



Public-Private Partnerships

Best Practices for a Successful Deal

CDFA National Development Finance Summit

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VISION
ECONOMICS
STRATEGY
FINANCE
IMPLEMENTATION

Challenges with PPP

According to survey of public and private sectors, respondents identified the following as the greatest challenges:

62%

Public sector failure to understand private capital
underwriting criteria
and **return requirements**

49%

Validating the **"fairness"**
of the deal to the public
sector

49%

Negotiations
dynamics—too much
hard bargaining and not
enough trust building

Source: Urban Land Institute, "Successful Public/Private Partnerships" (2016)

Best Practices for PPPs

Bridging the Public/Private Divide

- Create a shared vision with public purpose & benefit
- Expect public sector role in pro-active predevelopment
- Assemble a complete & capable development team
- Make a fair deal: "but-for..."
 - Minimize the public role & cost
 - Maximize public benefits & impacts
 - Manage risk
 - Expect documentation & monitoring

01 Creating a Shared Vision with Public Benefit

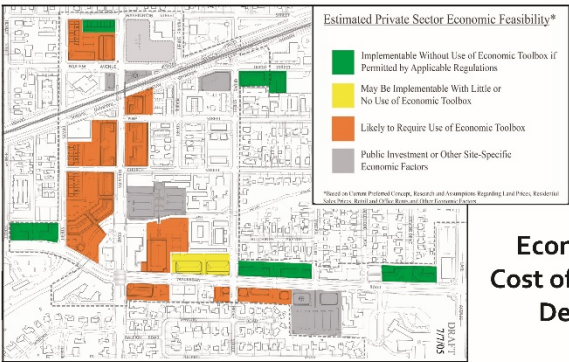
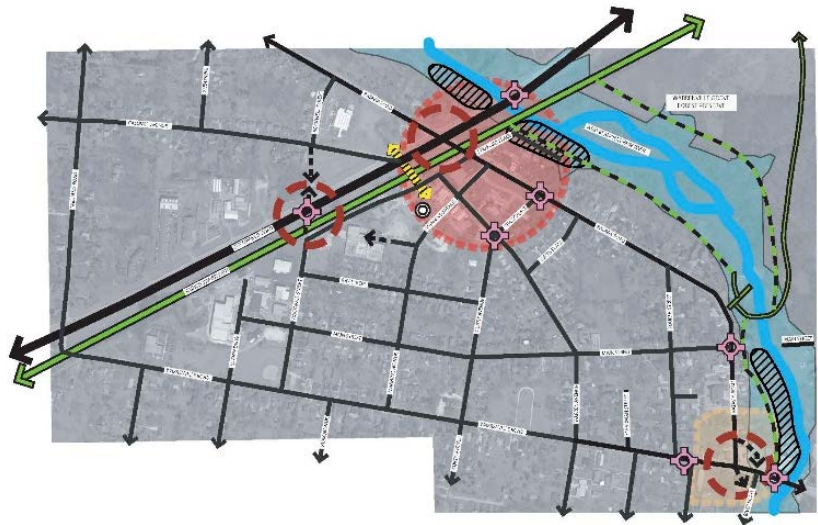
Compelling Development Strategy



