HOT ISSUES

The "But For" Test

Multijurisdictional Authorities

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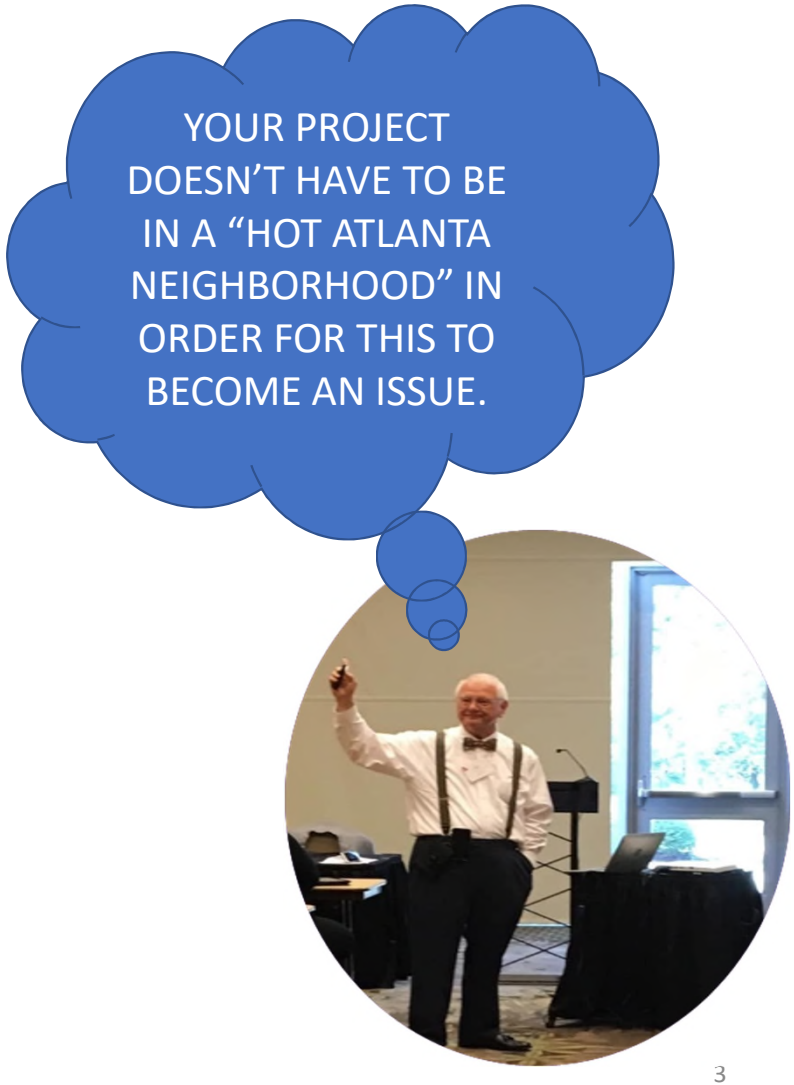
IT'S ALL THE BUZZ TODAY, BUT…

"This is called the "but-for" test, asking whether a site would really go undeveloped or underdeveloped "but for" the property tax discount. Is that Midtown parking lot really going to stay a parking lot forever "but for" a tax discount? Is a company really going to locate in Charlotte instead of Atlanta "but for" the subsidy?

No "but-for" test is required by state law; it's more of a thought experiment."

Source: Saporta Report,
https://saportareport.com/
developer-property-tax-breaks-in-hot-atlanta-neighborhoods-raising-questions/
columnists/maggie-lee/maggie/



"BIGFOOT WAS SPOTTED AT THE CAPITOL THIS YEAR. (HB924). BUT FORTUNATELY, HE DIDN'T MAKE IT THROUGH THE SESSION.

(b)(1) No development authority, county, consolidated government, or municipality shall enter into any contract or agreement to provide financial incentives unless such authority or local government provides all affected local governments with a written notice of intent providing details on the proposed contract or agreement and financial incentives.

(2) The written notice described in paragraph (1) of this subsection shall be delivered to each affected local government at least seven days prior to the date on which the development authority, county, consolidated government, or municipality will consider approval of the contract, agreement, or financial incentives.

(3) Such written notice of intent shall include, but not be limited to, the following:

(A) An analysis of the project that is the subject of the contract, agreement, or financial incentives, including, but not limited to, information demonstrating that the project would not be feasible without the proposed financial incentives;

(B) Enumeration of the specific financial incentives that will be provided regarding the project; and

(C) An estimate of the direct financial impact upon each affected local government from such financial incentives."

Navigation

BUT FOR

No matches

Headings Pages Results

We couldn't find what you were looking for.

Do you want to look for something else?

THIS "TEST" IS NOT IN THE DEVELOPMENT AUTHORITIES LAW.

Westlaw.

Ga. Code Ann., § 36-62-1

C

West's Code of Georgia Annotated Currentness

Title 36. Local Government

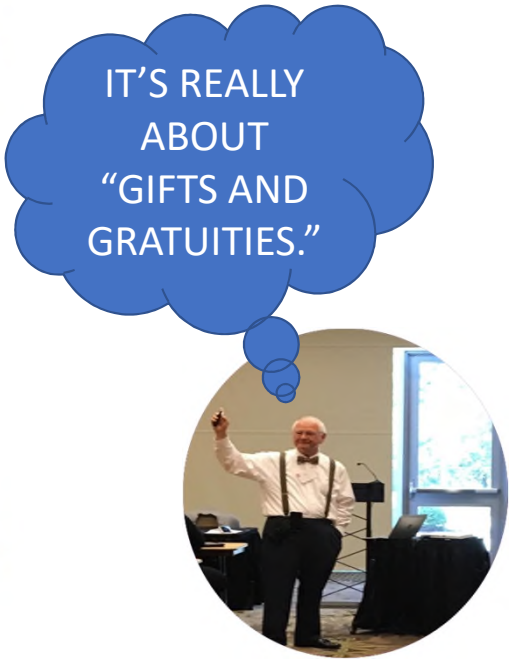
Provisions Applicable to Counties and Municipal Corporations

Chapter 62. Development Authorities (Refs & Annos)

➡ **§ 36-62-1. Short title**

This chapter may be referred to as the "Development Authorities Law."

