analysis of a property's opportunities and constraints
- Evaluated in light of the owner's objectives

Is It Worth It?

- Costly, time consuming, complex
- Takes place under the gun of an approaching deadline

Yes, It is Worth It!

- Only way to develop a realistic and achievable investment strategy
- Crawl into the details (literally and figuratively)
- Find hidden risks and opportunities

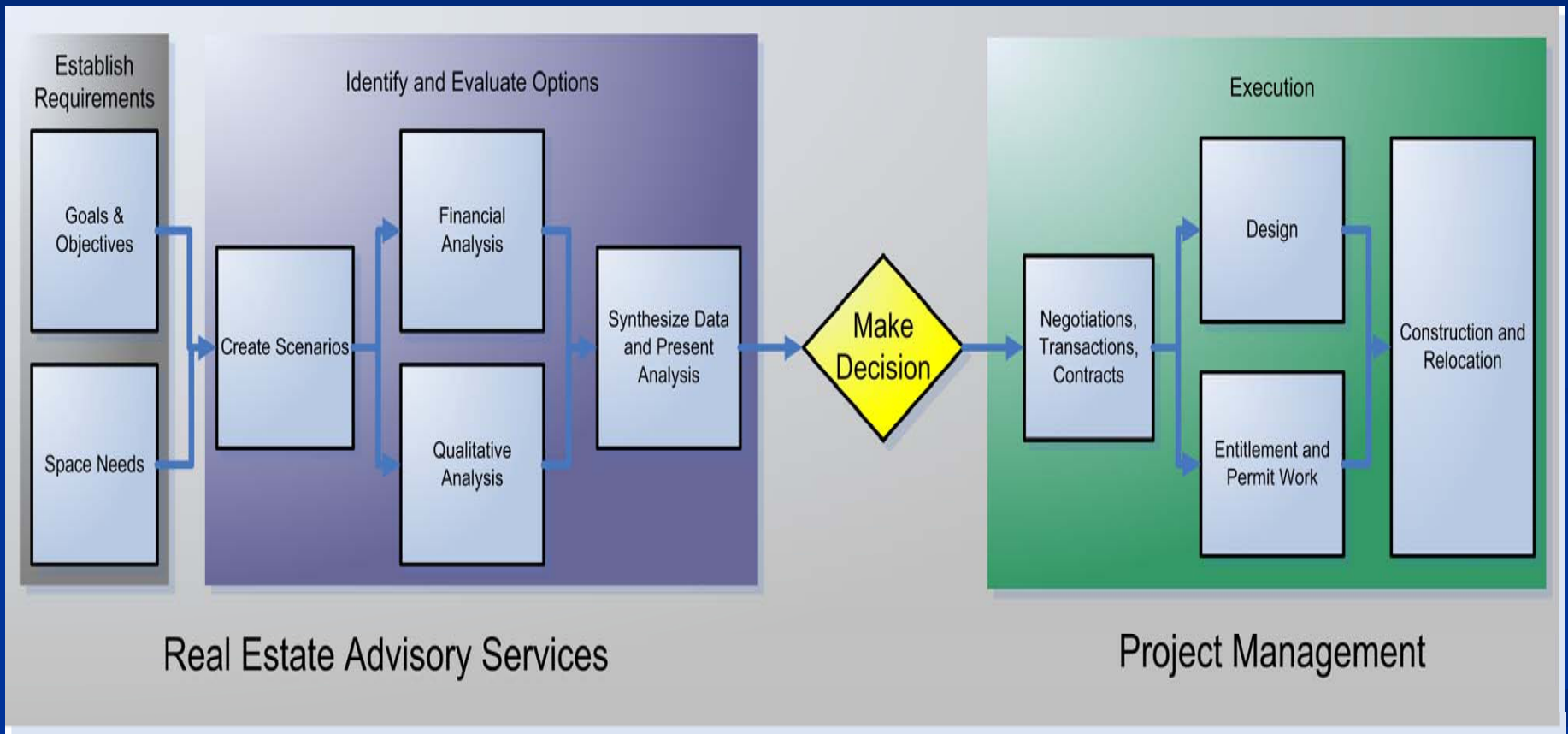
Principles of Investment

- Outline objectives (know your goals and risk tolerance)
- Get your finances in order
- Think long term
- Evaluate options
- Identify an exit strategy
- Execute

