MODULE 2

DEALMAKING
FOR
DEVELOPMENT AUTHORITIES

some things development authorities can't do
and some workarounds to do them anyway

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EVERYDAY DEVELOPMENT AUTHORITY ISSUES

Can't- Confer "gifts or gratuities"

GA CONSTITUTION

Issue: incentives

Can't- Go beyond your powers

DEVELOPMENT AUTHORITIES LAW

Issue: new types of projects

Can't- Carry out public projects

GA CONSTITUTION

Issue: P3

Can't- Carry out road projects in concert with local government

GA CONSTITUTION

Issue: large projects

Can't- exceed jurisdiction

DEVELOPMENT AUTHORITIES LAW

Issue: extra-territorial projects

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CAN'T- CONFER A "GIFT OR GRATUITY"

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EVERYDAY DEVELOPMENT AUTHORITY ISSUE

Can’t- Confer “gifts or gratuities”

GA CONSTITUTION

Issue: incentives

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GEORGIA WAS ONCE THE LARGEST STATE

map credit: unknown

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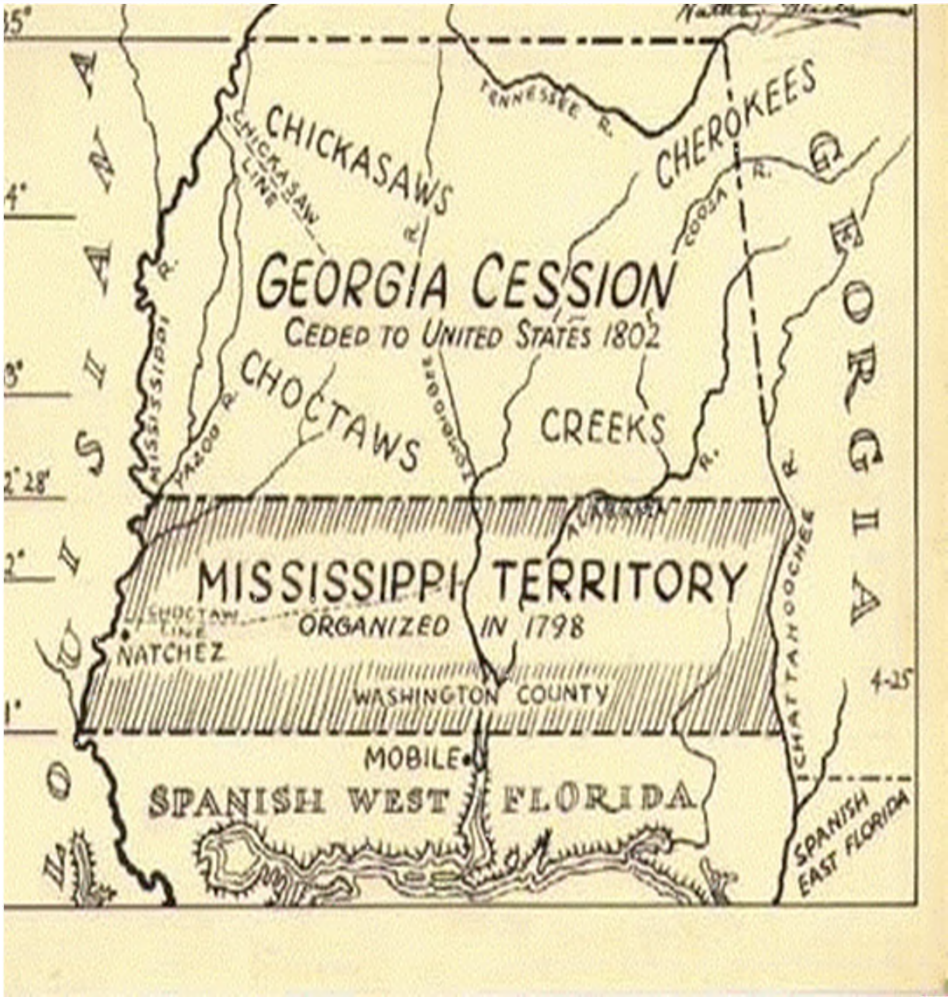
BUT NOT AFTER SOME "GIFTS OR GRATUITIES" WERE MADE

"The Yazoo land controversy was a massive, real estate fraud perpetrated, in the mid-1790s, by Georgia governor George Mathews and the Georgia General Assembly. Georgia politicians sold large tracts of territory in the Yazoo lands, in what are now portions of the present-day states of Alabama and Mississippi, to political insiders at very low prices in 1794….In the landmark decision in Fletcher v. Peck (1810), the [U.S. Supreme] Court ruled that the contracts were binding and the state could not retroactively invalidate the earlier land sales." Source: Wikipedia



Source: alabamapioneers.com

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FROM “FORGIVABLE LOANS” TO REBA & ONEGEORGIA

Forgivable Loans

1995: ATTORNEY GENERAL RULED THE STATE’S “FORGIVABLE LOAN” PROGRAM UNCONSTITUTIONAL

“The forgiveness of loans made under the incentive loan program is clearly outside the scope of the legal powers of GHFA. Under the Constitution, the granting of any donation or gratuity or the forgiveness of any debt or obligation owing to the public is prohibited. Ga. Const. 1983, Art. III, Sec. VI, Para. VI (a)” 1995 Ga. Op. Atty. Gen. 55 (April 28, 1995).

State Grants

ONEGEORGIA AND REBA PROGRAMS WERE RESPONSE MADE TO “KEEP GEORGIA IN THE GAME” AND PERMIT GRANTS FOR PROSPECTS

concepts taken from bond financing: inducement, finding of equivalent public benefit and no “gratuity”

Communities

BUT- PROHIBITION OF “GIFTS AND GRATUITIES” APPLIES TO ALL INCENTIVES AND ALL AUTHORITIES

“This provision of the Constitution applies to the operations of public authorities…It has been held that the forgiveness of a loan operates as a gift to the debtor/donee.” 1995 Ga. Op. Atty. Gen. 55 (April 28, 1995).

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THE BASIS FOR THE BARGAIN

"The Georgia Constitution prohibits the General Assembly from granting any donation or gratuity. Ga. Const. 1983, Art. III, Sec. VI, Para. VI....This office has opined repeatedly that agencies may not dispose of publicly owned property without obtaining fair market value, **or** its equivalent in an exchange, for the transaction. See, e.g., 1971 Op. Att'y Gen. U71-17; 1995 Op. Att'y Gen. 95-25; 1997 Op. Att'y Gen. 97-6.Therefore, based upon these legal authorities, it is my official opinion that the Department [of Transportation] must receive in return for the disposal of access rights under O.C.G.A. § 32-6-l33(b), the fair market value of such rights **or** other substantial benefit in aid of the performance of the Department's governmental mission." Op. Ga. Atty. Gen. No. 97-14

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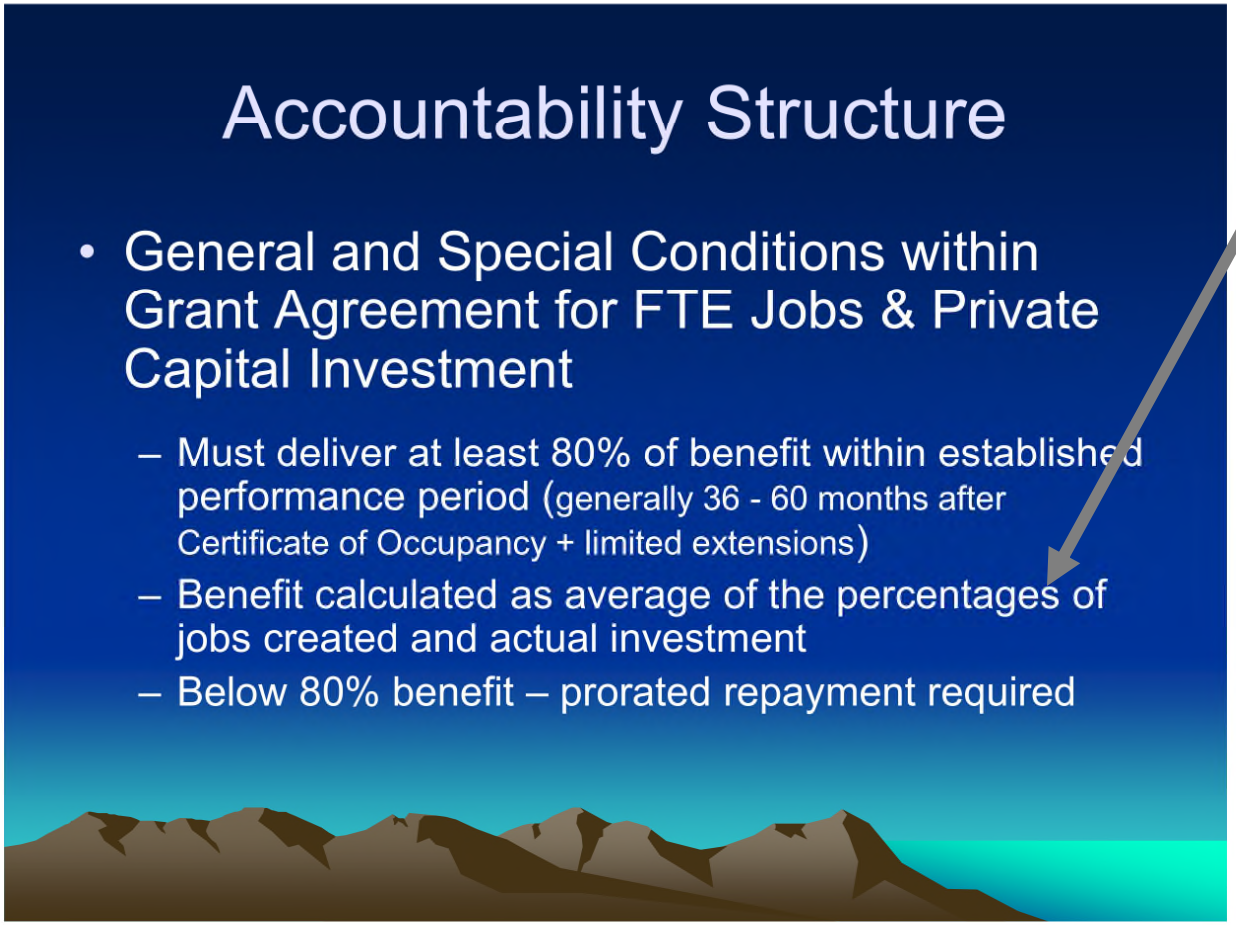
YOU CAN'T- "GIVE STUFF AWAY" BUT YOU CAN- MAKE A BARGAIN the MOU contains the bargain



