SEYFARTH SHAW

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DEALMAKING
FOR DEVELOPMENT AUTHORITIES

MAKING A PROJECT BY PUTTING THE PIECES TOGETHER

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THE ROAD TO ECONOMIC DEVELOPMENT

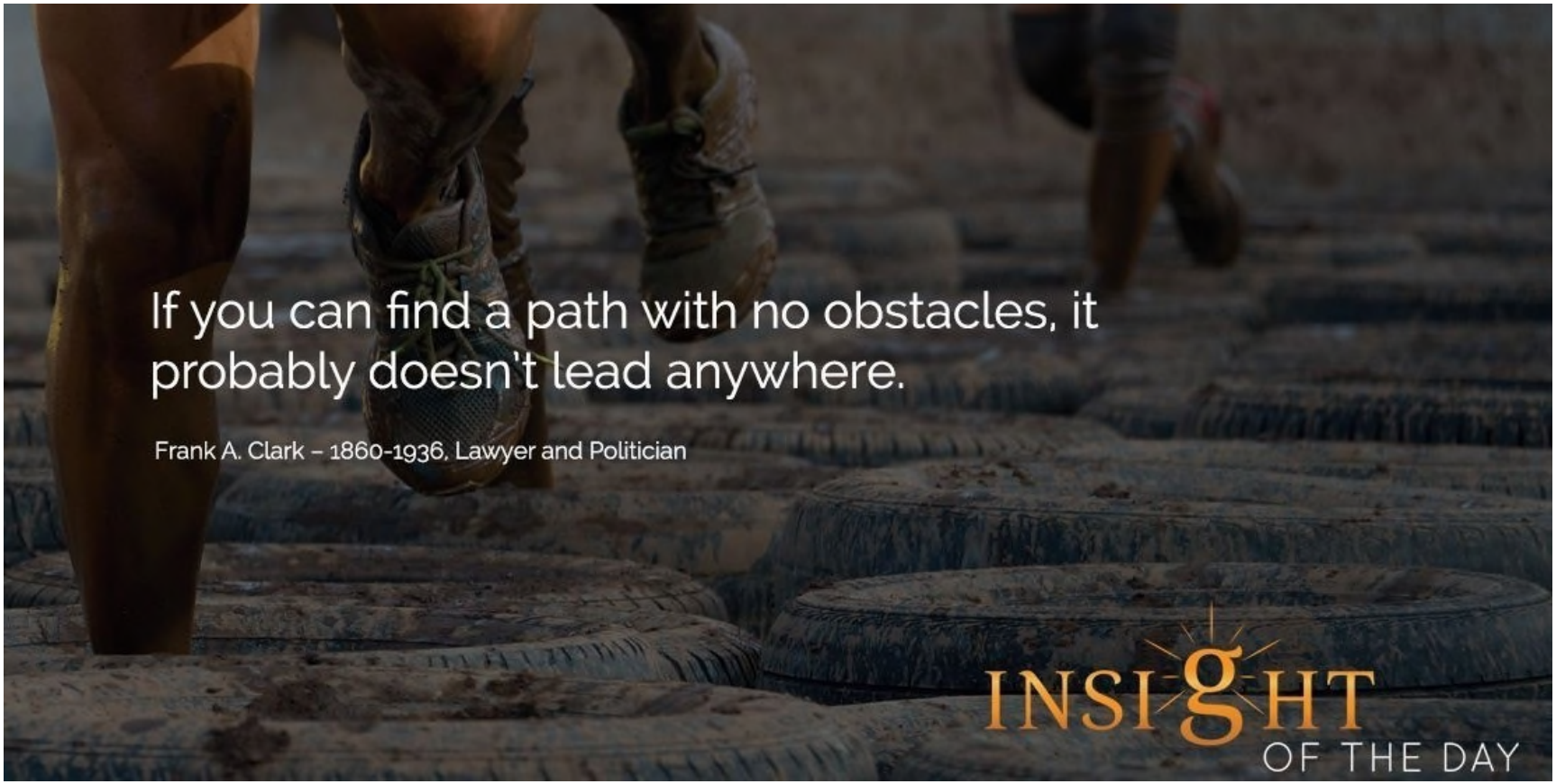

image credit: unknown

IT'S A SLIPPERY SLOPE

- "Gifts and Gratuities"
- No Local Government/Statutory Authority Road Projects in Concert
- All Taxes Must Be Uniform
- Bids or RFPs Required for Construction Projects
- Real Public/Private Partnerships Are Unconstitutional