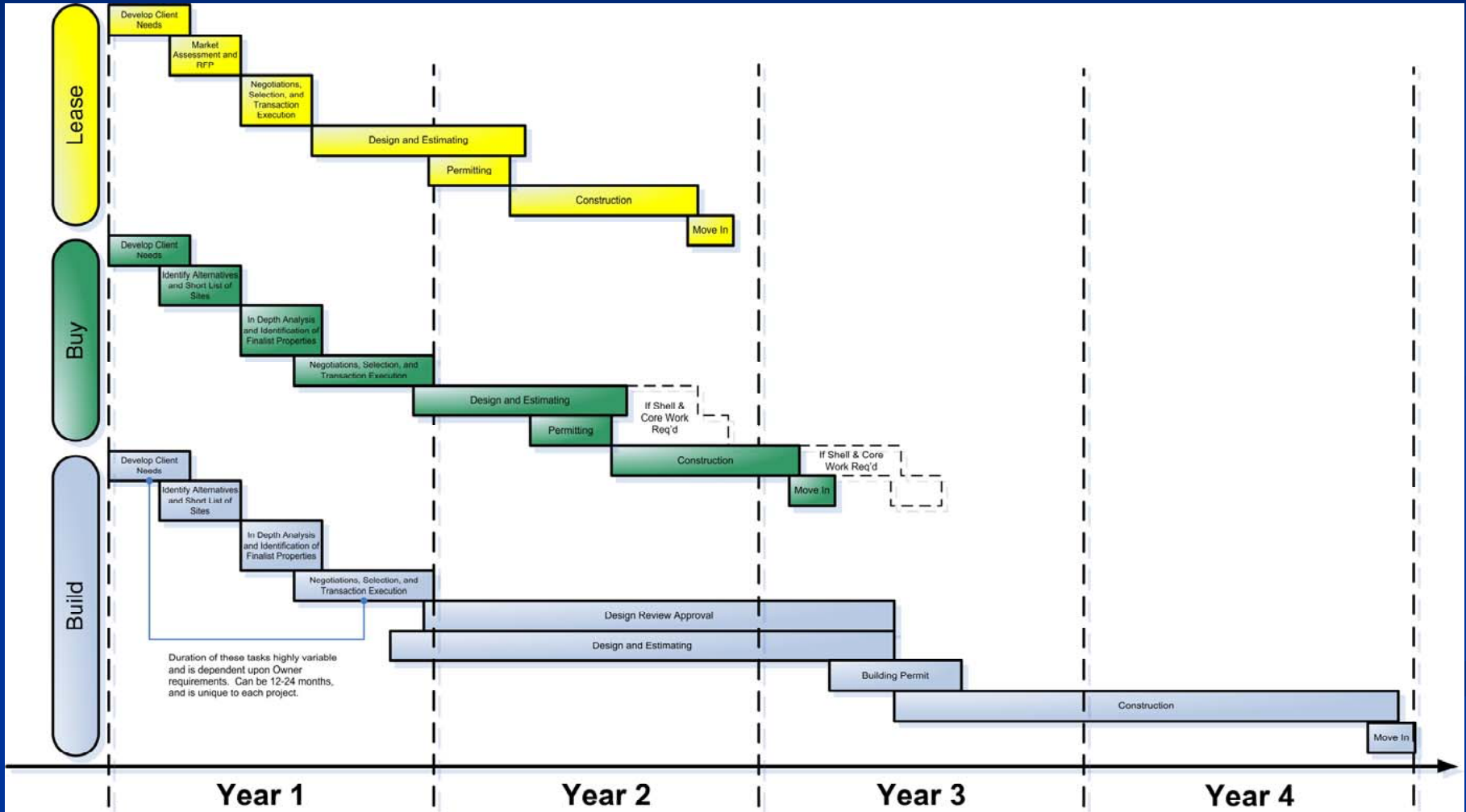
Project Management Role (Client or Retained)

- **Manages budget and schedule**
- **Provides leadership and direction**
- **Organizes the process and provides structure**