Source: DCA

- When there is a state grant, these are the public benefits that the State is bargaining for.
- What is the community bargaining for?
- It can be whatever is important to it that the Company will agree to.
  - Example- In light of some recent long term, 100% abatements, some communities are considering removing investment from the clawback formula- making it 100% jobs. Rationale- What significance is the investment if no taxes are being paid on it?

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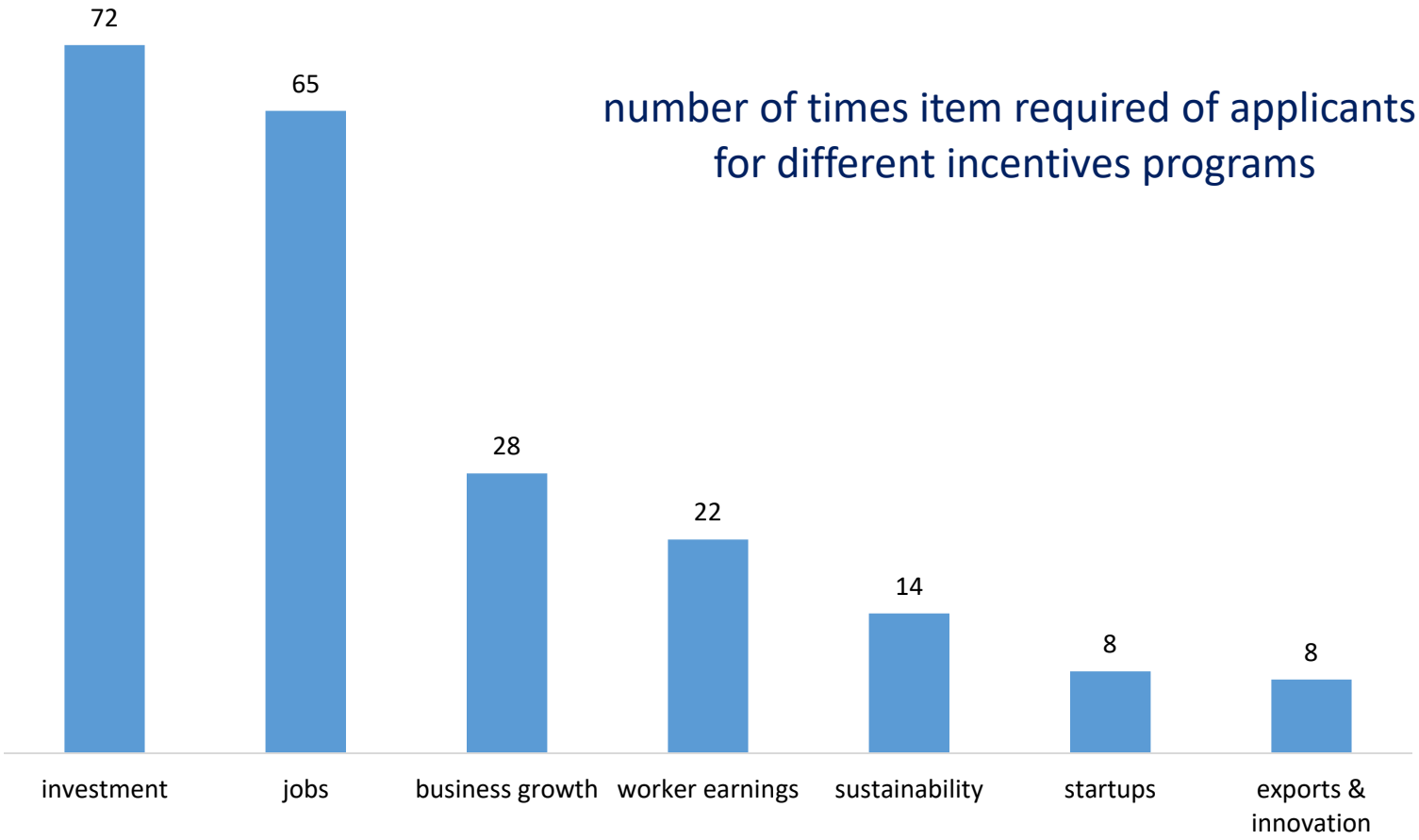
WHAT SOME OTHER COMMUNITIES ARE REQUIRING AS GOALS



Data Source: CREC; goal chart based on interpolation- data estimated
Data Visualization: Dan McRae

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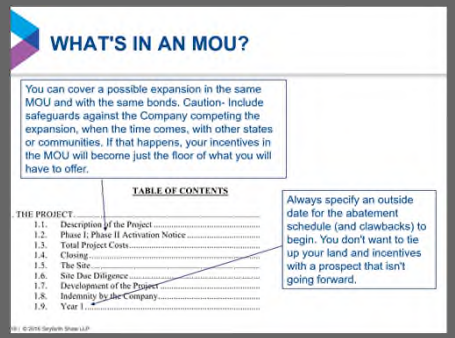

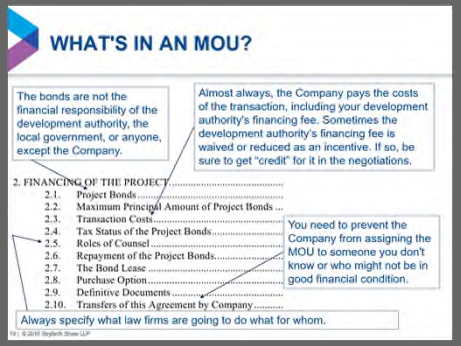

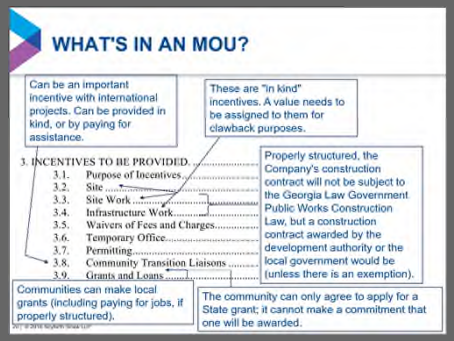

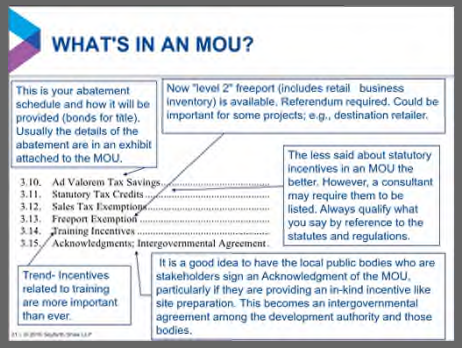

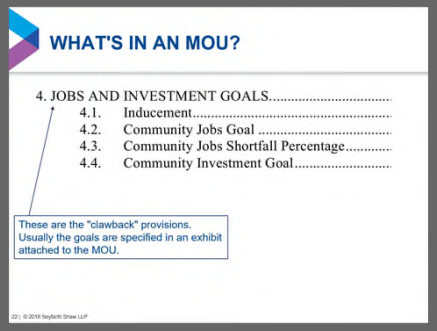

HOW YOU MAKE THE BARGAIN- THE MOU IS THE "DEAL DOCUMENT"

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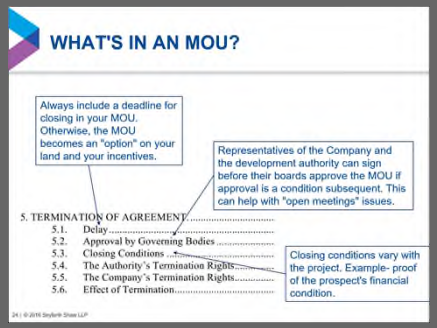
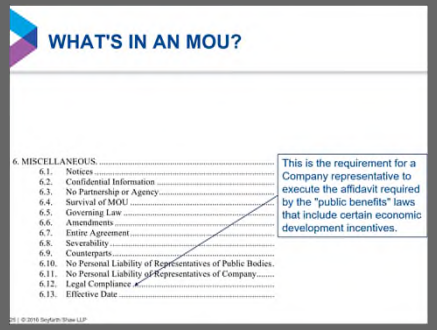
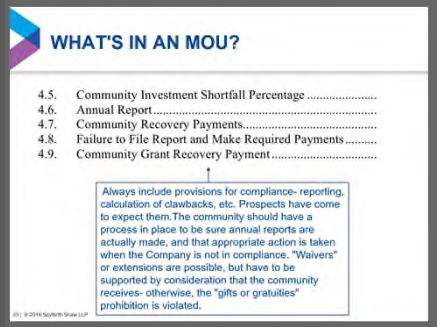
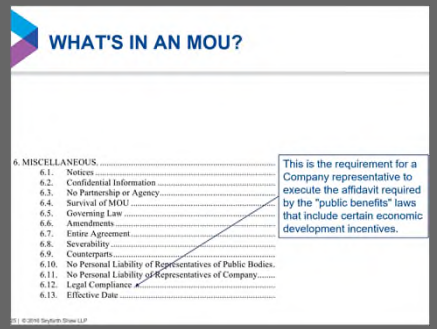