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IT'S A SLIPPERY SLOPE

- No Public Guaranties of Private Obligations
- Local Governments Can't Bind Their Successors
- Development Authorities Can't Do Purely Public Projects
- PILOTs Can't Be Monetized without Taxing Authority Consent
- Development Authorities Are Restricted to Limited Powers

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RESTRICTED POWERS

CAN DEVELOPMENT AUTHORITIES DO COMMERCIAL PROJECTS?
The "Kroger" Case

Georgia

Decided: June 3, 2019

19A0378. DEVELOPMENT AUTHORITY OF COBB COUN
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 uld 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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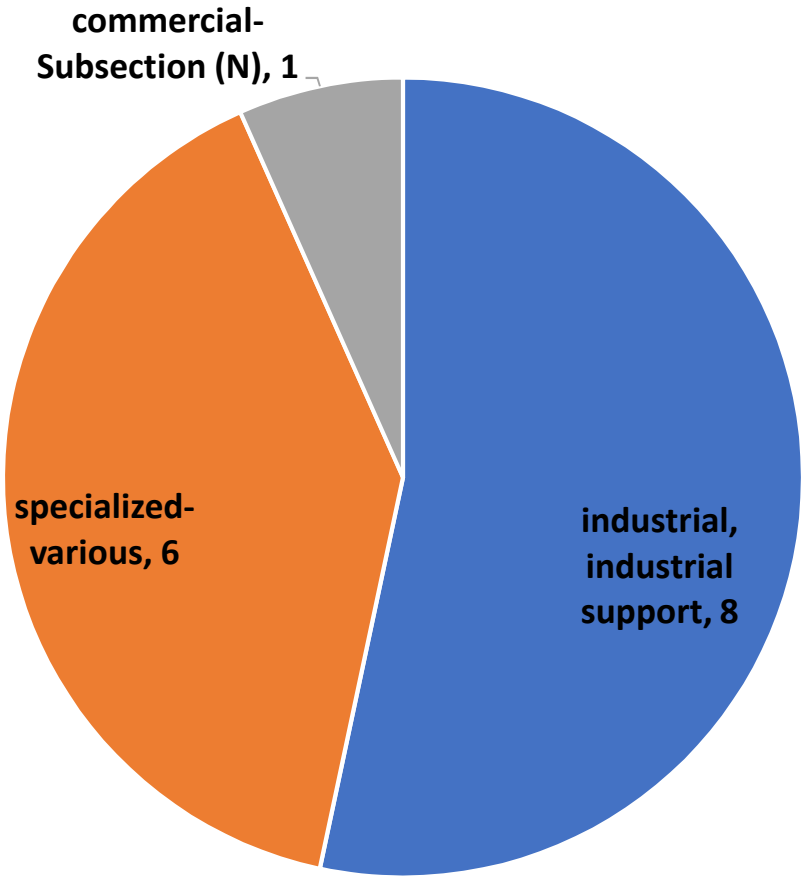
ONLY ONE PROJECT DEFINITION IN THE DAL AUTHORIZES COMMERCIAL PROJECTS….