- Broader Vision: The Region & Community
- The Development Project

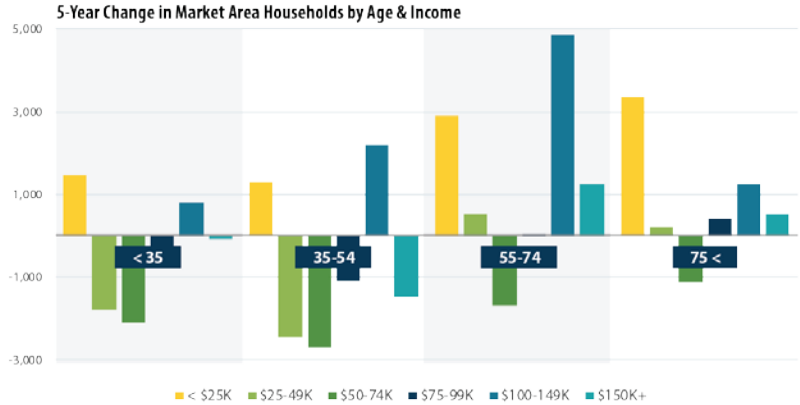
The Broader Vision

Participate in Regional, Community & Sub-Area Planning

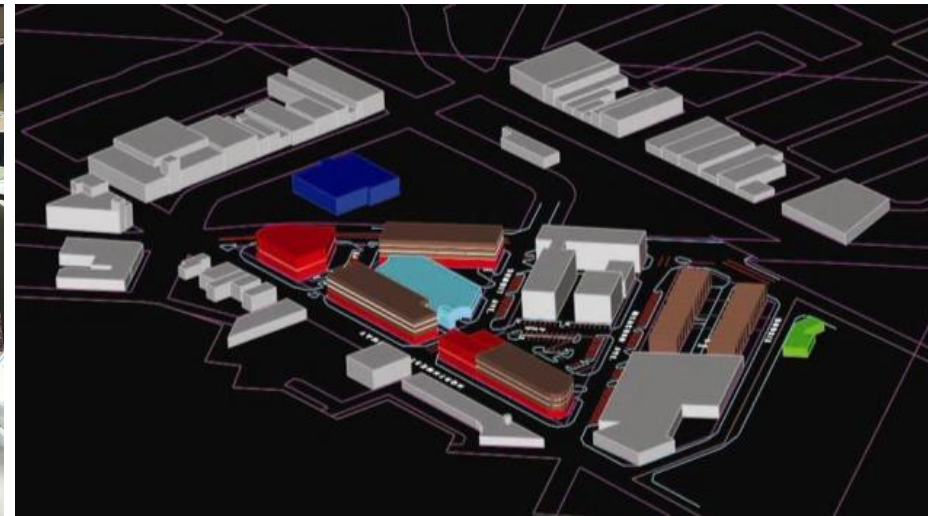


Economics:
Cost of Land vs.
Density

Description	Townhomes and a one-acre park	Townhomes	Mid-rise Condos
Townhome Units	23	29	0
Condo Units	0	0	120
Total Units	23	29	120
Height	30 ft.	30 ft.	50 ft.
Density (du/gross acre)	5.3	6.7	27.9
Site Asking Price	\$5,619,240	\$5,619,240	\$5,619,240
Residual Land Value	\$2,747,036	\$3,913,964	\$6,237,257
Surplus (Shortfall) For Land	\$(2,872,204)	\$(1,705,276)	\$618,017

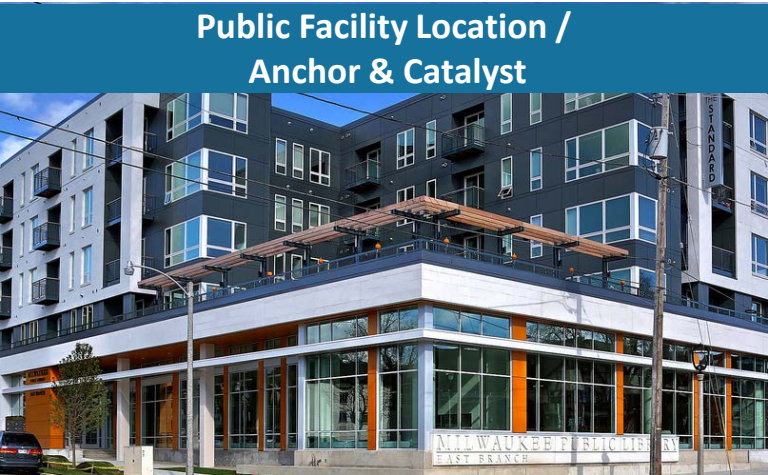
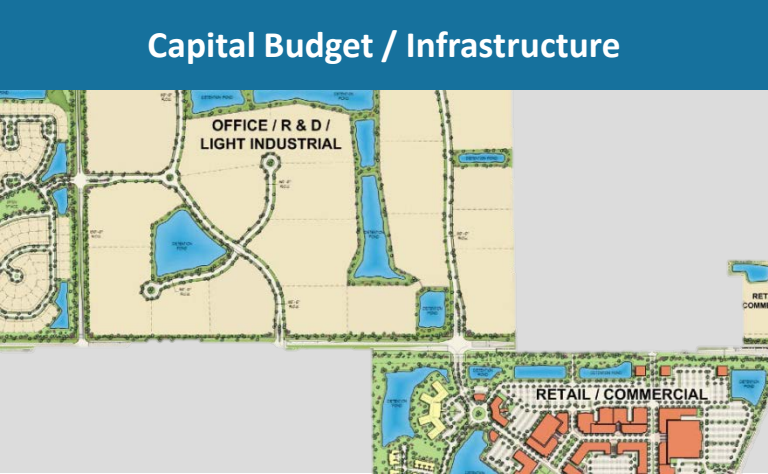
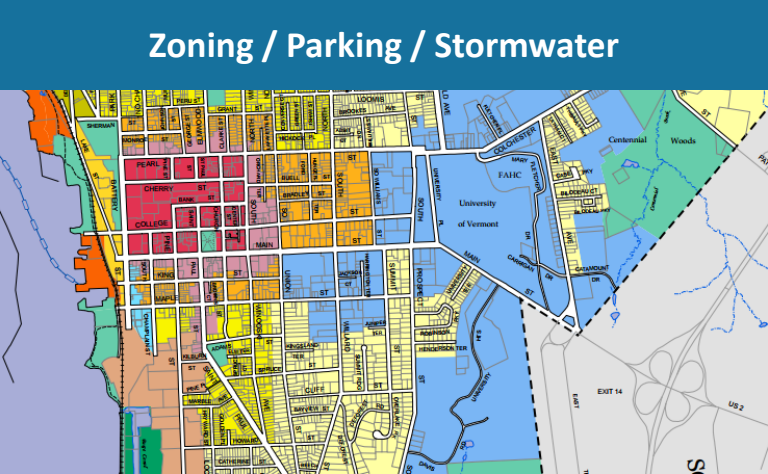