"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



AND MATH IS INVOLVED…

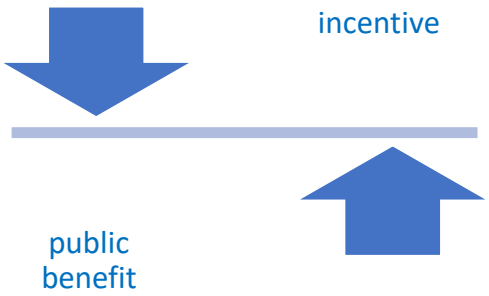
PUBLIC BENEFIT ≥ INCENTIVE

=

FAIR MARKET VALUE + OTHER SUBSTANTIAL BENEFIT ≥ INCENTIVE

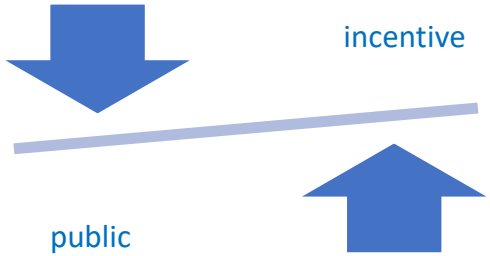
PUBLIC BENEFIT AND INCENTIVE NEED TO BE AT LEAST EQUAL, SO THIS IS-

OK



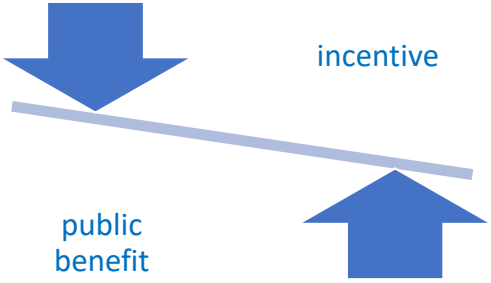
IF THE PUBLIC BENEFIT EXCEEDS THE INCENTIVE, THAT IS EVEN BETTER, SO THIS IS-

OK



BUT IF THE INCENTIVE EXCEEDS THE PUBLIC BENEFIT, THAT IS-

NOT OK



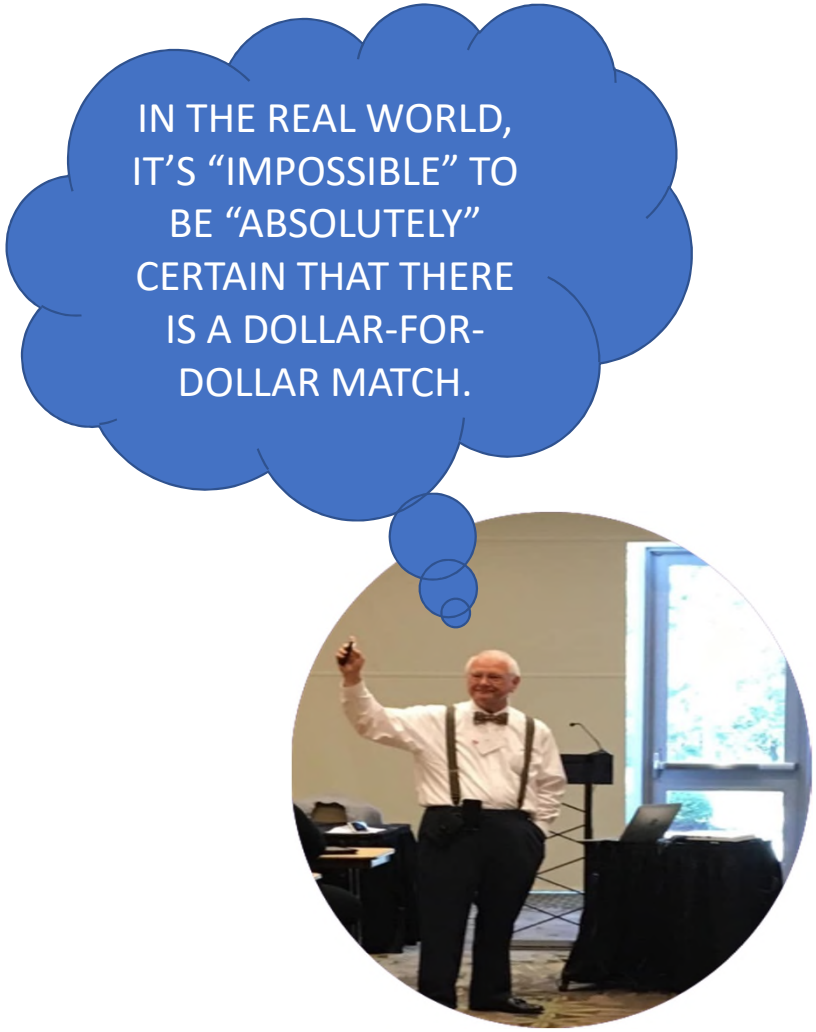
A GOOD EXAMPLE

fair market value (cash portion)