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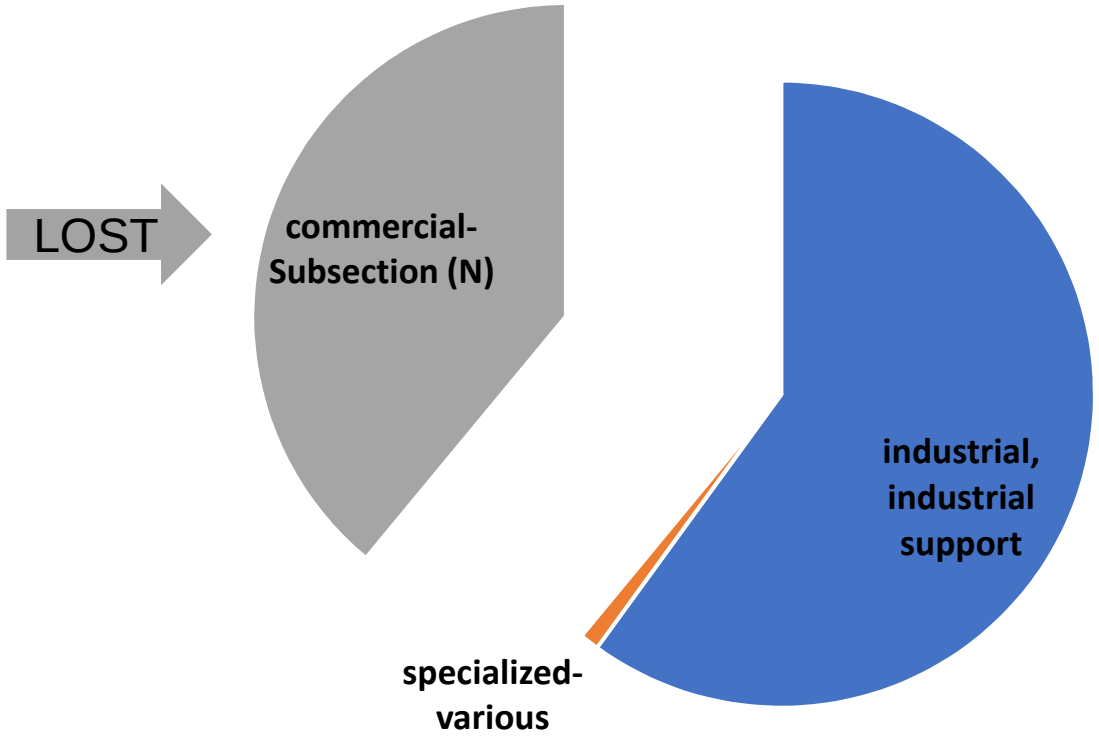
HOW MANY PROJECTS WOULD A BAD KROGER DECISION HAVE COST....

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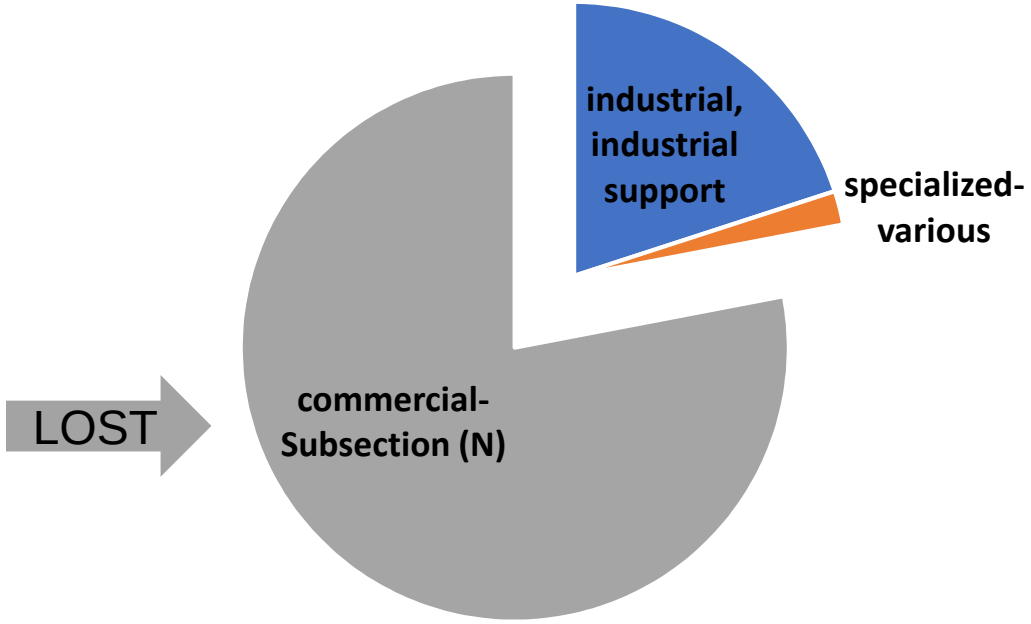
HOW MANY PROJECTS WOULD A BAD KROGER DECISION HAVE COST....