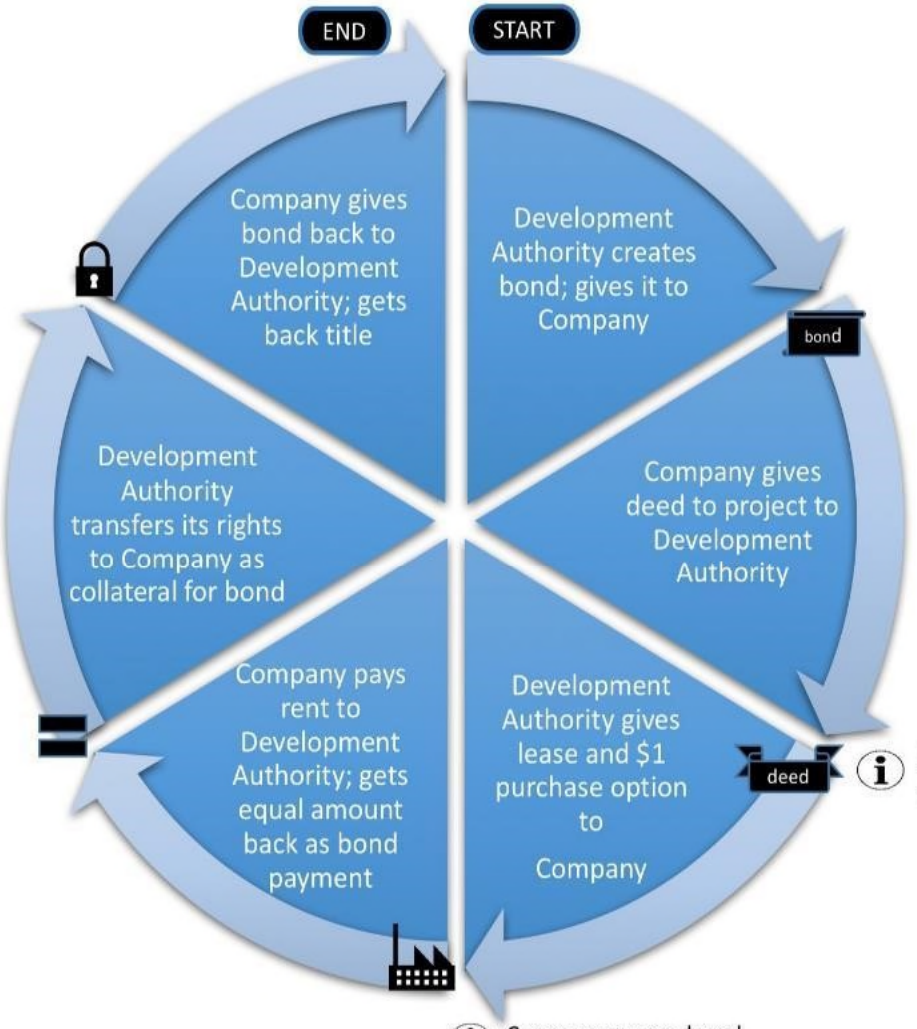
HOW YOU MAKE THE BARGAIN- THE MOU IS THE "DEAL DOCUMENT"

“BONDS FOR TITLE”-

THAT’S HOW YOU DELIVER ON PROPERTY TAX SAVINGS AND CASH AND IN-KIND INCENTIVES

It's not just about property tax "abatement." Cash and in-kind incentives also flow through the development authority.

The lease is the conduit for the incentives- abatement, cash, in-kind.



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IT'S NOT JUST GEORGIA

Commissioners OK issuing $13 million in industrial revenue bonds for retail development

By
Phil Anderson
The Topeka Capital-Journal, Kan.

Published
April 23 2019, 1:41pm EDT

More in

Print

Shawnee County, Kansas, commissioners on Monday morning approved by a 3-0 vote a resolution to issue about $13 million in taxable industrial revenue bonds for a shopping development in west Topeka.

Bob Perry, the county's bond counsel, told commissioners the issuance of the industrial revenue bonds would generate "substantial" ad valorem taxes for the city and county.

He said the resolution acknowledges EIG's request for the bonds expresses the commission's intent to issue the bonds. Perry said he would begin negotiating terms of the agreement in the next few weeks.

"EIG is buying its own bonds, so we don't have to worry about selling bonds to third-party investors," Perry said. "Reduces everybody's risk."

Sound familiar?

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Source: "The Bond Buyer"

CAN'T- GO BEYOND YOUR POWERS

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CAN YOU CARRY OUT A PROJECT?

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POWERS MATTER!
THE "KROGER CASE"

Georgia

Decided: June 3, 2019

S19A0378. DEVELOPMENT AUTHORITY OF COBB COUNT
et al. v. STATE OF GEORGIA et al.

BLACKWELL, Justice.

The Development Authority of Cobb County resolved in May 2018 to issue $35 million in revenue bonds under OCGA § 36-62-2 (6) (N) to finance a retail development in east Cobb County. In particular, the Development Authority proposed to use the bonds to acquire land near the intersection of Powers Ferry Road and Terrell Mill Road and to construct a facility on that land that is suitable for the operation of a grocery store. The Development Authority the ould lease the facility to the Kroger Company, which w te a nearby grocery store to the newly constructed f

to the record, the new grocery store is a
e development. It appears that
privately finan

The Georgia Supreme Court sided with the Development Authority of Cobb County Monday in a dispute over $35 million in revenue bonds issued to financ a retail development.

In a unanimous ruling, the justices overturned a lower court decision that had declared the bonds invalid under the state law governing bonds issued by local development authorities.

The Cobb authority voted in May of last year to issue the bonds to acquire land near the intersection of Powers Ferry and Terrell Mill roads in East Cobb. The authority planned to build a grocery store on the property and lease it to the Kroger chain, which would relocate a nearby Kroger to the site.

Source: Atlanta Business Chronicle

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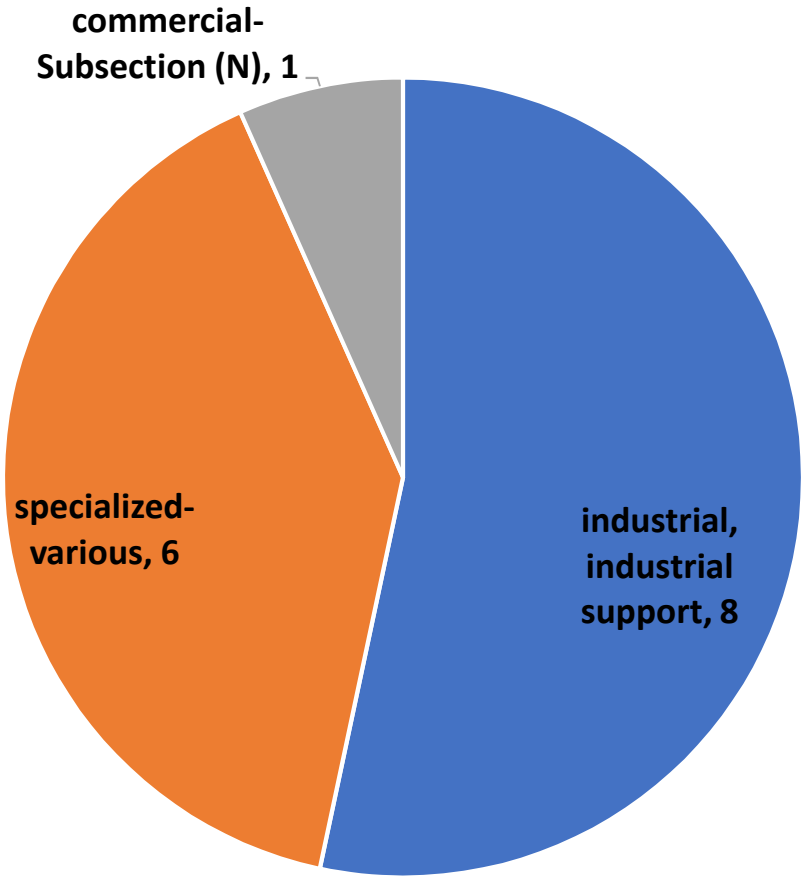
ONLY ONE PROJECT DEFINITION IN THE DAL AUTHORIZES COMMERCIAL PROJECTS….



… and many other types of projects that have no other authorization.
What would have happened if the Kroger case had gone the other way?