Framing the Successful Project



02 Eliminating Hurdles

Policy Alignment



Relocating Municipal Facilities to Free Development Site

Scenario 1: Continued Investment in Existing Facilities	Scenario 2: On-Site Reconstruction of City Hall & Public Library	Scenario 3: Public/Private Redevelopment New On-site 71,400 sf Public Library New Offsite 27,500 sf City Hall* with Structured Parking		
		Scenario 3A:	Scenario 3B:	Scenario 3C:
		370 rental apartments	185 rental apartments	100,000 sf of medical office
		10,000 sf of commercial	54 rental townhomes	54 rental townhomes
			10,000 sf of commercial	10,000 sf of commercial
Alternate Scenarios				
Surface, Rather than Structured Parking at New City Hall				
Acquisition/Rehab of Existing Off-Site Building for City Hall				

Site Predevelopment

Heavy Lifting by Public Sector Help Get Sites to “Shovel-Ready”

Site Assembly



Remediation



Demolition



Coordination of Multiple
Government Entities

*Obtaining grants
Traffic signals/access
Floodplain realignment
Etc.*

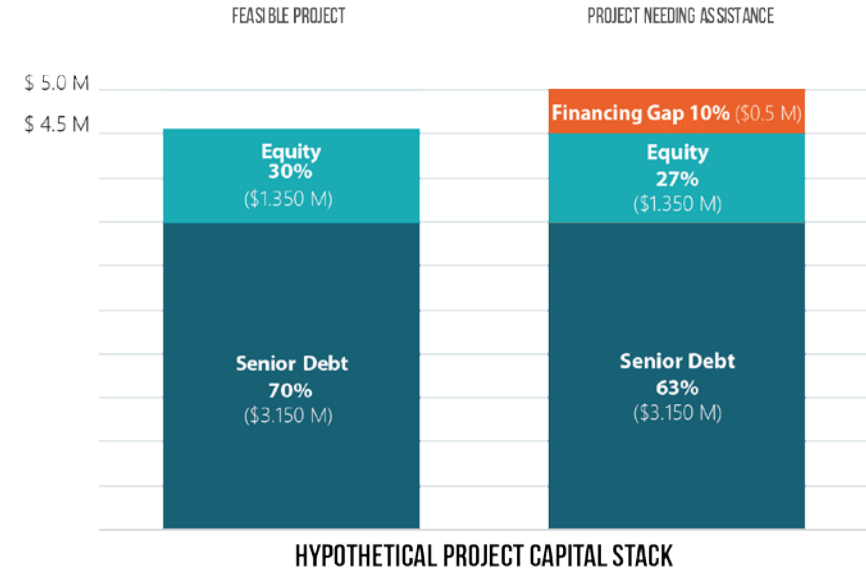
03 Right-Sizing & Structuring Fair Deals

Keys to Right-Sizing & Structuring Fair Deals

- Fiduciary responsibility & the “but-for...” test
- Maximize private financing
 - Skin in the game
 - Maximize debt
 - Risk adjusted returns

Evaluating a Financial Gap

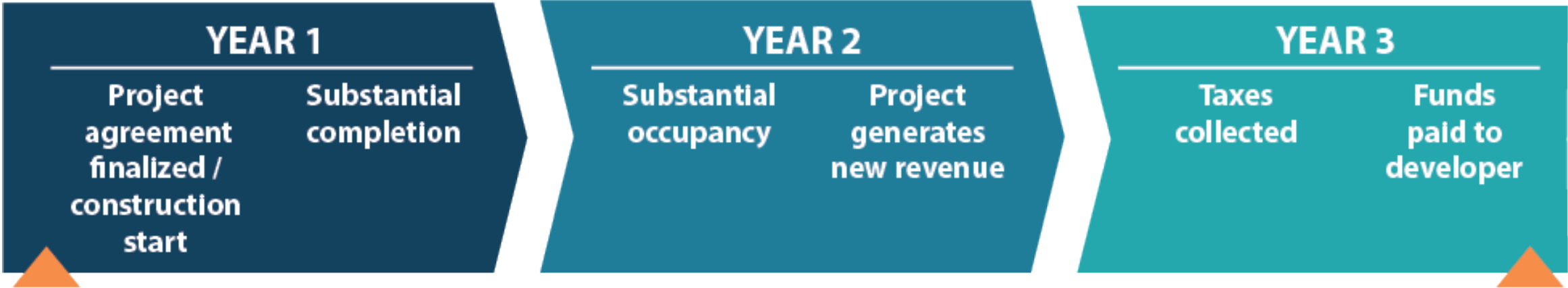
- True Gap Deal: Returns insufficient to attract capital (debt and/or equity)
 - Amount readily explained by extraordinary costs
 - Cost of providing true public improvements
 - Rent/cost mismatch
- Incentive Deal: Incremental cost of locating at proposed site or to compete with alternative site