Objectives of Process Overview



Lease Build Buy



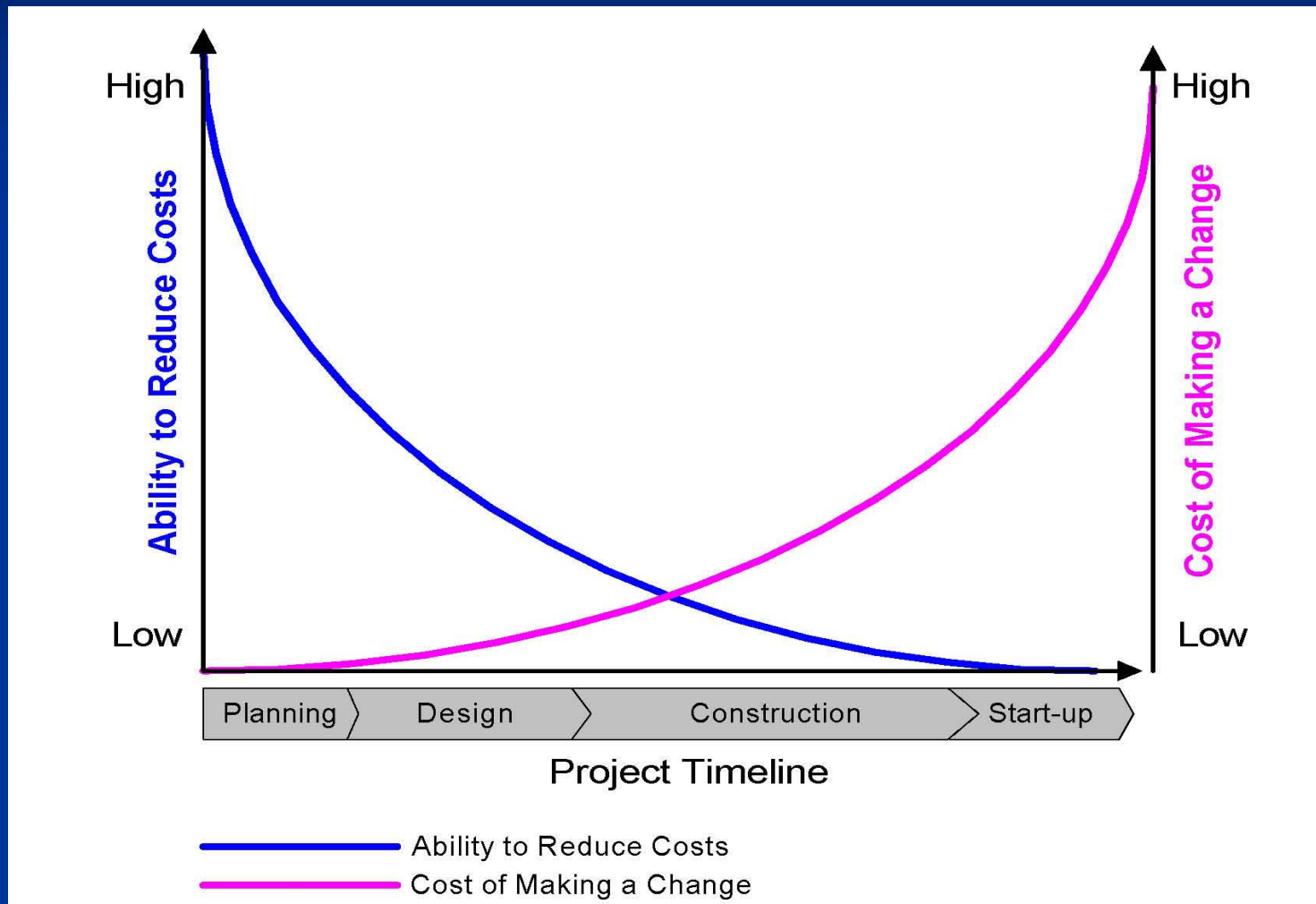
Multi-Disciplinary Analysis

- Market Analysis
- Physical/Property Analysis
- Regulatory/Compliance Analysis
- Leasing/Tenant Analysis
- Financial Analysis
- Risk Analysis
- Transaction Analysis

Generally, Advisors Must Be:

- Focused on owner's objectives
- Proactive thinkers
- Technical specialists
- Holistic perspective
- Collaborative