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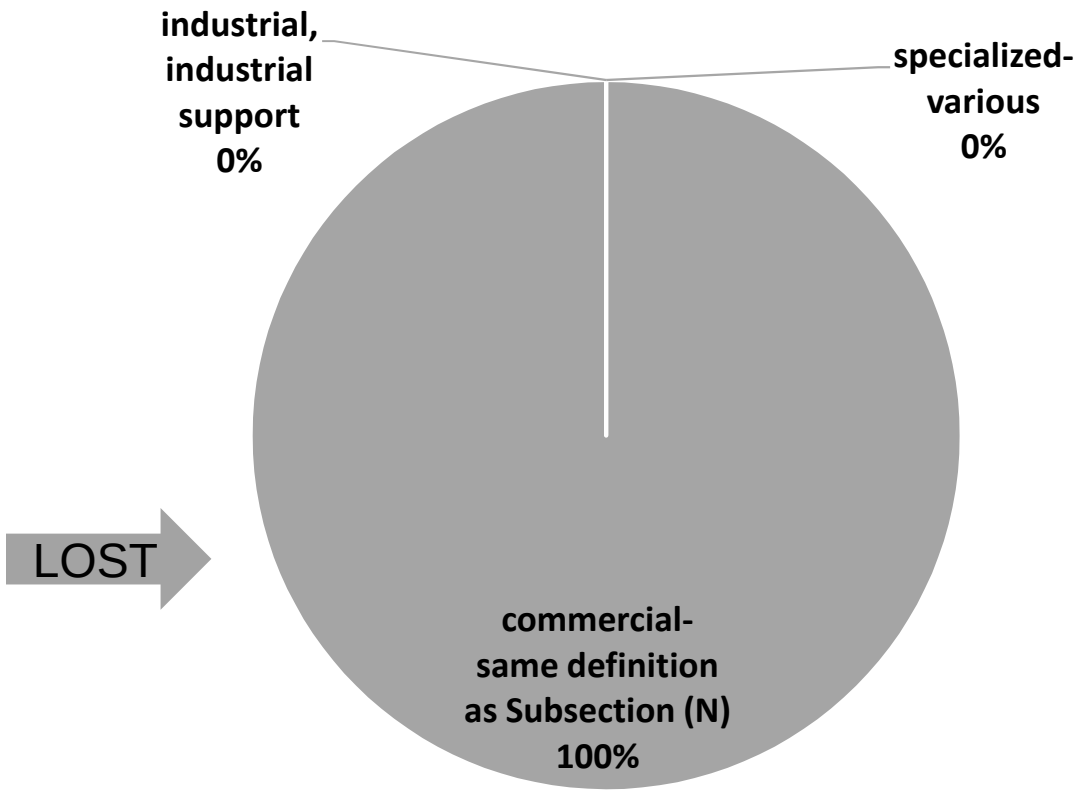
HOW MANY PROJECTS WOULD A BAD KROGER DECISION HAVE COST....

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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SALES BELOW FMV

CAN A DEVELOPMENT AUTHORITY SELL LAND FOR LESS THAN FAIR MARKET VALUE?
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 must be property unusable for a project)