Funding the Gap

Understanding Public Sector Timing & Risk

Fundamental Timing Problem



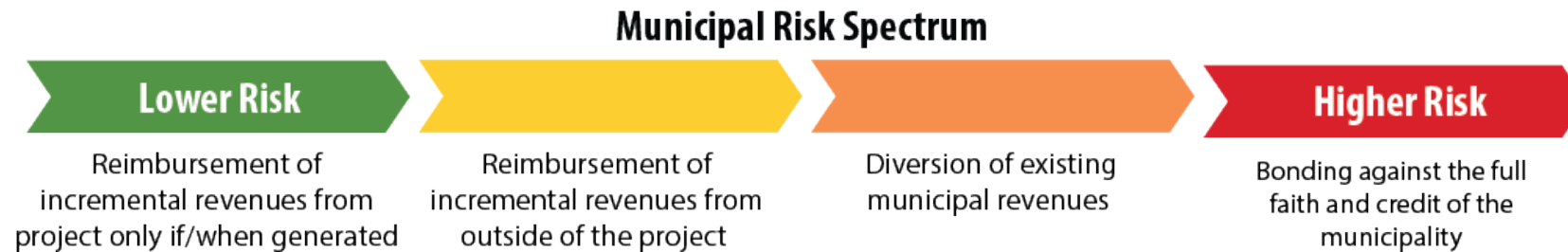
Mismatch:
Gap financing is most needed HERE...

...but revenue becomes available HERE.

Funding the Gap

Monetization Approaches

- Pay-As-You-Go
- Monetizing Future Revenues from Project Itself
- Developer Notes
- Special Revenue Bonds/Land Secured Bonds
- Backing Bonds with Other Revenue Pledges
- Loan Instead of a Grant
- Trigger & Take-Out Bonds



Successful Public-Private Partnerships . . .

- Help achieve (realistic) community goals through a shared vision
- Provide substantial community benefit(s)
- Can be facilitated by an array of financial & non-financial public actions
- Require different & more complex relationships and transactions
- Must be sufficiently profitable and a fair deal to all parties



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P3 – Background, Trends and Contract Terms

Seth Kirshenberg, Partner



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Types of Transactions

- **Availability-based payment structures** – After construction completion, the private developer is entitled to payments from the government as long as contract conditions are fulfilled. Availability payments are sized to cover operating and maintenance costs, debt service costs and equity returns.
- **Concession/Demand-risk projects** - Project is largely financed by user payments and we monetize the new or existing asset. This model is often used for roads, student housing and parking. Less Risk to owner.
- **Asset monetization** - Public assets in return for public projects (for example land for commercial development for new schools, fire stations, libraries, etc.)
- **Hybrids** (evolution of the project need)

Contract Terms - Client Concerns P3

- **Government/Owner**

- Risk of failure (political, project, etc)
- Risk on non-delivery
- Risk of injury
- Risk of hiring the wrong long-term contractor/manager
- Risk of cost
- other