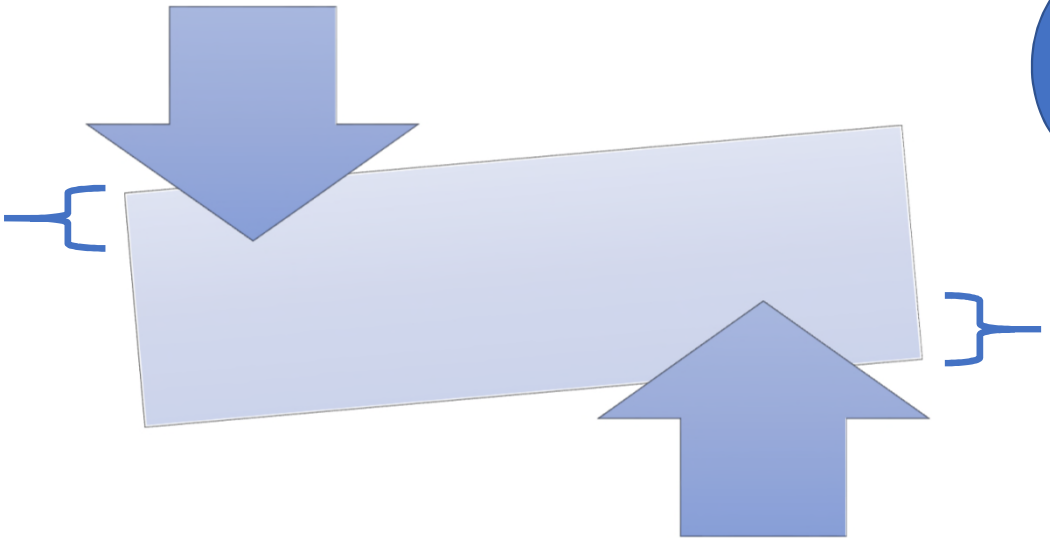
"Although the General Assembly could have chosen other ways to deal with the issue, we cannot say that its decision to allow the cutting of trees on public property in exchange for information on billboards and the payment of the value of the trees amounts to an illegal gift under our constitution. Therefore, we affirm the trial court's ruling that the statute is constitutional." *Garden Club of Georgia v. Shackelford*, 274 Ga. 653, 560 S.E.2d 522(2002)

other substantial benefit (non-cash portion)

- There is a fairly recent tendency to evaluate incentives on an all or nothing basis. In other words, some view incentives as either 100% necessary, or as 100% not necessary.
- A more thoughtful view is found in a recent paper by the Smart Incentives firm and the Center for Regional Economic Competitiveness. This is "Estimating the Influence of Incentives on Investment Decisions" (November 2020)(hereafter, "Incentives Study").
  https://smartincentives.org/wp-content/uploads/Estimating-the-Influence-of-Incentives-Nov-2020.pdf
- The Incentives Study refers to the "task of determining whether incentives proved absolutely decisive to investment decisions in order to assess effectiveness" as being "impossible." (emphasis added)
- Indeed, the State of Georgia, for example, in its documentation for REBA or OneGeorgia grants, only requires the private grant recipient to provide a certification along these lines: "But for the State assistance described in Section IV of this document, the Company may have decided to locate the Project described in Section III at a site in the competing states of …." (emphasis added)



SO, UNLESS THE BARGAIN IS CASH EXCHANGED FOR CASH, THE REALITY IS, THE EQUATION ACTUALLY LOOKS LIKE THIS



IT'S LIKE AN AUCTION.
YOU'RE BIDDING AGAINST YOURSELF.
THERE IS A "RESERVE PRICE."
BUT YOU DON'T KNOW WHAT IT IS!
AND THE INCENTIVE CAN'T EXCEED THE PUBLIC BENEFIT!!

A municipal advisor suggested to the Council of Development Finance Agencies that the real question is- "How Much Help Is Needed?" His presentation offered these as some guidelines for that decision-making-

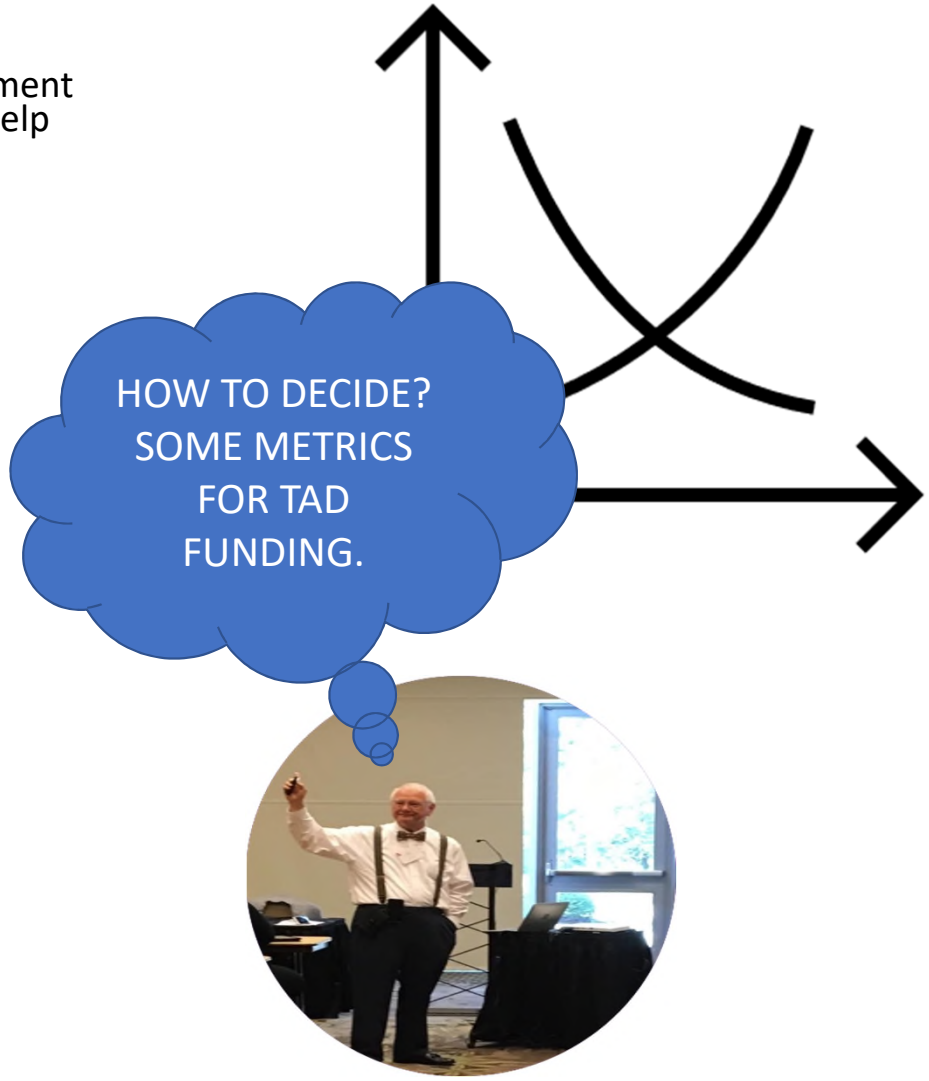
1. Primary Ways to Determine:

- Subsidy needed in order to achieve reasonable rates of return
- True capital gap without which project could literally not start construction
- Amount readily explained by extraordinary costs in budget
- Cost of providing true publicly dedicated improvements
- Incentive deal: incremental cost of building at proposed site versus alternate locations

2. Other Factors Often Considered (use these as yardsticks and limiters, but not for primary decision-making):

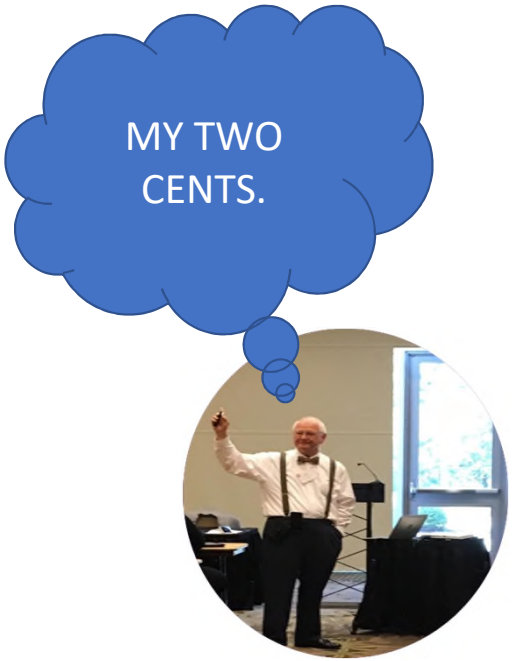
- Subsidy as % of Incremental Property Tax to be generated
- Subsidy as % of Project Cost (Public funds "leverage" private)
- $ Amount Per Job Attracted/Retained

Tony Q. Smith, "TIF Underwriting and Deal-Making: Financing Gap Analysis and Deal Terms" (December 10, 2014)(hereafter "TIF Presentation").



More generally, on the community level these are some of the questions that can help answer the “good bargain or not” question. “But for” incentives in a certain range…

- Will the project locate in this community or in this part of the community?
- Will the project go forward now, or will it stall if incentives are not provided now?
- If the project does not go forward now, will it miss the economic cycle, and be delayed, potentially for years, or lost forever?
- Will the project provide public infrastructure or neighborhood amenities as a “give back”?
- Will the project be built to the level of quality that the community desires?
- Will the project provide a return on investment to the equity provider and debt provider sufficient to attract financing?
- Is another community (or another state) more competitive for this project, because it is more willing to cost-share?
- Is this a transformational, catalytic project that is a once in a lifetime opportunity?
- And more.