Ability to Reduce Costs/Cost of Making a Change



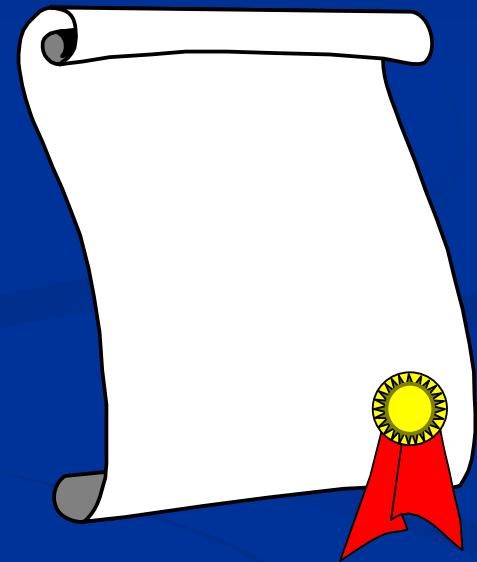
The Mechanics

- Who Performs?
- Lawyer v. Consultant v. In-House Staff
- Typical Team Members
 - Permit/Compliance Analyst
 - Contamination, Wetland/Critical Area, Other Specialist
 - Timelines, Depth and Purpose
- The Product
 - “Verbal OK” or Other Assurance
 - Memorandum, Opinion Letter or Form



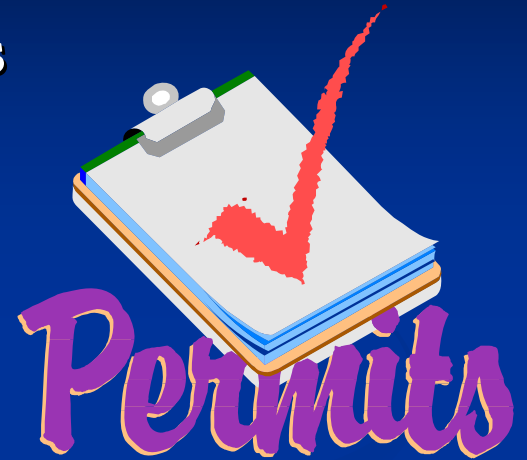
Necessary Details

- Contractual Definition
 - Due Diligence Period or Option
 - Who Can Get Out When?
- Challenges
 - Access Agreements
 - Disclosure
 - “In-House Protectionism”
 - Other Parties
 - Government
 - Associated Permitting or Permit Transfer?



The Deal Greasers

- Opinion Letters, Compliance Letters and Pro Formas
- Permits and Permit Transfers
- “No Further Action” Letters
- Prospective Purchaser Agreements
- Bonafide Prospective Purchaser Status
- Safe Harbors for Lenders
- Environmental Insurance
- Positive Markets



The Deal Killers

- Opinion Letters and Pro Formas
- Unfamiliarity With Local Process
- Uncertainty
- Liability
- Contingency and Risk
- Entitlement Challenges
- Enforcement Challenges
- Marketplace Absorption
- Income Stream



The Specific Role of the Lawyer on the Due Diligence Team

- Getting to yes...or no
- Land use and environmental regulation but a piece of the puzzle
- Team means team!
- Quiz: Define “pro forma”
- Understand the Tower of Babel

The Role of the Lawyer in Team Building and Achieving Success

- Analyze compliance and permitting path
- Advise as to transactional/long term liabilities
- Commensurate with nature of site and site constraints, advise as to necessary studies and necessary professionals
- Understand context, client goals, and conflicting priorities
- Understand development and redevelopment!

The Tower of Babel

- Depending on client, be ready to suggest and facilitate:
 - Real estate advisor
 - Architect, contractor, environmental and planning consultants
 - Permitting and SEPA
 - Wetland/critical areas, habitat and related issues
 - Contamination
 - Cultural resources
 - Civil, transportation, geotechnical and structural engineers
 - Public relations and public involvement

**Due Diligence Can Result
in....NO GO...**

Or Determining Best Way to Address Liability and Site Constraints...





To Facilitate a Transformation from Here....





To Here...