Data Source: O.C.G.A
Data Visualization: Dan McRae

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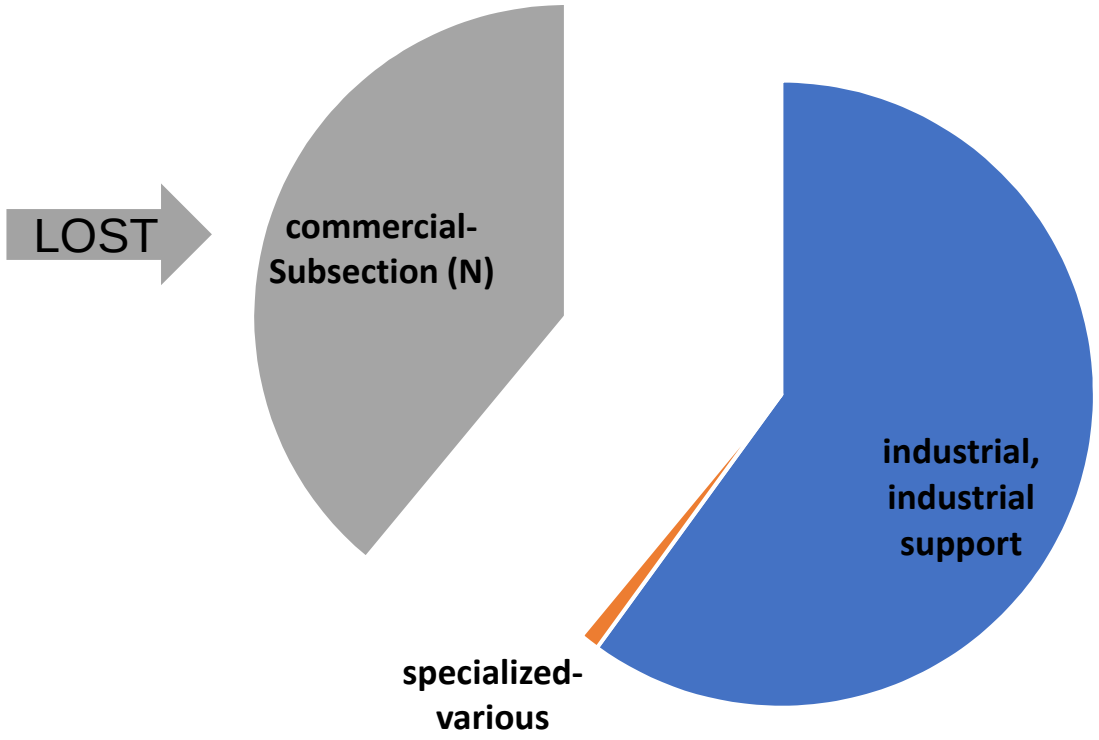
HOW MANY PROJECTS WOULD A BAD KROGER DECISION HAVE COST....

"MOSTLY RURAL" COMMUNITIES



Data Source: Dan McRae estimates of count of projects by Code Section in a typical year
Data Visualization: Dan McRae

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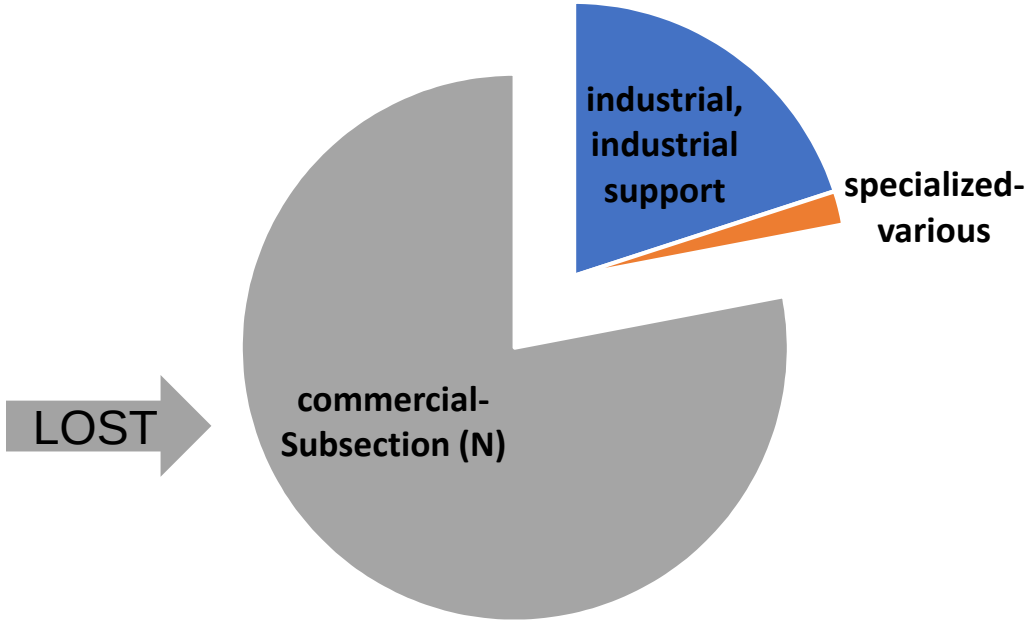
HOW MANY PROJECTS WOULD A BAD KROGER DECISION HAVE COST....

"MOSTLY URBAN" COMMUNITIES



Data Source: Dan McRae estimates of count of projects by Code Section in a typical year
Data Visualization: Dan McRae

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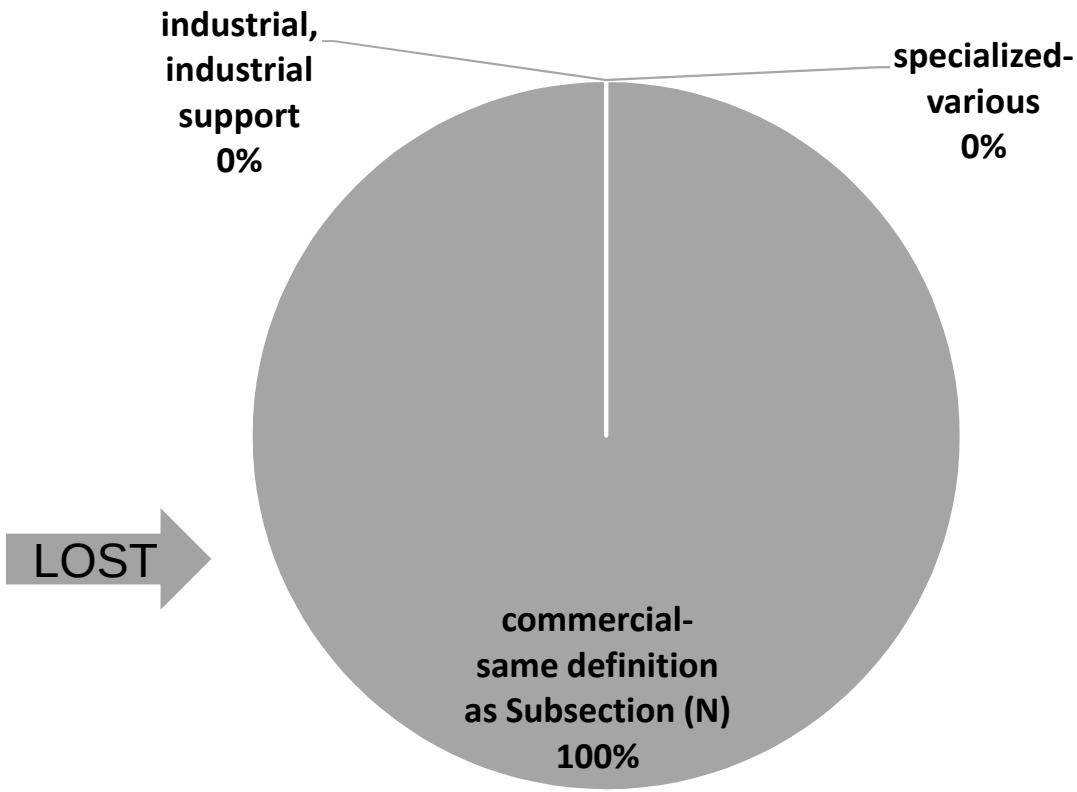
HOW MANY PROJECTS WOULD A BAD KROGER DECISION HAVE COST....

DOWNTOWN (DDAs)



Data Source: Dan McRae estimates of count of projects by Code Section in a typical year
Data Visualization: Dan McRae

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THE SUPREME COURT SPEAKS

The case revolved around the Development Authorities Clause of the Georgia Constitution, and "Subsection (N)" of the Development Authorities Law, O.C.G.A. Sec. 36-62-2(6)(N). Quoted here are three big takeaways from the opinion:

- ✓ "That a project may not be 'essential' to 'the development of trade, commerce, industry, and employment opportunities' does not render the project categorically ineligible for financing under paragraph (6)."
- ✓ "Employment opportunities at the new grocery store are, therefore, 'opportunities resulting directly from the trade, commerce, or industry' that the Development Authority proposes to finance, and they are 'employment opportunities' within the meaning of paragraph (6) (N)."
- ✓ "That paragraph (6)(N) may permit development authorities to issue bonds for different projects with different terms and conditions does not render paragraph (6) (N) unconstitutional."

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AND CONSTITUTIONAL ELIGIBILITY MATTERS!
THE "COLUMBUS CASE"

"A Muscogee County Superior Court judge has sided with a Columbus-based hotel owner, issuing an injunction that will halt the sale of a prime piece of downtown property to a competing hotel company….[The plaintiff's attorneys] argued that under state law the Development Authority, an arm of the Columbus Consolidated Government charged with economic development, could not sell land for less than fair-market value."

http://www.ledger-enquirer.com/news/local/article71817147.html#storylink=cpy

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“AS THE WORLD TURNS”
DOES THE DAL TURN ON PRICE?