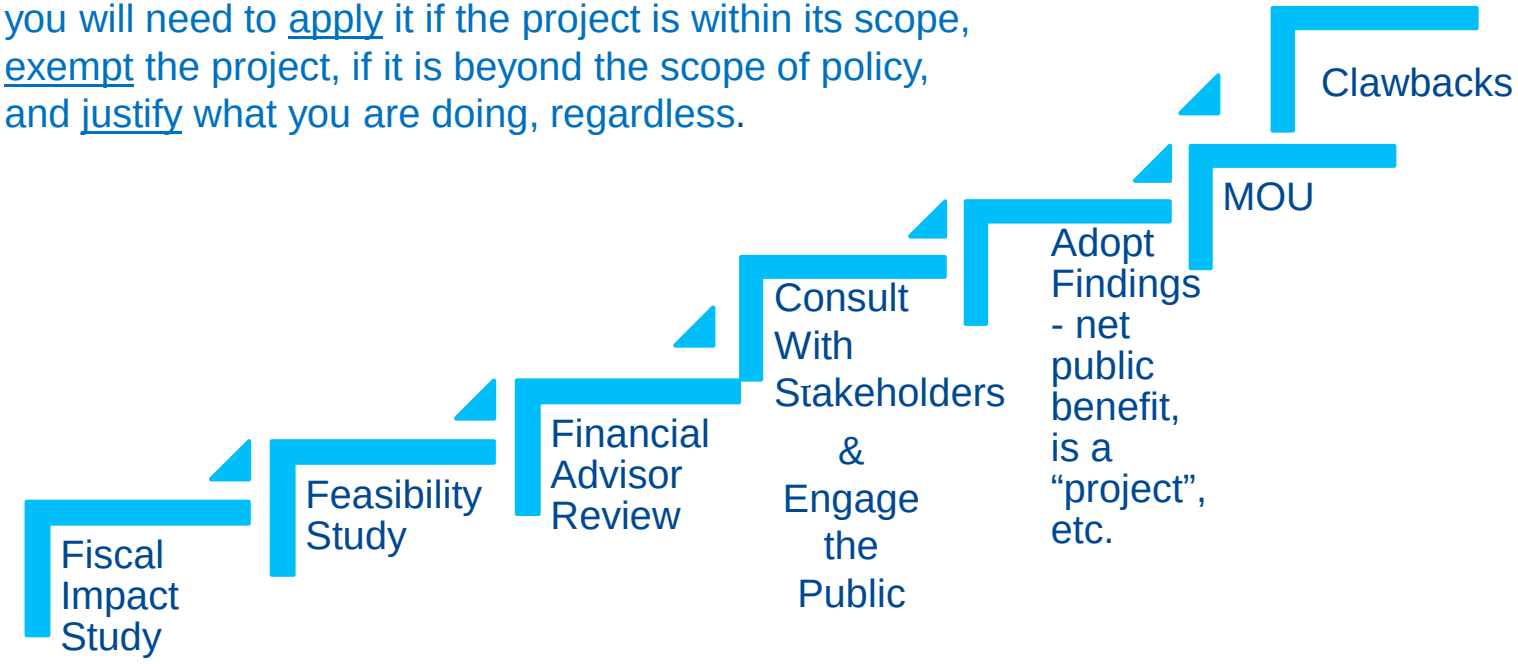
2

1. **FOLLOW A GOOD PROCESS.**
2. **VALIDATE THAT THERE IS NO "GIFT OR GRATUITY" WHEN YOU ARE VALIDATING BONDS.**

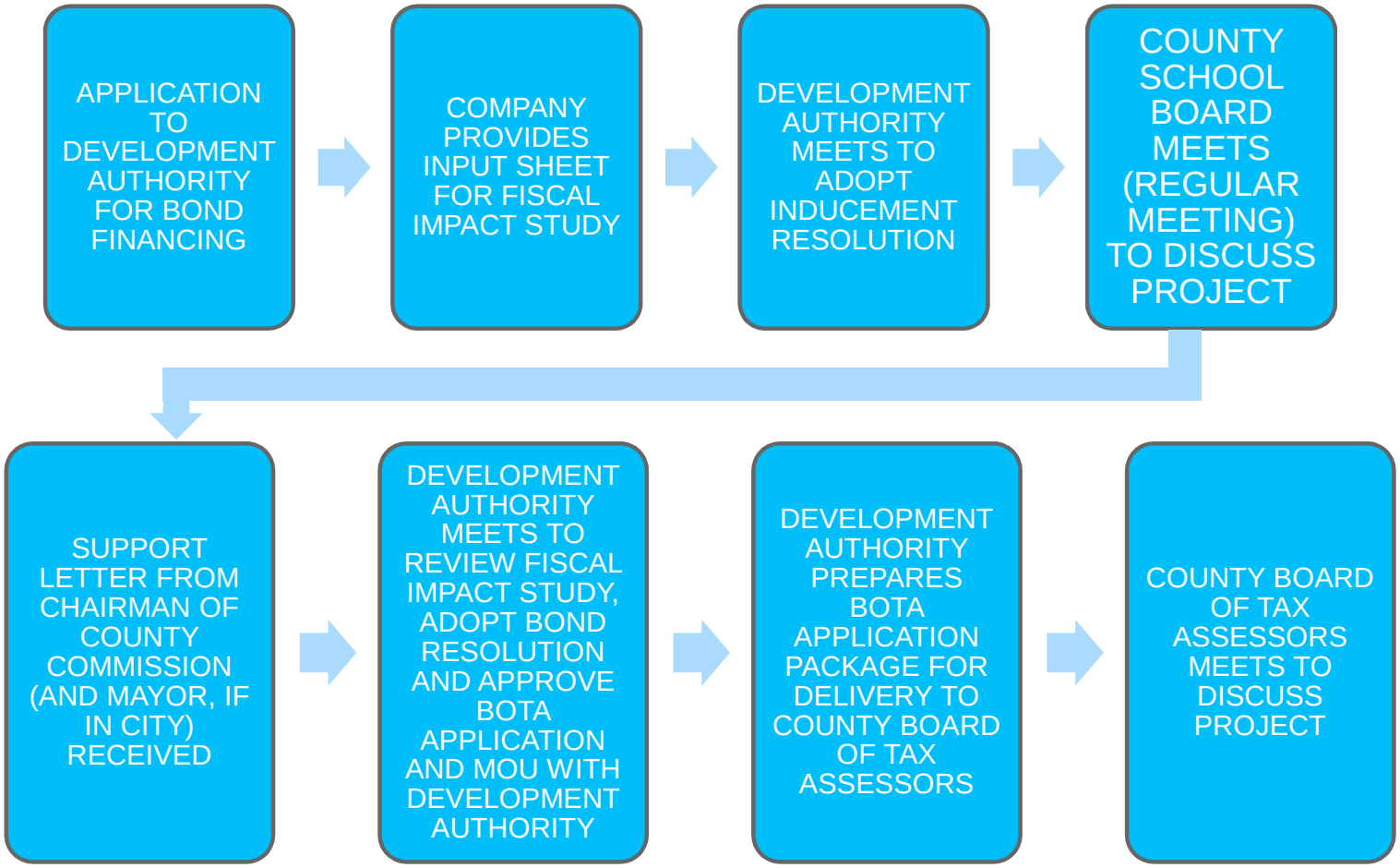
"2 STEPS YOU CAN TAKE TO PROTECT YOURSELF. NO . 1 HELPS YOU BEFORE YOU CLOSE. NO. 2 HELPS YOU AFTER YOU CLOSE."