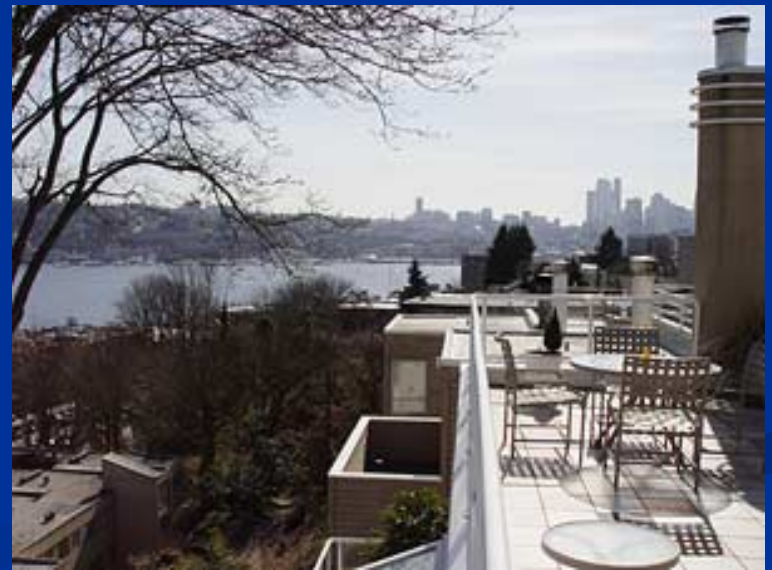
And There...







”In less than six months, Triad Development transformed the former American Tar Co. site -- just north of Gas Works Park on Lake Union -- from a brownfield to prime property suitable for an upscale condominium complex. Triad removed decades-worth of paint thinners, solvents and creosote from the 1.3-acre site, in what Ecology officials say was one of the most rapid cleanups in the agency's history. “ (DJC, June 2000)



**“A major milestone was reached recently. After Asarco removed the most highly contaminated soils from the site, the Everett Housing Authority took over the former smelter property and the cleanup, with help from Ecology and the City. The housing authority sold the cleaned up property to Barclays North, Inc. New townhouses are planned on the site of the former smelter.”
(City of Everett Website, May 2006)**

Due Diligence for Today's Implementation Issues

- Plan/regulatory amendments to avoid “Euclidean” tradition
- Development regulations/SEPA may mandate view preservation
- Impacts on historic buildings
- Cost effective compliance with building, seismic and fire codes; “green” building considerations, critical area and contamination issues
- Management of impacts on neighbors: regulatory/public perception standpoints

Understanding Development Holistically

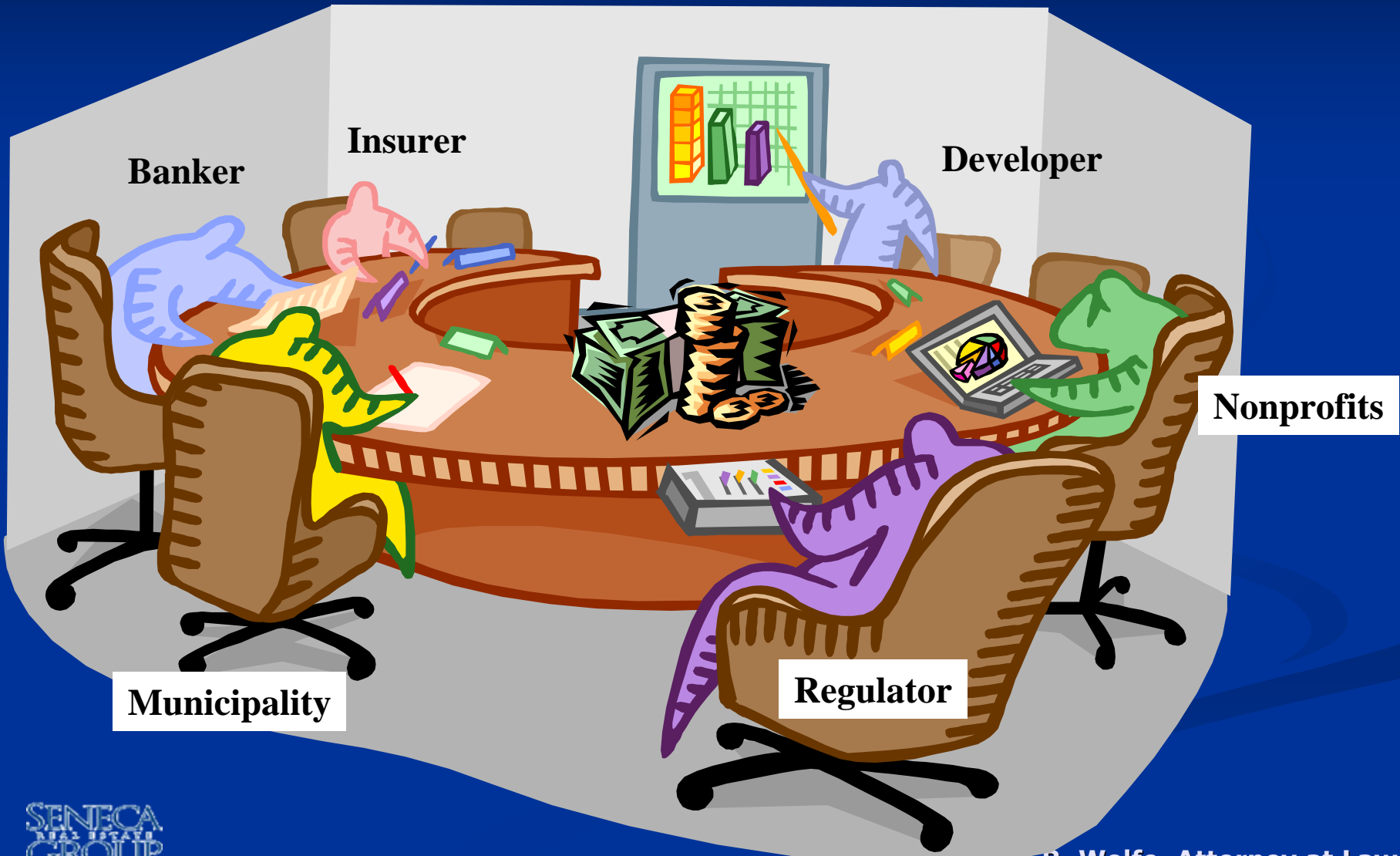
- **Common Expectations of Project Panaceae:
Affordable Housing and Transportation**
 - Resolution within pro forma
 - Balancing funds between housing/transportation and design/constructability decisions on complex sites. For example:
 - Constrained sites/demolition and mitigation
 - Quality of materials
 - Remediation expenses, cost of ongoing risk and assuring future income stream while protecting future stakeholders