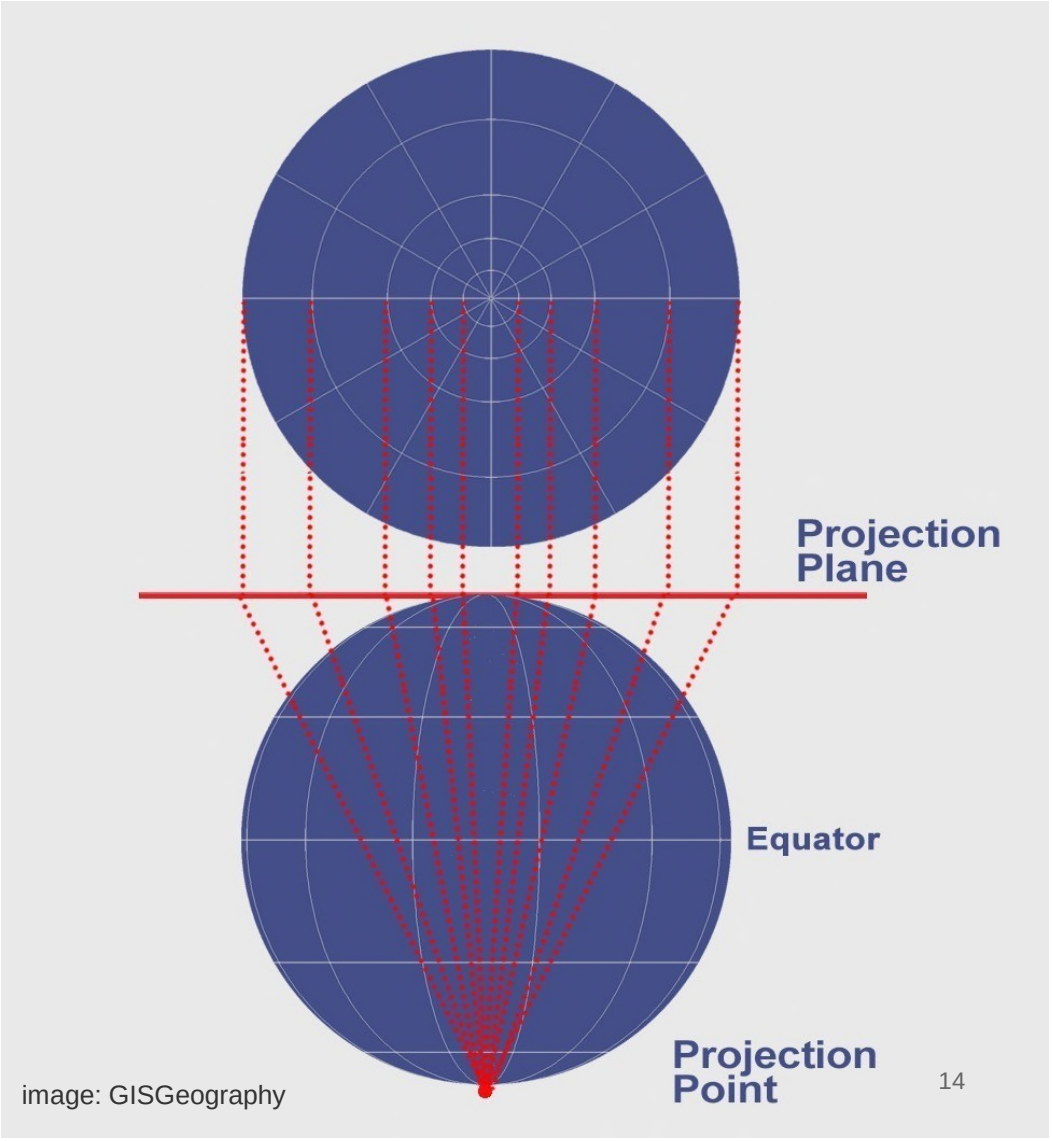

image: GISGeography

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

COURT OF APPEALS

price not an issue under DAL if property is a project

image: GISGeography

Note- DDAL is different. Does not have separate sales clause about non-projects.

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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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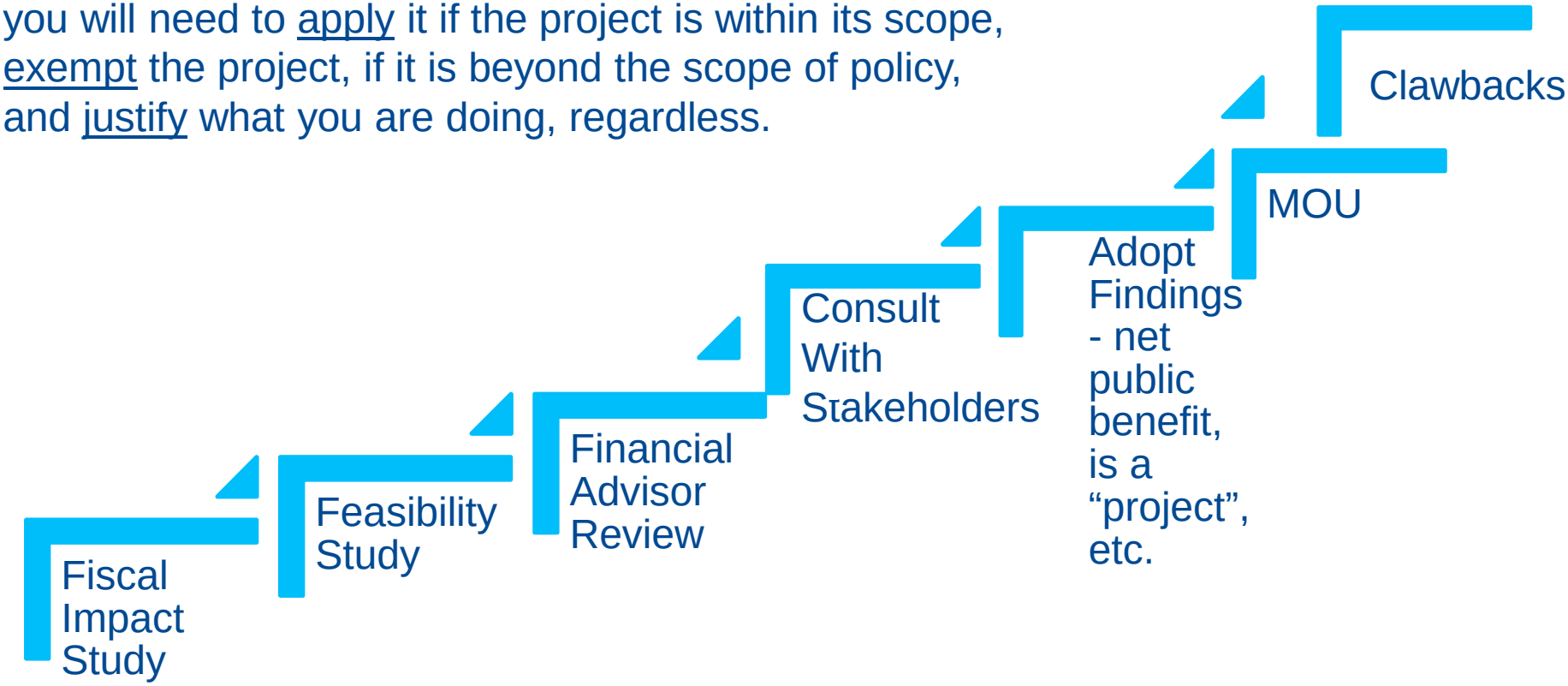
IF YOUR PROJECT IS LARGE OR CONTROVERSIAL