HOTEL OWNER

IF PRICE AT OR ABOVE FAIR MARKET VALUE- SALE OK

IF PRICE BELOW FAIR MARKET VALUE- SALE NOT OK UNLESS SALE IS TO THE STATE (and has to be property unusable for a project)

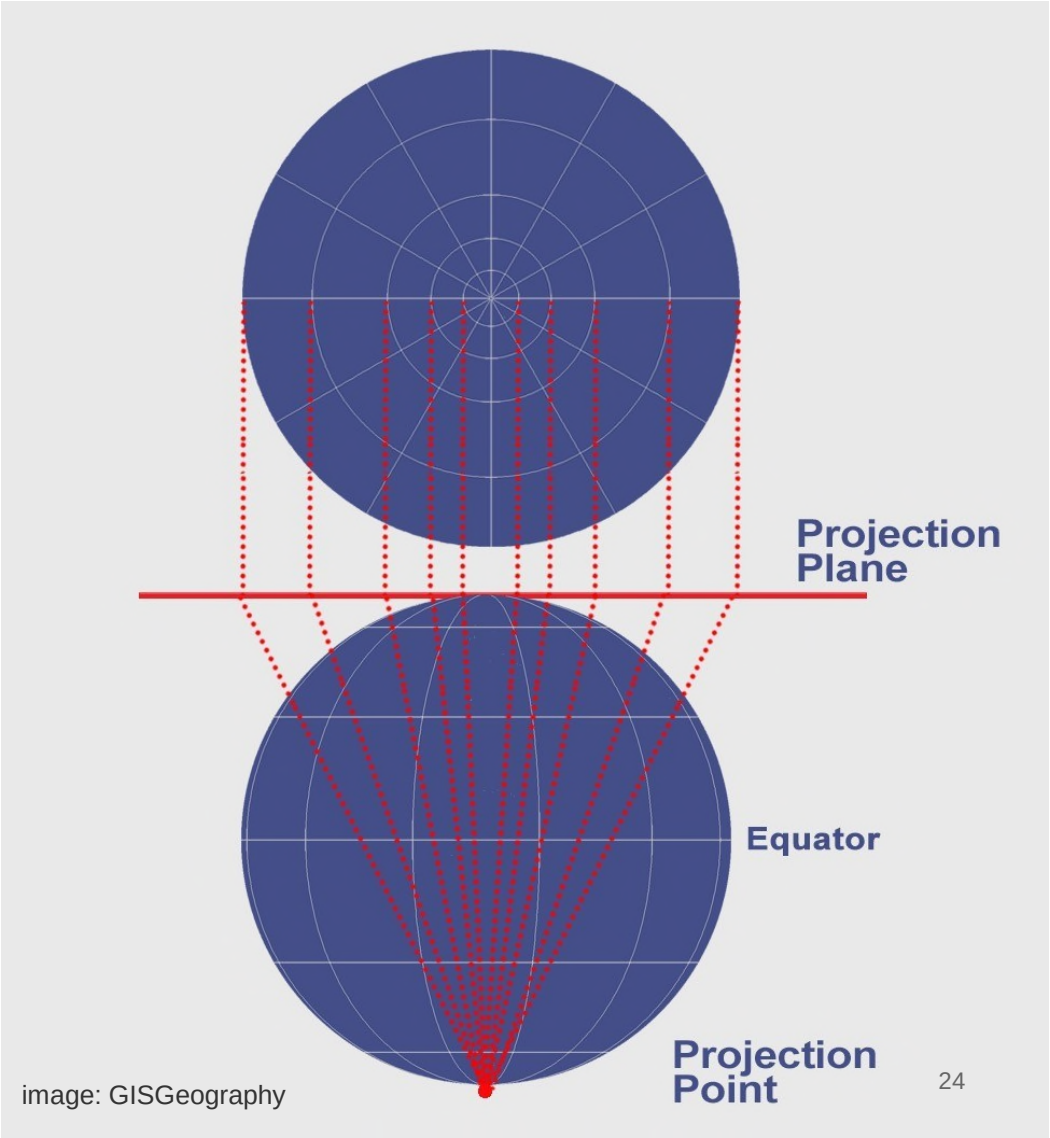

image: GISGeography

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NO! THE WORLD TURNS ON….
"PROJECT OR NOT A PROJECT"

COURT OF APPEALS

IF PROPERTY NOT A PROJECT, AUTHORITY HAS POWER TO-

- 1. dispose of any real property for fair market value, regardless of prior development of such property as a project, … **if** … such real property **no** longer can be used advantageously as a **project** ….
- O.C.G.A. Sec. 36-62-6(a)(7)
- 2. dispose of any real property for fair market value or any amount below fair market value … regardless of prior development of such property as a project, … **if** such real property **no** longer can be used advantageously as a **project** … **and if** title to such real property is to be **transferred to the state**. O.C.G.A. Sec. 36-62-6(a)(7.1)

price not an issue under DAL if property is a project

image: GISGeography

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BUT WAIT- YOU FORGOT THE CONSTITUTION!

Court of Appeals:

"In its appellate brief, Four JS also suggests that the Sale Agreement violated the constitutional prohibition against gifts and gratuities. See Ga. Const. of 1983, Art. III, Sec. VI, Par. VI (a) (1)….However, the trial court made no finding touching upon this question, which was not raised by the petition, and we do not reach the issue here…."

Bargain or gift? If you want to dodge your own bullet, what process should you follow?

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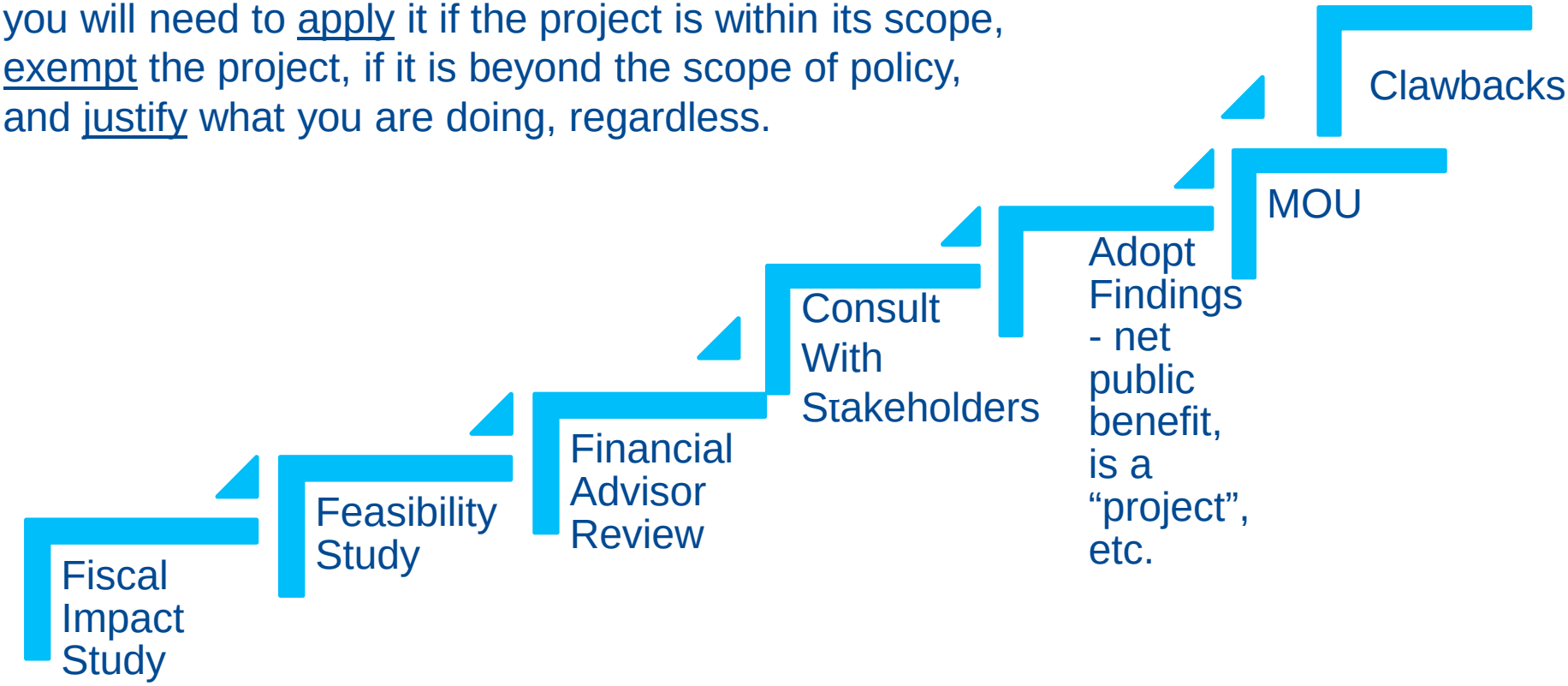
IF YOUR PROJECT IS LARGE OR CONTROVERSIAL

If you have a written incentives policy,
you will need to apply it if the project is within its scope,
exempt the project, if it is beyond the scope of policy,
and justify what you are doing, regardless.