IF YOUR PROJECT IS LARGE OR CONTROVERSIAL
OR
IF "BUT FOR" IS AN ISSUE

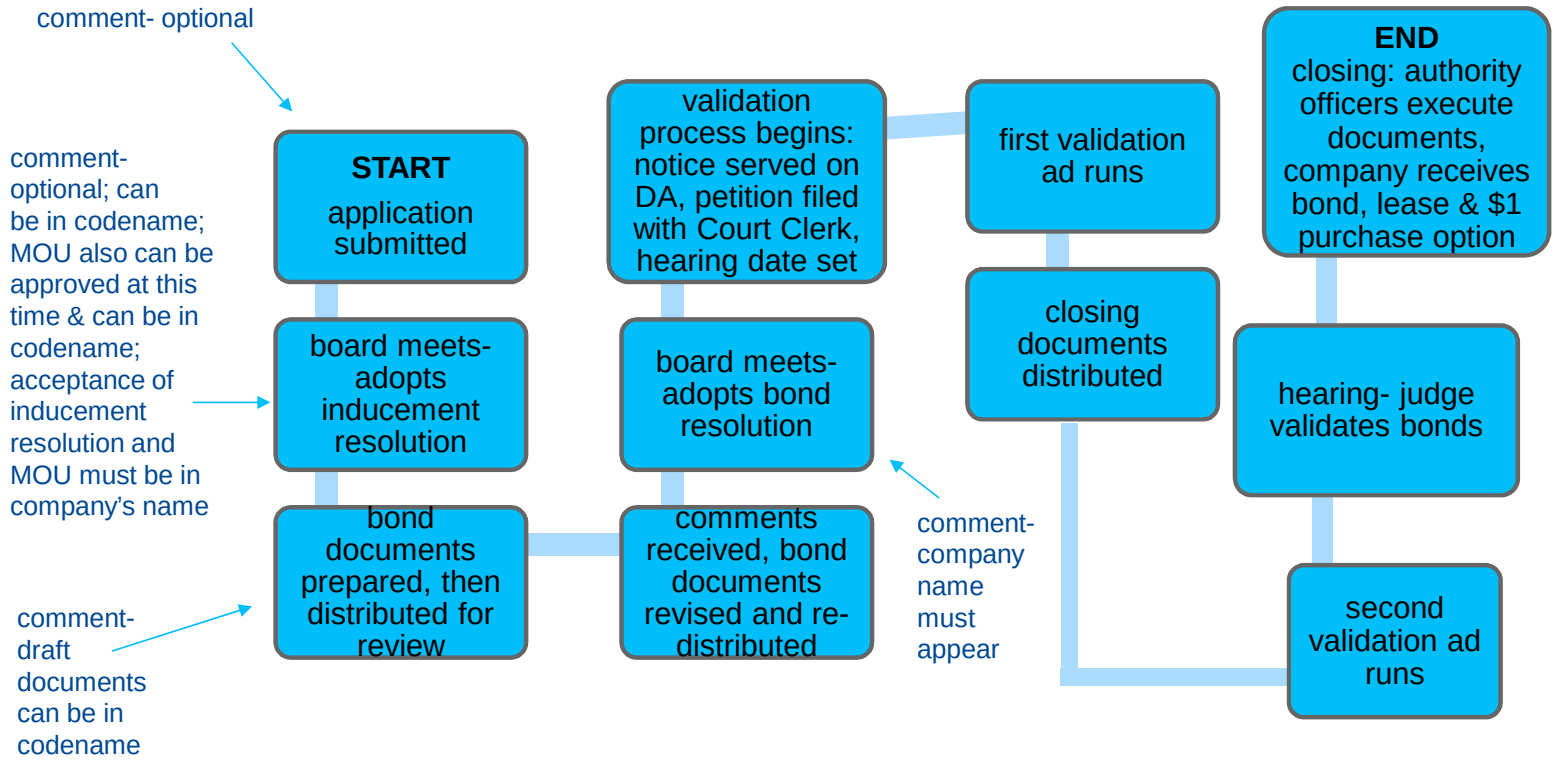
If you have a written incentives policy,
you will need to apply it if the project is within its scope,
exempt the project, if it is beyond the scope of policy,
and justify what you are doing, regardless.



LOCAL PROCESSES-COUNTY DA EXAMPLE



BONDS FOR TITLE
STEPS IN THE PROCESS



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MULTIJURISDICTIONAL AUTHORITIES

MULTIJURISDICTIONAL DEVELOPMENT AUTHORITIES (HB1044)

Joint development authorities (JDAs) are already authorized under O.C.G.A. §36-62-5.1, part of the Development Authorities Law, O.C.G.A. §36-62-1 *et seq*.

HB 1044 would authorize a new type of development authority under the Development Authorities Law. This would be a "regional industrial development authority" (RIDA). Its authorization would be codified as O.C.G.A. §36-62-5.2 and would also be part of the Development Authorities Law, O.C.G.A.

If this RIDA legislation becomes law, that would not abolish JDAs or prevent them from changing their membership. However, the new incentive connected with RIDAs could compete for resources that otherwise would go to JDAs.

Under HB1044, a business enterprise whose project invests in "qualified investment property" (defined in O.C.G.A. §48-7-40.17), which is located on RIDA property as described in the bill (see "Differences" table, below), would be eligible for a tax credit "for each new quality job at such location as provided by Code Section 48-7-40.17."

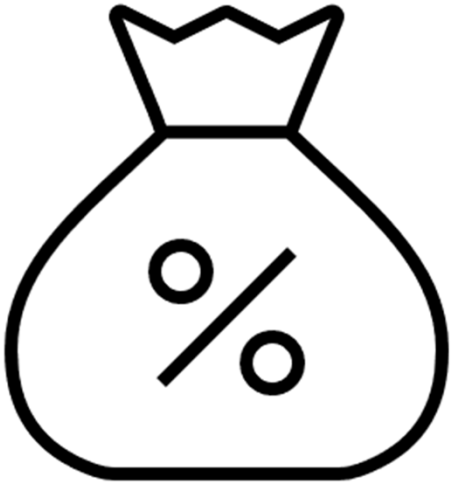
QUALITY JOBS TAX CREDIT (ORIGINAL VERSION OF BILL-NORMAL JTC)

COMPARING AND CONTRASTING JDAS AND RIDAS

SIMILARITIES		
FEATURE	**JDA**	**RIDA**
Number of board members	specified in activating resolution	same
Number of board members each participating jurisdiction appoints	specified in activating resolution	same
Term of office of board members	specified in activating resolution	same
Must be an active, bona fide authority?	yes	same
Must have a board of directors?	yes	same
Must meet at least quarterly?	yes	same
Must develop an operational business plan?	yes	same