The Redevelopment Context: Balancing the Marketplace, Affordability and Quality of Life

- Rational land assembly and regulatory compliance while assuring feasibility
- Implementation of infill redevelopment costs more!
 - Blending of old and new
 - Addressing neighborhood character
 - Public sector-mandated regulatory consistency, resource and human health protection

Assuring Success and the Right Fit: Complexity, Staffing, Stakeholder Needs, Timing and All That!

The Stakeholders

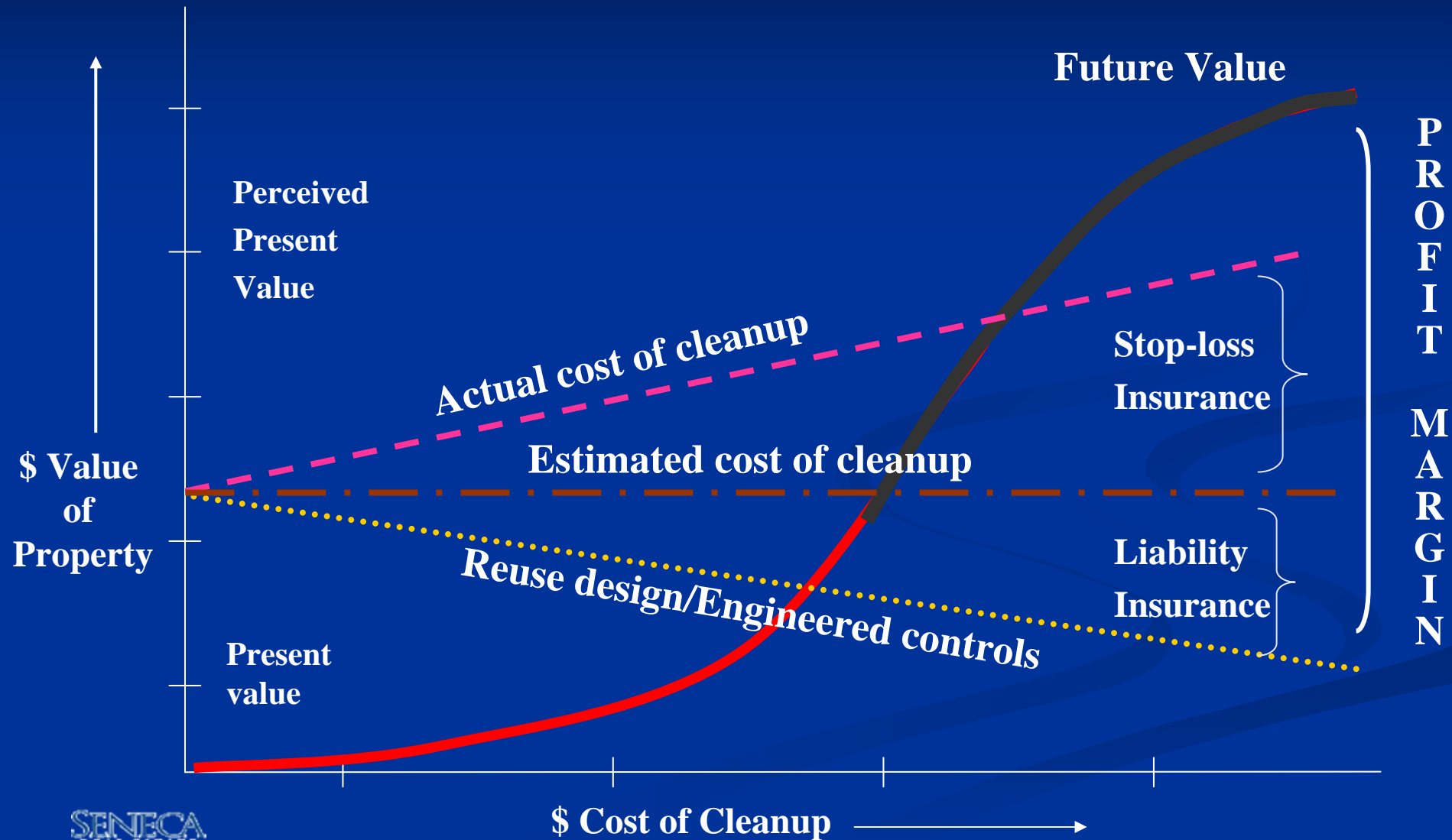


Lawyers Must Understand the Holistic Risks

- **Economic viability**
 - Is the project economically sound?
 - How much will it cost?
 - What's the return on investment?
 - Where's the money coming from?
 - How long will it take?

- **Financial risks**
 - How can the risk of unexpected loss be managed?
 - Discovery of new constraints, e.g. contaminants
 - Failure of controls
 - Firm regulatory decision

Managing the Risks - Example



Case Study of “The Perfect Storm”

- **Special Issues and Risk Avoidance**
 - Legalities, the Marketplace and Practicalities
 - Governmental Tools and Perspectives
 - The Developer’s Perspective

- **Example: EHA/ASARCO**
 - Housing Authority, City and Private Parties
 - Multiple Consent Decrees
 - Grant Resources
 - Facilitating Cleanup, Housing and Property Reuse

Step 1

Asarco

- EHA buys 15 Asarco Houses for \$2+M
- Asarco uses the \$ to remove soil above 3000 ppm in the Fenced Area in 2004

Everett Housing Authority