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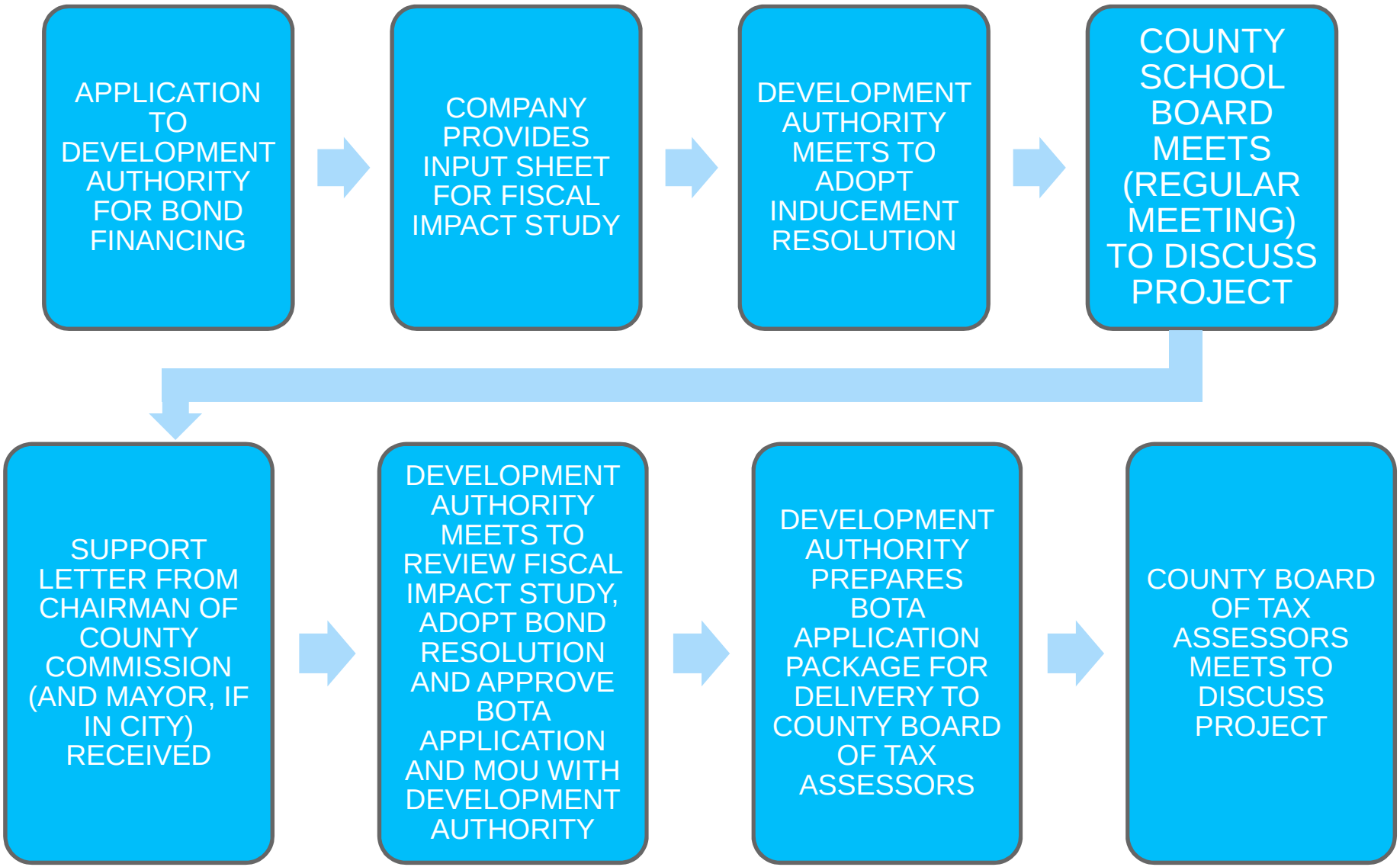
LOCAL PROCESSES-COUNTY DA EXAMPLE



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LOCAL PROCESSES-DDA EXAMPLE

- City's Economic Development Director gathers materials presented to the City Council and the various city departments (variances requested and responses/results from the City).
- The developer submits an application packet which summarizes the project and its estimated costs.
- The developer must provide an actual dollar amount requested. The DDA does not, at this time, consider proposals for a percentage of taxes to be abated over time.
- The developer must pay for the cost of a financial impact analysis which is done on behalf of the DDA (not on behalf of the developer).
- The developer must assert an economic benefit to the city and the citizens.
- The DDA has required that an engineer validate the costs provided in the developer's application.
- Based on the information provided by the developer, the information considered by other city departments and the financial impact analysis, the City's Economic Development Director provides information on current tax revenues and costs to the city and county. A forecast of projected project growth, changes in property value, and impact of abatement is also provided to the DDA.
- The DDA board typically discusses each project at 2-3 meetings before voting on any abatement. Developers are typically asked to provide additional information and details for consideration.

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CAN'T- CARRY OUT PUBLIC PROJECTS

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THE KEY TO P3

- THE DAL DEFINITION OF "PROJECT" INCLUDES THIS-

  (N) … A project may be for any industrial, commercial, business, office, parking, **public**, or other use, provided that a majority of the members of the authority determines, by a duly adopted resolution, that the project and such use thereof would further the public purpose of this chapter. O.C.G.A Sec. 36-62-2(6)(N)

- THIS POWER IS IMPORTANT, EVEN THOUGH…

AUTHORITIES CANNOT CARRY OUT PURELY PUBLIC PROJECTS LIKE GOVERNMENTAL ADMINISTRATIVE BUILDINGS, OR, IN CONCERT WITH A LOCAL GOVERNMENT, STREET AND ROAD PROJECTS. *See Odom v. Union City Downtown Development Authority*, 251 Ga. 248, 305 S.E.2d 110 (1983); Ga. Const. Art. III, Sec. VI, Para. V (e).

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THE KEY TO P3

- PROPERLY INTEGRATED PUBLIC/PRIVATE PROJECTS (P3s) ARE PERMITTED. *Nations v. Downtown Development Authority of the City of Atlanta*, 255 Ga. 324, 338 S.E.2d 240 (1985).
- SO CARRYING OUT THE PUBLIC COMPONENT OF A P3 RELIES ON THIS POWER.
  - SOME CONSTITUTIONAL DA's ARE AUTHORIZED BY THEIR LCA TO CARRY OUT PURELY PUBLIC PROJECTS.

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PUBLIC/PRIVATE PARTNERSHIPS (P3)

- PUBLIC/PRIVATE PARTNERSHIPS (P3) ARE VERY POPULAR NOW
- A P3 SUCCESS STORY IN GEORGIA WAS A REGIONAL PROJECT
- THE ENGINEERED FLOORS PROJECT
  - NEW INVESTMENT IN DALTON COUNTY AND MURRAY COUNTY
  - $450 MILLION INVESTMENT
  - 2,400 NEW MANUFACTURING JOBS
- BUT- NEW PUBLIC INFRASTRUCTURE WAS REQUIRED, AND HAD TO BE FINANCED
- SOLUTION- P3

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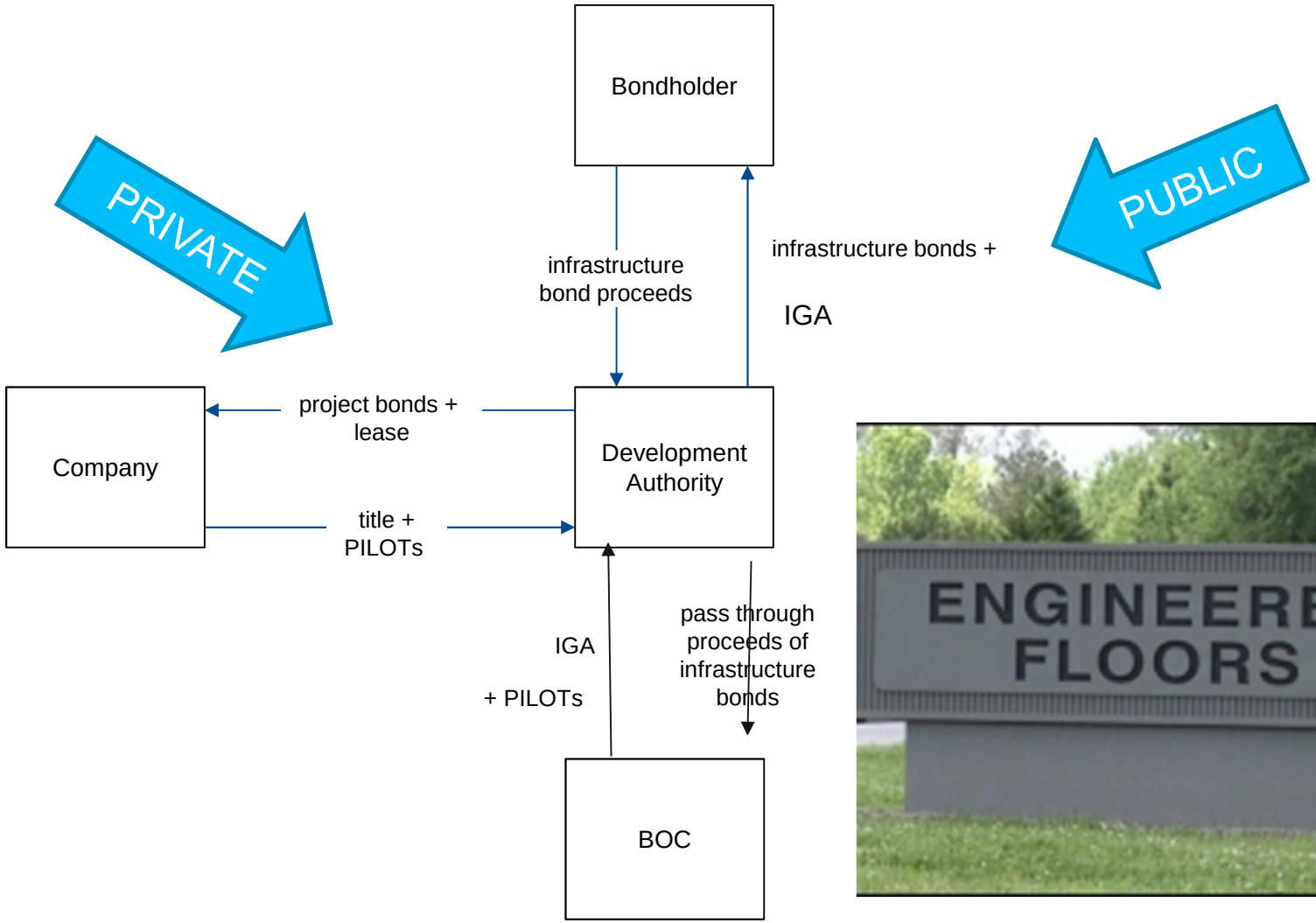
SUCCESSFUL P3 STRUCTURE
Won GEDA "Deal of the Year"
DALTON-WHITFIELD JDA