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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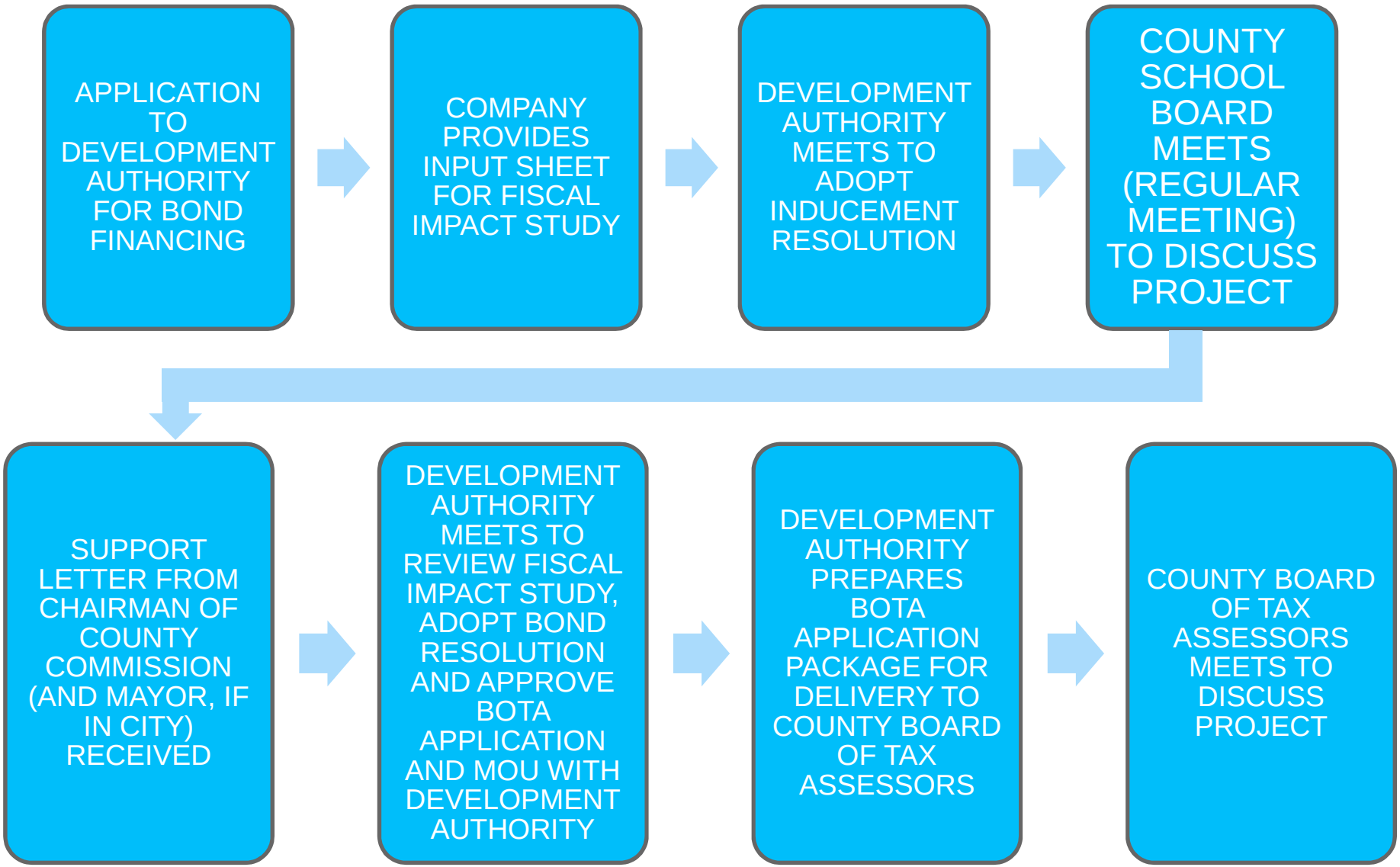
LOCAL PROCESSES-COUNTY DA EXAMPLE