- **Private Party**

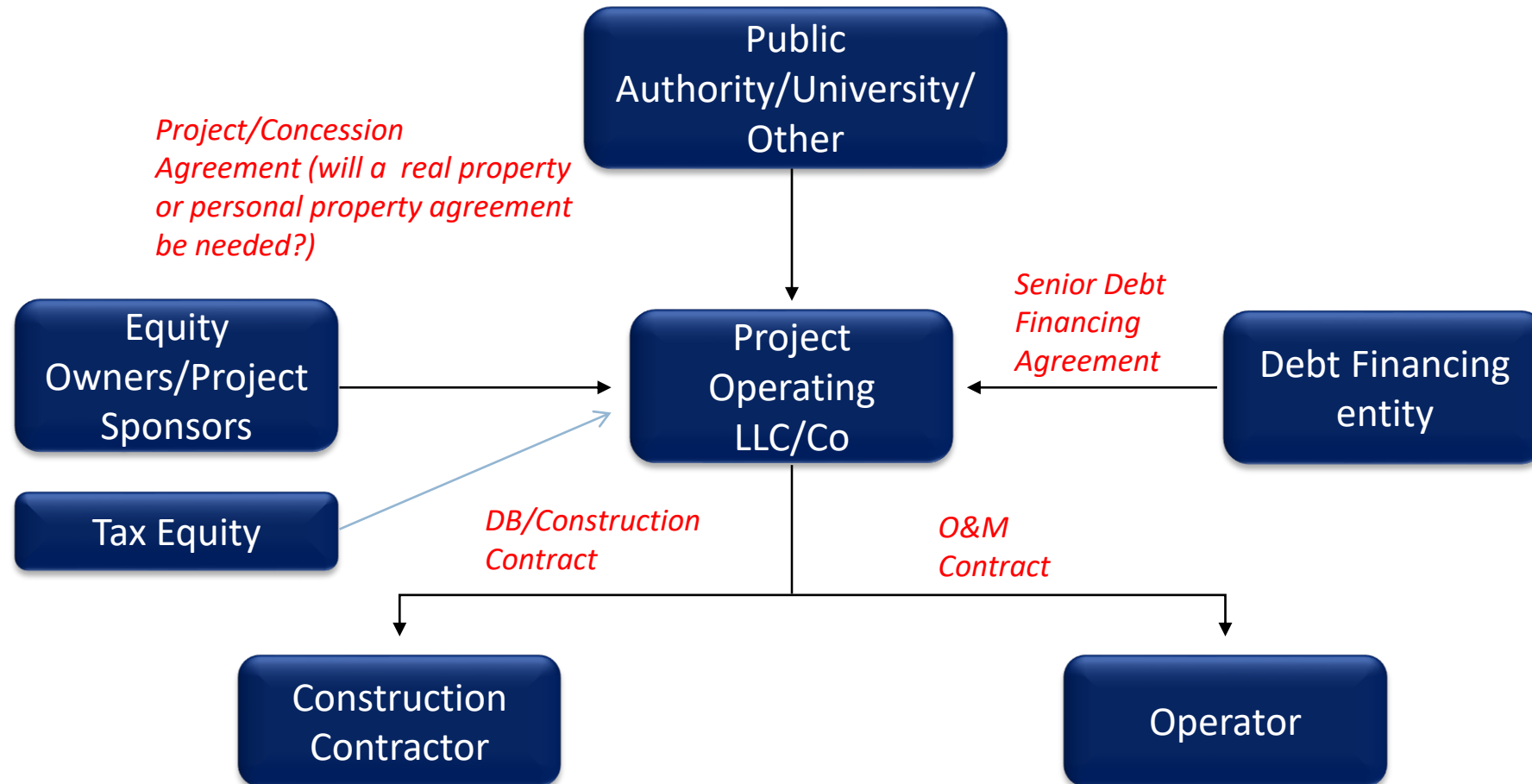
- Risk of losing the project
- Risk of Changes
- Risk of cost escalation
- Financing Risk
- Risk of termination
- Risk of politics
- other

Financier - concerns regarding Government/Owner and Private Party
All of the above

Clear Rules Define The Agreement and Provide Certainty to the Parties



P3 Contract Structure



Circumstances of Termination

Termination for Convenience

- 100% debt recovery
- Equity recovery via NPV or FMV calculation

Termination for Grantor Default

Termination for Developer Default

Termination Compensation
Provisions (Debt "Floor")

Termination for Force Majeure

P3 – Focus on What is Important to the Transaction

- A lot of issues that are “standard” are not always standard
- Each owner and developer (and financiers) have requirements to enable the transaction to go forward
- Recognize the motivations of the parties in the transaction
- Focus on what is important to you
- Recognize legal limitations and policy limitations
- Recognize the people that are responsible for decisions and what it will take to have the project approved



Backup Slides

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Contract Terms - Client Concerns P3

- **Government/Owner**

- Risk of failure (political, project, etc)
- Risk on non-delivery
- Risk of injury
- Risk of hiring the wrong long-term contractor/manager
- Risk of cost
- other

- **Private Party**

- Risk of losing the project
- Risk of Changes
- Risk of cost escalation
- Financing Risk
- Risk of termination
- Risk of politics
- other

Financier - concerns regarding Government/Owner and Private Party
All of the above