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CAN'T- CARRY OUT ROAD PROJECTS WITH LOCAL GOVERNMENT

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STRUCTURING AROUND A ROADBLOCK

- THE GEORGIA CONSTITUTION DOES NOT ALLOW A STATUTORY AUTHORITY TO "CONSTRUCT, IMPROVE OR MAINTAIN" ROADS OR STREETS IN CONCERT WITH A LOCAL GOVERNMENT.
- A COMMUNITY HAS A LARGE REDEVELOPMENT PROJECT.
- THE SITE IS DIVIDED BY AN ELEVATED RAIL LINE AND NEEDS AN UNDERPASS;*i.e.*, A COVERED ROAD.
- THE PROJECT WILL NOT SUCCEED UNLESS PUBLIC FINANCING IS MADE AVAILABLE FOR THE ROAD INFRASTRUCTURE.

Solution: find partners for the authority

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PUBLIC/PUBLIC PARTNERSHIP-

LOCAL STRUCTURES PUT IN PLACE TO SUPPORT PROJECT

school district

DDA- bonds for title 35%/30 yrs Assembly abatement; graduated Serta Simmons abatement

City- TAD; SSD

County- consent to TAD

CID- issues bonds; levies CID millage; owns infra-structure

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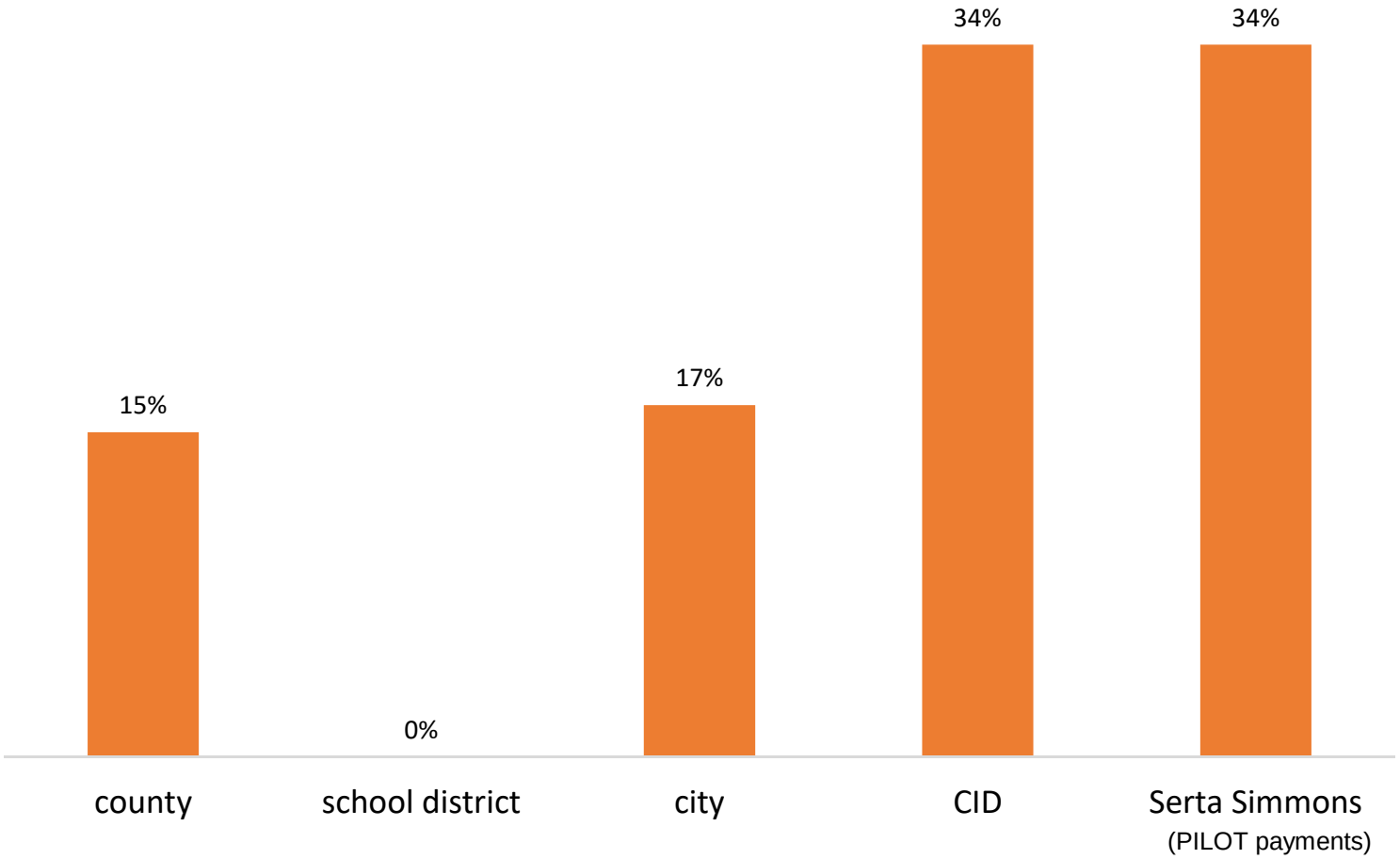
TOTAL SHARE OF CID BOND DEBT SERVICE DIRECTLY PAID BY EACH



Data Visualization: Dan McRae, of levelized use of millage & PILOT payments over 12-year period; some figures assumed for purposes of illustration; SSD millage is “back up” for repayment of CID bonds; not actually imposed so not shown

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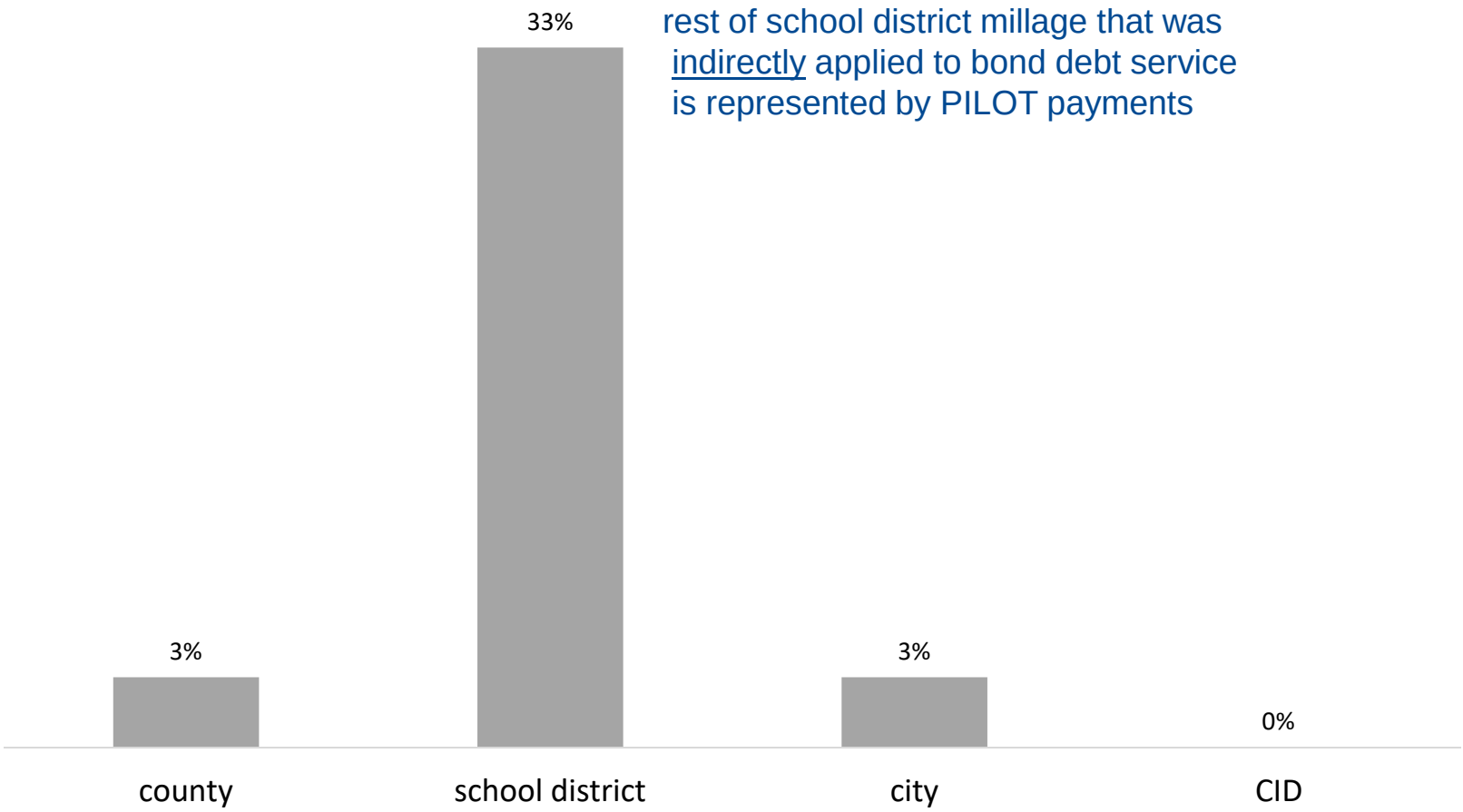
SHARE OF NORMAL REVENUES LEFT FOR EACH