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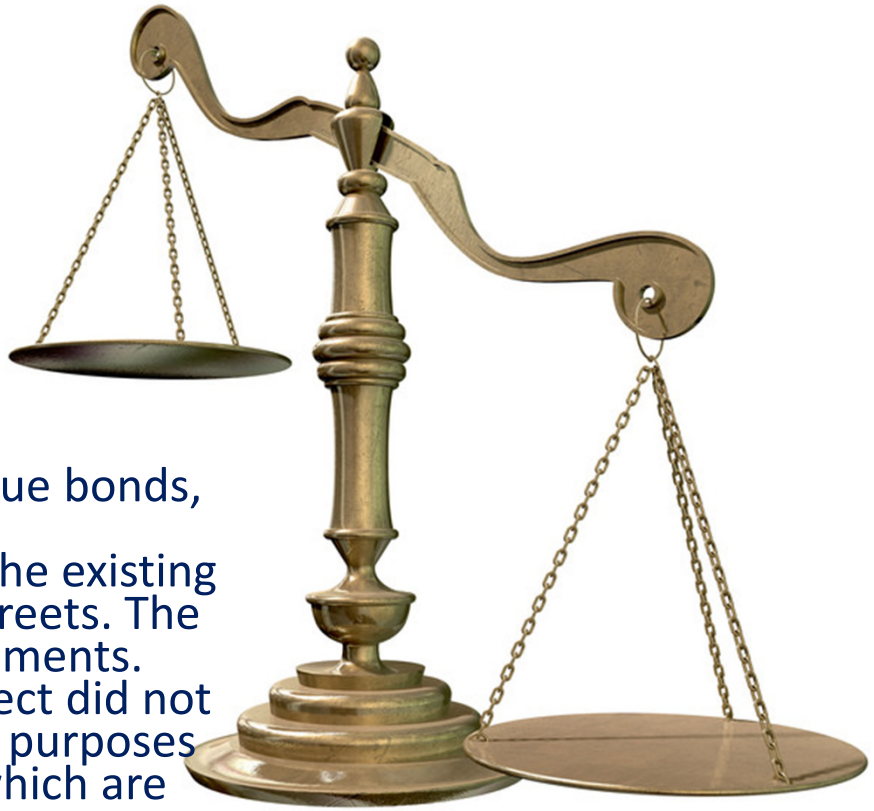
BINDING SUCCESSORS, MONETIZING PILOTS, PUBLIC/PRIVATE PARTNERSHIPS, PROPERTY TAX "ABATEMENT"

