HOT ISSUES

The "But For" Test

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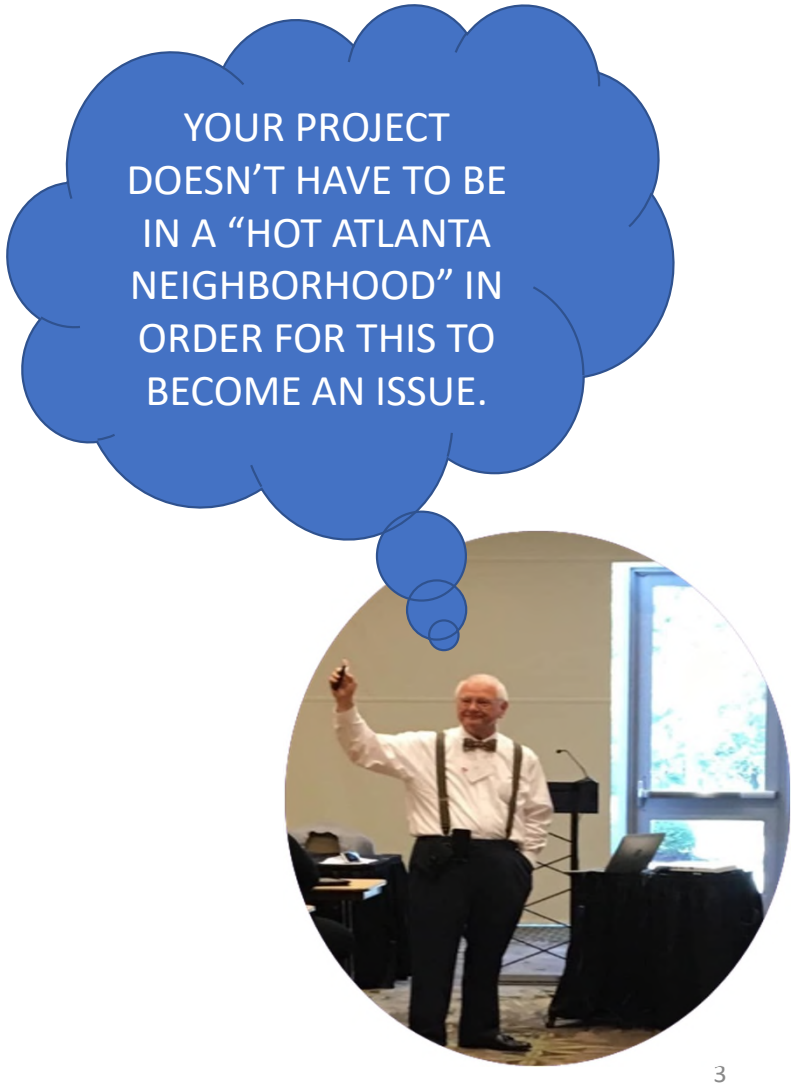
IT’S ALL THE BUZZ TODAY, BUT…

"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

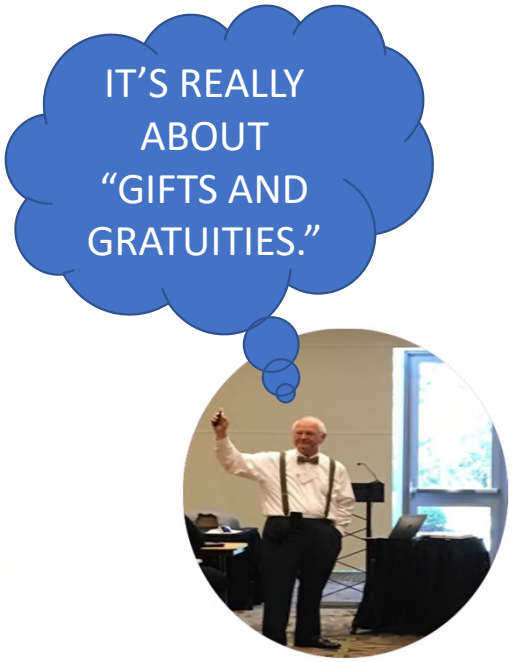
Provisions Applicable to Counties and Municipal Corporations

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…

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)