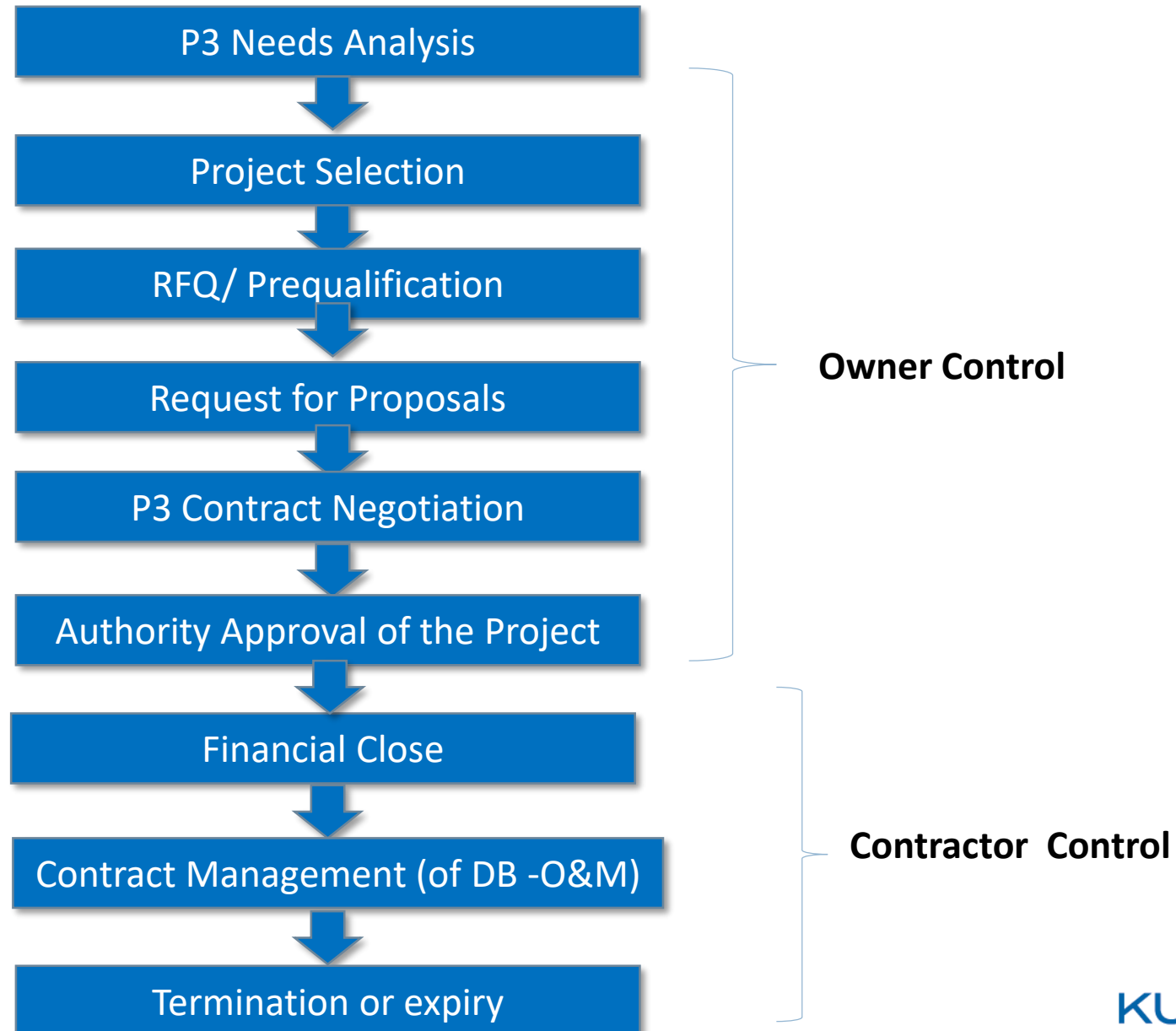
What is being negotiated?

DBFOM or DBFM or DBF or

- | | | |
|------------|----------------------|-----------------------|
| • Design | • Design | • Design |
| • Build | • Build | • Build |
| • Finance | • Finance | • Finance |
| • Operate | • Operate | • Operate |
| • Maintain | • Maintain | • Maintain |

...and asset monetization is a real estate agreement with delivery of a project (including a DBF)

Typical Phases of the P3 Process



Contracts

- Certainty and Clarity of the Agreements develops long-term processes
- Relationship of the parties grows and education occurs during the negotiations
- Critical step of the process to permit the project to move forward.

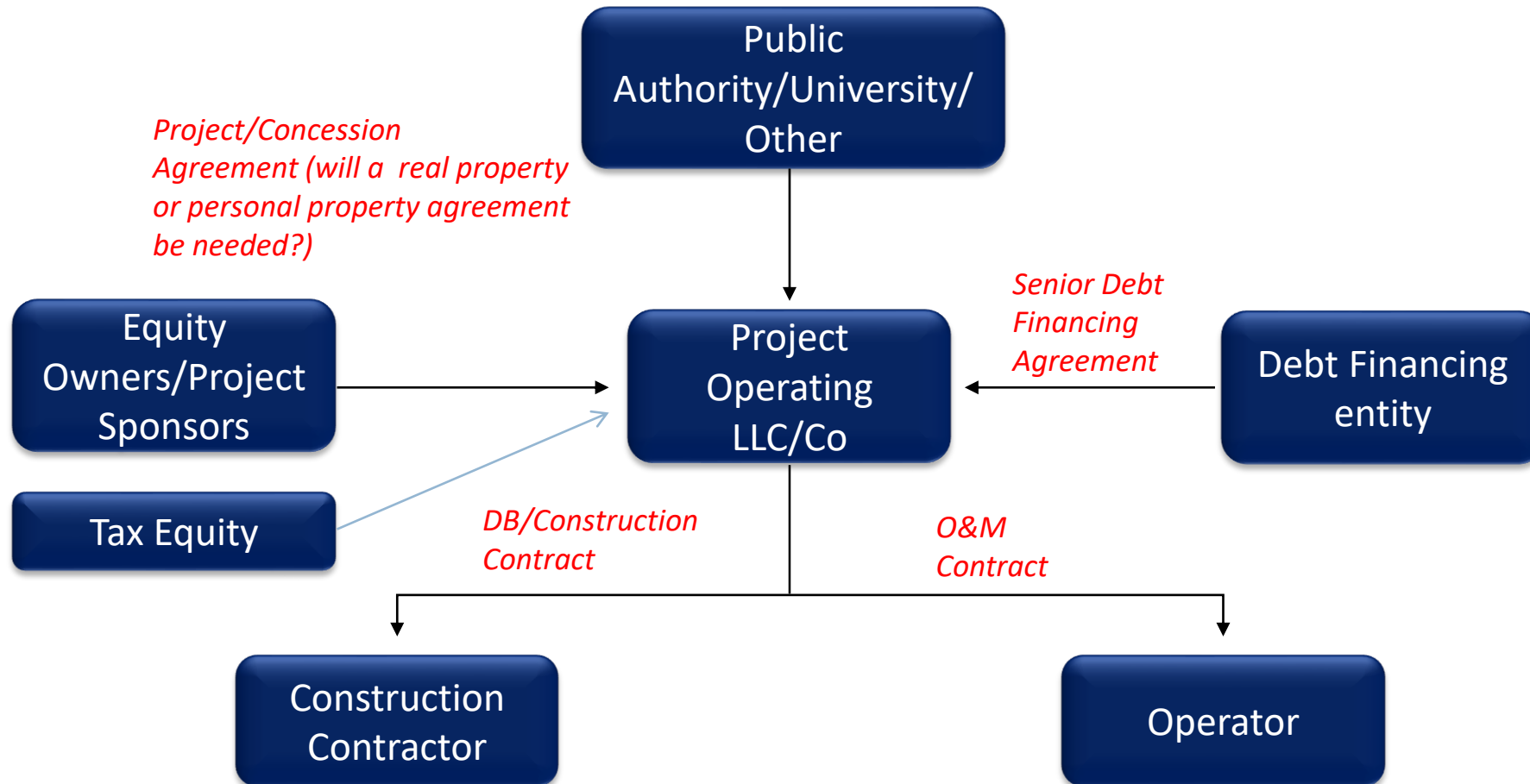
Contract - Balancing the Owner and Private Interest