DIFFERENCES			
FEATURE	**JDA**	**RIDA**	**COMMENT**
Participating Jurisdictions	cities and/or counties; no cap on number of members	counties only; membership limited to 3-5 counties	
Exclusivity	county may belong to more than one JDA among contiguous counties	county shall not belong to more than one RDA	
Required to own property?	no	Yes. Must: "own property lying within one or more of the participating counties with all of the participating counties"	HB1044 could be read to imply that RIDA property must be in joint ownership by it with its participating counties.
Increase in job tax credit?	$500 bump. However, if a regional facility, then: "Unless otherwise provided by law … a regional facility will qualify for the greatest dollar amount of income tax credits which may be provided for by general law for any of the counties or municipalities which have entered into an agreement for the development of the regional facility, regardless of the county or municipality in which the business is physically located. " Ga. Const. Art. 9, § 4, ¶ IV ("**Regional Facilities Amendment**")	Quality Jobs Tax Credit for the lowest tier participating county (project must be located on jointly owned RIDA property)	HB1044 is ambiguous as to whether, and if so, how, it affects the QJTC's Rural County requirement, and regarding which county is used for the QJTC's "county average wage" determination.
Sharing of real estate property taxes and expenses	Optional. If regional facility, sharing may be in Intergovernmental Agreement ("**IGA**") among participating jurisdictions. "Other revenues" of regional facility may be shared.	Mandatory (excludes taxes that are for bonded indebtedness or that are otherwise dedicated).	HB1044 does not cite Constitutional authority for its sharing of property taxes by the participating counties. Note that Regional Facilities Amendment
			authorizes cities to participate in sharing whereas HB1044 is limited to counties.
Required to provide materials and information to State Revenue Commissioner and State Auditor so that local tax digest can be adjusted to account for its activities, including abatements	Yes. *See* O.C.G.A. §36-62-5.2	no	
Financial feasibility study required?	yes- if regional facility and proposed contract requires public funds of city or county to be expended outside of its borders. *See* O.C.G.A. § 36-73-3	no	
Board member Training	required by O.C.G.A. §36-62A-1 for all directors except elected officials (incurred upon a director's appointment)	at least half of the members from each county must have completed training certified by DCA (implication that minimum training required before RDA can be activated); no exception for elected officials	Must RDA members also be trained under O.C.G.A. §36-62A-1?

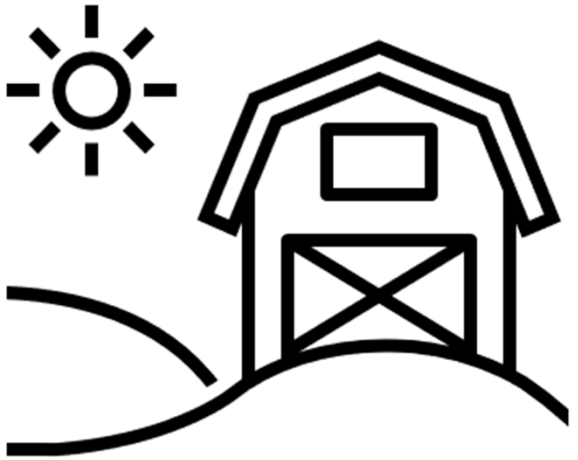
- Under HB1044, a business enterprise whose project invests in "qualified investment property" (defined in O.C.G.A. §48-7-40.17), which is located on RIDA property as described in the bill (see "Differences" table, below), would be eligible for a tax credit "for each new quality job at such location as provided by Code Section 48-7-40.17."
- This is the "quality jobs tax credit" (QJTC). It is a powerful incentive. If a taxpayer has any unused QJTC after first applying it to the taxpayer's state income tax liability thereto, then this excess QJTC may be applied to offset the taxpayer's state payroll withholding tax liability. Claimed but unused QJTC may be carried forward for 10 years. *See* Ga. Comp. R. & Regs. 560-7-8-.51.
- The same job cannot be claimed for both the normal job tax credit (JTC) and the QJTC. However, if some of the new jobs that are created do not meet the QJTC requirements, but they are eligible for JTC, then these jobs may be claimed for JTC purposes. *Id*.
- Although "industrial" is in the name of the new RIDA, taxpayer eligibility for the new incentive is based on higher paying jobs, rather than on the taxpayer's economic sector.
- By keying on the QJTC, the new incentive is aimed at helping rural Georgia.



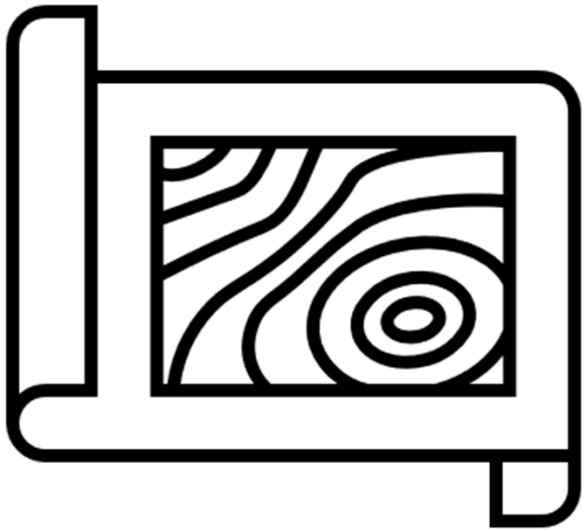
Under the QJTC-

- If the project location is both a Rural County and a tier 1 county, then the minimum jobs requirement is reduced to 10.
- If the project location is both a Rural County and a tier 2 county, then the minimum jobs requirement is reduced to 25.
- If the project location is not a Rural County and/or not a tier 1 or tier 2 county, then the minimum jobs requirement is 50.

- "Rural County" is defined in O.C.G.A. §48-7-40.17(a)(6). This basically is a county whose population is less than 50,000, of whom 10% or more live in poverty.



- The apparent intention of HB1044 is that, in order for a project to qualify for the new incentive, it must, first, be located on jointly owned RIDA property, and if so-
  - If the RIDA includes a tier 1 county, then projects in any participating county need only create 10 new jobs, subject to the “Rural County” note below.
  - If the RIDA does not include a tier 1 county, but does include a tier 2 county, then projects in any participating county need only create 25 new jobs, subject to the “Rural County” note below.
  - Otherwise, at least 50 new jobs must be created.