Step 2

Asarco

- EHA buys Fenced Area for \$1+ M after Ecology cert (8/04)
- Asarco uses the \$ to: (a) remove soil in Fenced Area & (b) clean rest of R-2 zone to residential standards at all 15 Asarco Houses and 22 non-Asarco Houses

Everett Housing Authority



Step 3

Asarco

- Asarco caps Fenced Area with 2+ feet of topsoil; Ecology certifies cleanup to residential standards to EHA
- EHA rehabs & sells 8-15 Asarco Houses (\$150K+ ea) for \$1-2 M
- EHA sells Fenced Area lots (\$30K ea) for \$3M

Everett Housing Authority



Agreements & Approvals Needed

City Actions/Agreements

- EHA/City agreement & contingent loan agreement for repayment of line of credit
- City designations of blight, community renewal area, and EHA as community renewal agency (so EHA can sell the cleaned up property)
- *Later:* City approval of community renewal plan/project & processing of R-1A rezone, subdivision applications, etc.

Key EHA Approvals Needed

- Purchase & Sale and Remediation Agreements with Asarco (for Asarco to sell the property & do the cleanup)
- Prospective Purchaser Agreements with Ecology (to limit liability); deed restrictions
- EPA and Ecology grant and trust fund approvals
- EPA approval order for disposal of all soils at Asarco Tacoma

Some Practice Pointers

- Client and site context will define role
- Getting to yes or no
- Early involvement, strategy and integration with team
- Regulatory solutions as pro forma cell
- Lawyer as counselor and facilitator