- P3's reflect the Public Interest
 - Retain ultimate control over the asset — state as guardian/custodian of public assets
 - Transparency required when dealing with public assets, services and funds
 - Obtain value for money
 - Pay for performance
- P3's reflect the Private Interest
 - Profit and performance standards — usually best determined through open tender
 - Protects profit (and expense) against identified risks, especially those controlled by the public body
 - Balances transparency with protection of proprietary trade secrets or intellectual property

Contract - Balancing the Financing Entity Interest

- Financing has a say in the project
 - Equity – works closely with the developer and more behind the scenes
 - Will only invest in projects that meet criteria without requiring higher returns
 - Focused on the terms of the transactions
 - Return is based on success of the project
 - Debt
 - Must meet specific criteria
 - Needs step-in rights that protect the interest of the debt holders (ability to cure and ability to remove developer and replace with new developer)
 - Will require specific items in the contract (similar to developer needs)
 - Termination provisions are important
 - Usually fixed rate of return
 - Other investors (tax credit, etc.)
 - Requirements of specific laws (for example tax laws) must be met in the transaction

P3 Contract Structure



Issues to Negotiate - Agreement Terms

- Parties to the Agreement
- Authority of the parties
- Description of the Project/facility/etc.
- Term of the Agreement
- Payments/Revenues
- Obligations (DBFOM, DBFM, etc.)
- Construction/Installation Obligation
- Operation and Management Obligation
- Base and incentive fees and process
- Special requirements of jurisdiction
- Ability to sell or assign
- Informal/Formal process to resolve disagreements
- Liabilities/indemnifications
- Environmental Issues/liabilities
- Insurance
- Bonding
- Default/Default Process
- Protection of financiers interest
- Bankruptcy
- Termination and Termination Process
-and more

Terms to Cover in the Agreement

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Terms

- Payment obligation or revenue sharing is a key negotiation term
 - Concession – what is the revenue source
 - Is the full risk on the private sector
 - Anti-competition clauses? (Owner cannot compete with the project)
 - Is there revenue sharing
 - Reserve account funding is critical
- Availability payment project—
 - clear funding source to make availability payments
 - Appropriations risk
 - Clear legal authority for the owner to make the payment and contract
 - Anti-deficiency authority issues?

Terms to Cover in the Agreement

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P3 Concession/Project Agreement

Design/Build – Construction Issues

- Preparation of design — what flexibility to make changes from preliminary design
- Responsibility (including permits, zoning, environmental, etc.)
- Government input into design/plans
- Construction program and performance standards
- Plans
- Fees
- Supervision of construction
- Bonding/guaranty requirements
- Liability of Subcontractors
- Insurance requirements
- Force majeure/Delay Events
- Default
- Reporting/Confidentiality
- Delivery of Product requirements

Concession Agreement/Project Agreement (Cont.)

Operation/Maintenance Issues

- Performance standards during operation/control/modification
- Performance Plan (maintenance and reinvestment)
- Review of Contractor(s) over time and actions if the contractor is not meeting requirements
- Replacement plan
- Supervision of operations
- Fees
- Specific existing employee issues
- Force majeure
- Insurance requirements
- Performance Security and Guarantees
- Liability of Subcontractors
- Guarantee of public access
- Reporting/Confidentiality

Terms to Cover in the Agreement

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Form of Equity Member Certificates.....	Exhibit R

Concession Agreement/Project Agreement (Cont.)