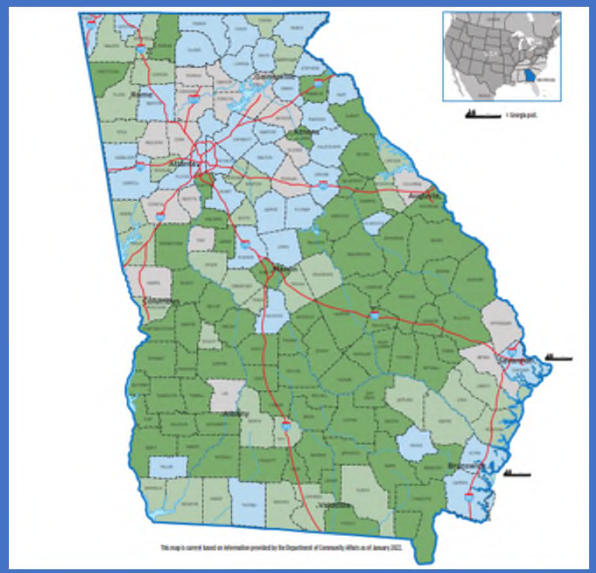


Rural County Note- Here are possible interpretations of how HB1044 treats the QJTC's Rural County requirement for reducing the minimum number of jobs that are required-

- If any participating county is a Rural County, then all participating counties are deemed to be Rural Counties; or
- If the lowest tier county is a Rural County, then all participating counties are deemed to be Rural Counties; or
- If the participating county where the project is located is a Rural County, then the Rural County requirement is satisfied.

It is not clear which of these interpretations would be applied to HB1044, or whether some other interpretation would be applied.

- The dollar amount of the tax credit per job is graduated according to how high project wages are above the county average wage. The maximum amount is $5,000/job at a level of 200% or more above the county average wage. Under HB1044, the county used for “county average wage” is apparently the county where the project is located, although the bill does not address this question specifically.
- The number of counties participating in an RIDA is limited to 3-5. The apparent public policy is that at least 3 counties are needed for a successful RIDA, whereas allowing more than 5 counties to participate would abuse the new tax credit incentive.



TIER	JOB TAX CREDIT $ (FOR 5 YEARS)	MIN. NEW JOBS	CREDIT ALLOWANCES	CARRY FORWARD
1	$4,000*	2	100% of tax liability - excess to withholding up to $3,500 per job	10 years
2	$3,000*	10	100% of tax liability	10 years
3	$1,750*	15	50% of tax liability	10 years
4	$1,250*	25	50% of tax liability	10 years

SPECIAL ZONE	JOB TAX CREDIT $ (FOR 5 YEARS)	MIN. NEW JOBS	CREDIT ALLOWANCES	CARRY FORWARD
MZ/OZ	$3,500	2	100% of tax liability - excess to withholding	10 years
LDCT	$3,500	5	100% of tax liability - excess to withholding	10 years

**Includes $500 bonus for Joint Development Authority (JDA). Georgia counties can form partnerships that benefit companies with this $500 Job Tax Credit bonus. The majority of counties are in a JDA. To confirm a county's status, please call 404.962.4840.*

Source: Georgia Department of Economic Development

Source: Georgia Department of Community Affairs

Source: Georgia Department of Economic Development

Quality Jobs Tax Credit

A manufacturer chooses a Tier 1 location that has a Rural County designation. The facility creates 200 jobs new to Georgia that are maintained for 5 years.

Additional details of example location:

- The 15 new jobs in management each have a wage greater than 110% of the county average wage
- The average wage for those 15 jobs is greater than 200% of the county average wage

QJTC value: $5,000

JTC value: $4,000

Example Calculation:

15 jobs x $5,000 QJTC x 5 years
= $375,000 credits to claim
+ 185 jobs x $4,000 JTC x 5 years
= $3,700,000 credits to claim

= $4,075,000 total credits to claim

% OF COUNTY AVERAGE WAGE	QUALITY JOB TAX CREDIT $ (FOR 5 YEARS)
≥110% and <120%	$2,500
≥120% and <150%	$3,000
≥150% and <175%	$4,000
≥175% and <200%	$4,500
200% or greater	$5,000

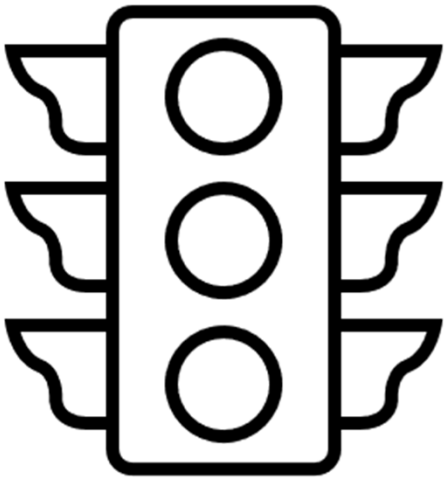
Practice Pointers:

1. A pure revenue sharing agreement among local governments is not authorized by the "**Intergovernmental Contracts Clause**" of the Georgia Constitution, Ga. Const. Art. 9, § 3, Par. 1(a). *City of Decatur v. Dekalb County,* 289 Ga. 612, 713 S.E.2d 846 (2011).

2. The Regional Facilities Amendment is Constitutional authorization for the sharing of real estate property taxes and other revenues from a regional facility. It is independent of the Intergovernmental Contracts Clause. **"Regional facilities**", under the Regional Facilities Amendment, means "industrial parks, business parks, conference centers, convention centers, airports, athletic facilities, recreation facilities, jails or correctional facilities, or other similar or related economic development parks, centers, or facilities or any combination thereof."

CONCLUSION

ECONOMIC DEVELOPMENT ISN'T EASY. BUT IT'S IMPORTANT.

SCOPE

This presentation is a quick-reference guide for elected and appointed officials and their staffs, company executives and managers, economic developers, participants in the real estate and financial industries, and their advisors. The information in this presentation is general in nature. Various points which could be important in a particular case have been condensed or omitted in the interest of readability. Specific professional advice should be obtained before this information is applied to any particular case.