AFTER ASSEMBLY ABATEMENT, SERTA SIMMONS ABATEMENT, PILOT PAYMENTS TO PAY CID BONDS, AND USE OF CID TAXES TO PAY CID BONDS



rest of school district millage that was indirectly applied to bond debt service is represented by PILOT payments

Data Visualization: Dan McRae, of levelized use of millage & PILOT payments over 12-year period; some figures assumed for purposes of illustration; SSD millage is "back up" for repayment of CID bonds; not actually imposed so not shown

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CAN'T- EXCEED YOUR JURISDICTION

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LIGHTING STRIKES THRICE

3 EXAMPLES OF PROJECTS WHERE THE FACILITY LOCATION INVOLVED TWO COUNTIES

3 DIFFERENT SOLUTIONS

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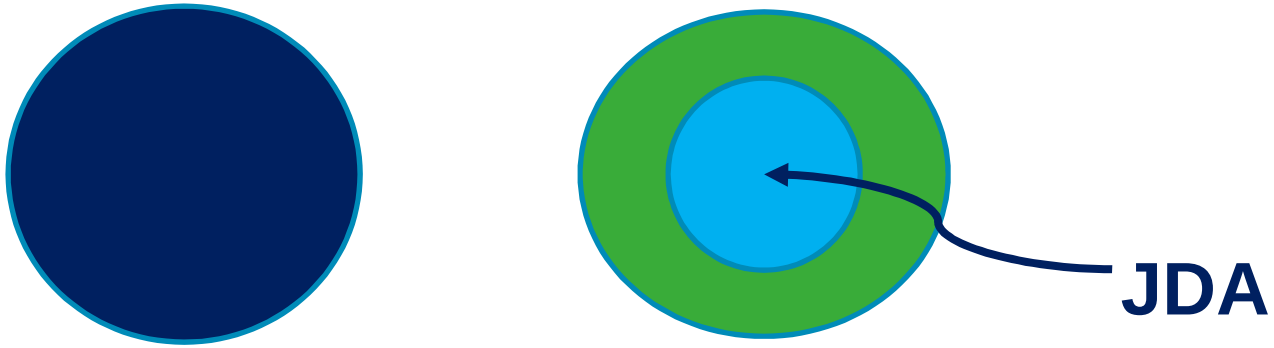
MANDO AUTOMOTIVE SUPPLIER
MERIWETHER COUNTY: OWNED PARK
TROUP COUNTY: SITE OF PARK



- SOLUTION: CREATE JOINT DEVELOPMENT AUTHORITY OF MERIWETHER COUNTY AND THE CITY OF HOGANSVILLE (SITE OF PROJECT IN TROUP COUNTY)
- JDA ISSUES BONDS FOR TITLE AND HOLDS TITLE TO THE PROJECT
- TROUP COUNTY BOARD OF TAX ASSESSORS APPROVED MOU BETWEEN MANDO AND THE JDA
- JDA'S JURISDICTION LIMITED BY CONCURRENT ACTIVATING RESOLUTIONS TO THE INDUSTRIAL PARK

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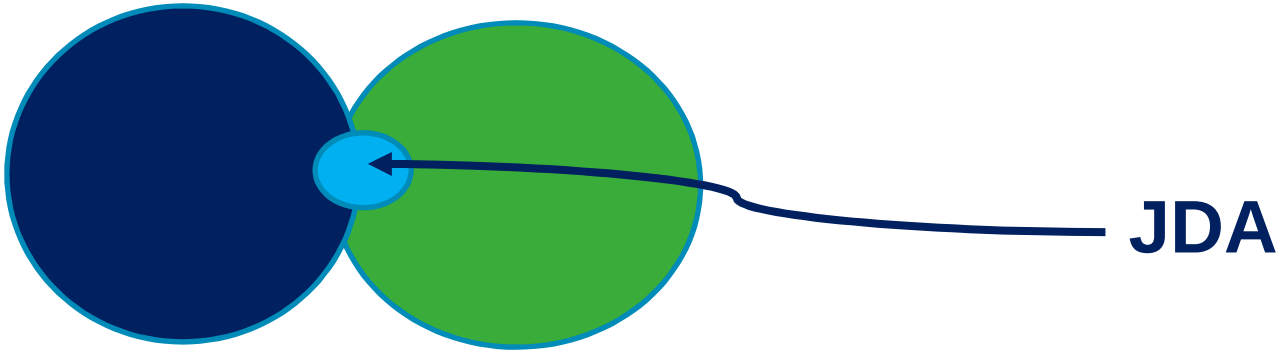
DOLLAR GENERAL DISTRIBUTION CENTER
FACILITY LOCATED IN BOTH BUTTS COUNTY AND SPALDING COUNTY



- SOLUTION: CREATE JOINT DEVELOPMENT AUTHORITY OF BUTTS COUNTY AND SPALDING COUNTY
- JDA ISSUES BONDS FOR TITLE AND HOLDS TITLE TO THE PROJECT
- INTERGOVERNMENTAL AGREEMENT BETWEEN THE COUNTIES REGULATES WHO ASSESSES TAXES, WHO ISSUES BUILDING PERMIT, SPLIT OF REVENUES, WHO PROVIDES UTILITIES, ETC.
- JDA'S JURISDICTION LIMITED BY CONCURRENT ACTIVATING RESOLUTIONS TO THE SITE OF THE FACILITY

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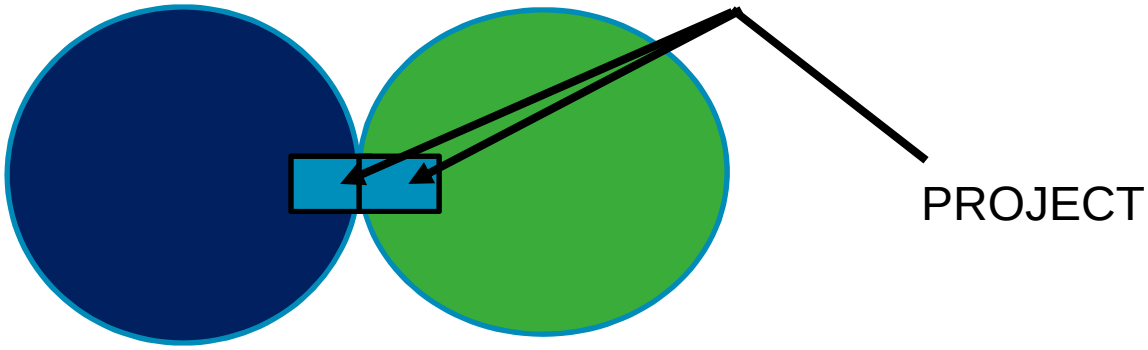
CATERPILLAR CONSTRUCTION EQUIPMENT MANUFACTURING PLANT

LOCATED IN BOTH ATHENS-CLARKE AND OCONEE COUNTY



- SOLUTION: EACH LOCAL GOVERNMENT'S DEVELOPMENT AUTHORITY ISSUED ITS OWN BONDS FOR TITLE FOR ITS PORTION OF THE PROJECT
- IN ADDITION TO CATERPILLAR, THE LOCAL GOVERNMENTS, THEIR ASSESSORS, AND THEIR DEVELOPMENT AUTHORITIES ENTERED INTO AN MOU WHICH, AMONG OTHER THINGS, PROVIDED FOR ASSESSMENT OF BOTH PORTIONS OF THE PROJECT TO FOLLOW A JOINT LEASEHOLD VALUATION SCHEDULE

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CONCLUSION

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“DEAL STRUCTURING” IS HOW DEVELOPMENT AUTHORITIES GET IT DONE

“It’s hard to beat a person who never gives up.”
Babe Ruth

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MORE INFORMATION

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QUESTIONS?

If you have any questions or comments on this presentation, please do not hesitate to let me know.

Daniel M. McRae, Partner
Seyfarth Shaw LLP
1075 Peachtree Street, N.E.
Suite 2500
Atlanta, GA 30309
404.888.1883
404.892.7056 fax
dmcrae@seyfarth.com
danmcrae.com

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