Financing Issues

- Proposed cost of construction, financing and operation
- Revenue allocation — profit benchmarking/clawbacks
- Appropriation/public approvals
- Rate setting
- Performance payment criteria
- Rights of senior debt holders
- Equity at risk
- Public buy-back of asset at expiration (residual risk transfer)

Termination Issues (see subsequent slides)

- Default and termination provisions
- Step-in rights of public agency and senior debt holders
- Dispute resolution
- Payments
- Handback requirements

Legal Issues in Project Agreement

- Equity: Change of Control and Required Equity Percentage Provisions
- Debt:
 - Lenders' Cure Periods and Step In Rights
 - Limitations on Financing
 - Review of and Consent to Financing
 - Lenders Direct Agreement
- Bankruptcy Related Provisions
- Refinancing Gain Provisions
- Revenue Share Provisions

Concession Agreement/Project Agreement (Cont.)

Compensation Events/Material Adverse Events

- Duties to expand/build-out facilities in case of increased demand/deterioration of
- service levels
- Other directives
- Construction and operation of competing facilities
- Risk of future changes in law and regulations
- Undisclosed conditions
- Taxes
- Permitting/regulatory delays
- Closures
- Litigation
- Demand/usage
- Concession term and option to extend/early termination
- Remedies

Termination – Decision-making Table

Termination Rights	“Traditional P3”	Proposed P3
Termination for Convenience		
Termination for Default Developer		
Termination for Default Owner (Govt/Universtiy/Other)		
Termination for Force Majeure		

Circumstances of Termination – Debt Provider Perspective

Termination for Convenience



- 100% debt recovery
- Equity recovery via NPV or FMV calculation

Termination for Grantor Default



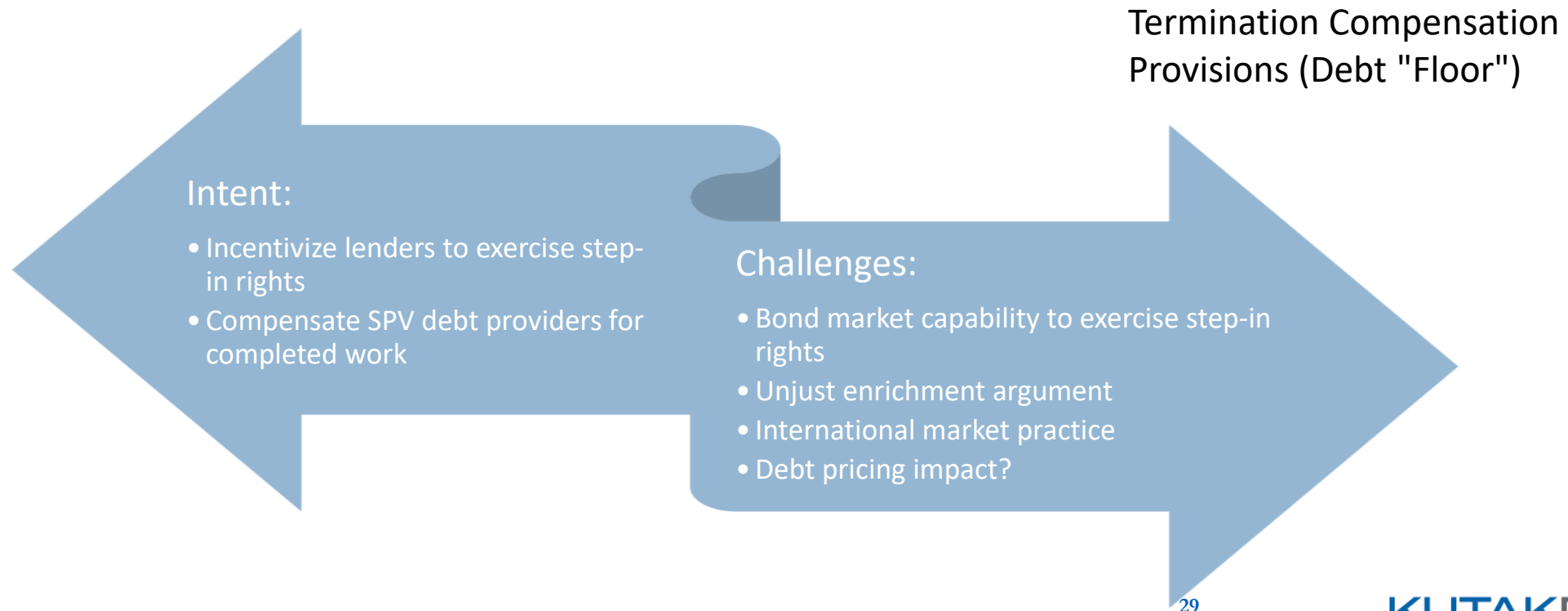
Termination for Developer Default



Termination Compensation Provisions (Debt "Floor")

Termination for Developer Default

Typically 80% of debt obligations



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