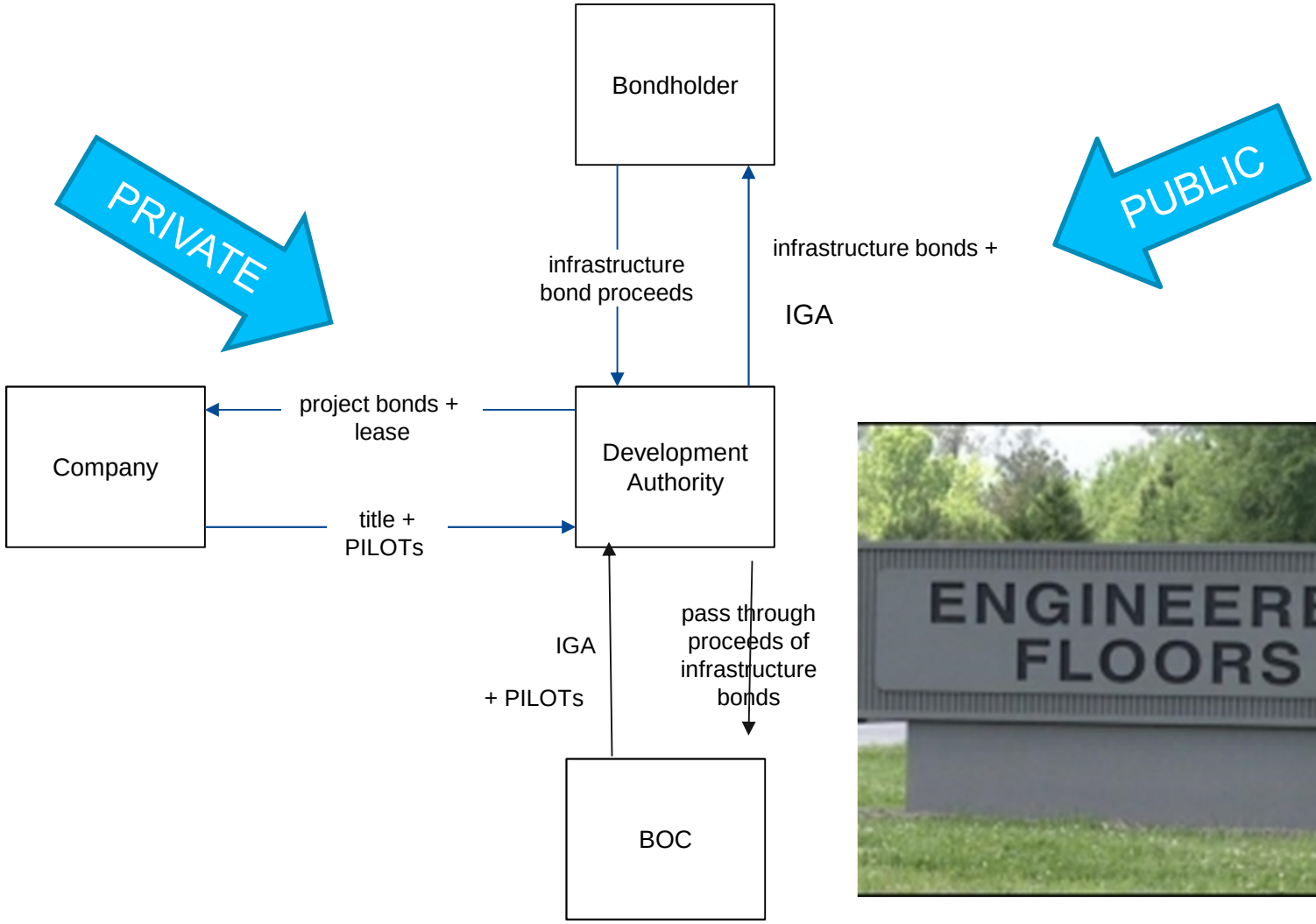
NO PUBLIC PROJECTS

Solution: Public/Private Partnership



“ In Odom, the DDA sought to issue revenue bonds, the proceeds of which would finance the construction of a new city hall, renovate the existing police station and jail, and improve city streets. The project thus consisted of purely public elements. This court held that the scope of this project did not fall within the constitutionally designated purposes of Downtown Development Authorities which are the promotion and development of "trade, commerce, industry, and employment opportunities." 1983 Georgia Constitution, Art. IX, Sec. VI, Par. III. In the case before us the project is comprised of both public and private components which are integrated so as to produce the desired purposes. The trial court found that the project will promote and develop the public purposes of trade, commerce, industry, and employment opportunities. There is evidence in the record to support this determination.” *Nations I*, 1985 (Underground Atlanta project).

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



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ROAD PROJECTS, “GIFTS AND GRATUITIES”, CONSTRUCTION LAW, PUBLIC/PRIVATE PARTNERSHIPS

CASE STUDY- EXTENDING A ROAD
The TopGolf Project in Augusta

… the road extension is the only public incentive Topgolf is receiving. … the facility, which aims to open in March, will be a $10 million to $15 million investment creating more than 100 jobs."

Source (image and quote): Augusta Chronicle

- Prospect to construct entertainment center
- Create jobs and make investment
- Prospect also constructs road extension on land owned by landowner
- Entertainment center and road extension determined to be economic development project
- No Authority or local government obligation to construct road
- Amount of road cost paid as purchase price upon completion of road
- Road conveyed to local government
- Public benefit determined to be sufficient to justify purchase price

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.

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