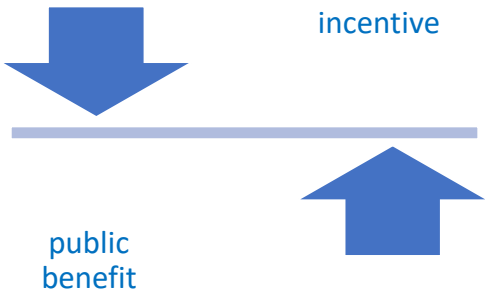
PUBLIC BENEFIT ≥ INCENTIVE

=

FAIR MARKET VALUE + OTHER SUBSTANTIAL BENEFIT ≥ INCENTIVE

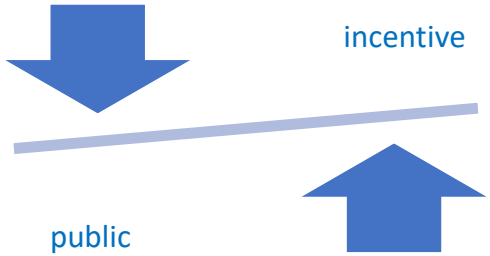
PUBLIC BENEFIT AND INCENTIVE NEED TO BE AT LEAST EQUAL, SO THIS IS-

OK



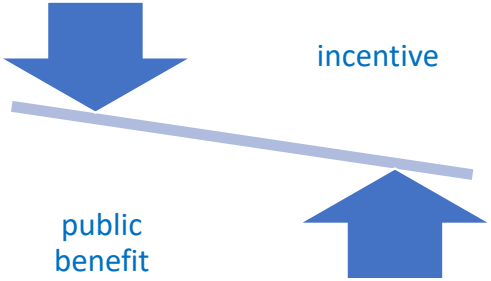
IF THE PUBLIC BENEFIT EXCEEDS THE INCENTIVE, THAT IS EVEN BETTER, SO THIS IS-

OK

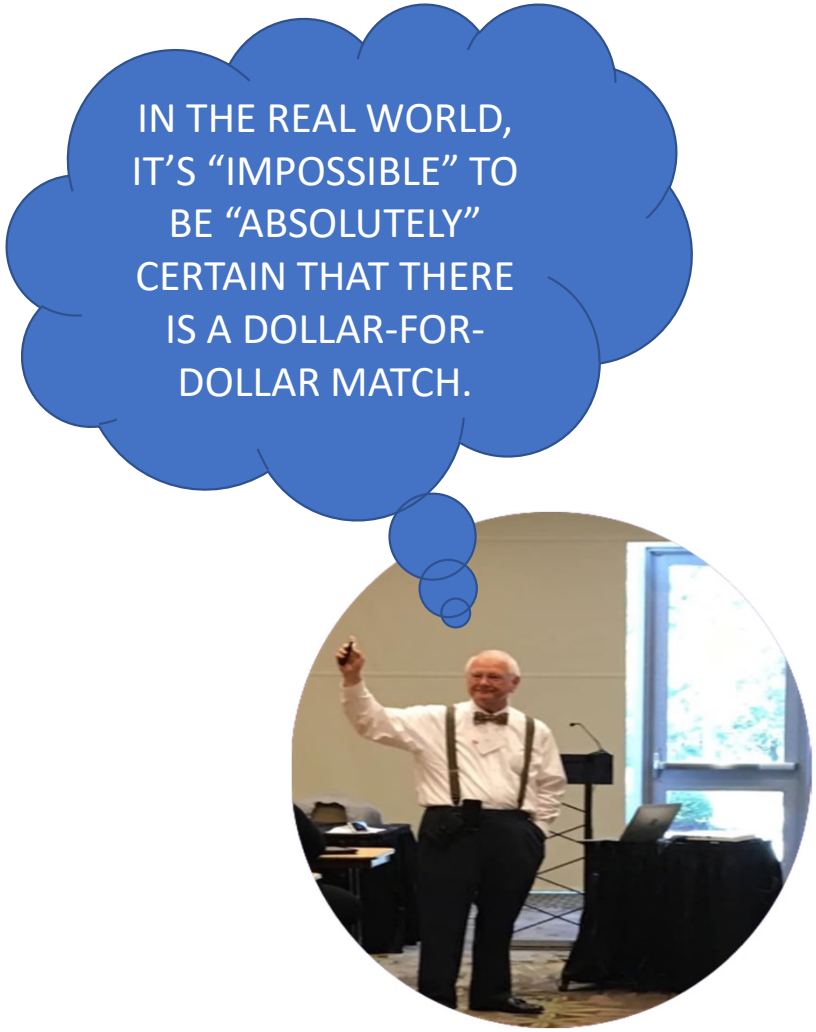


BUT IF THE INCENTIVE EXCEEDS THE PUBLIC BENEFIT, THAT IS-

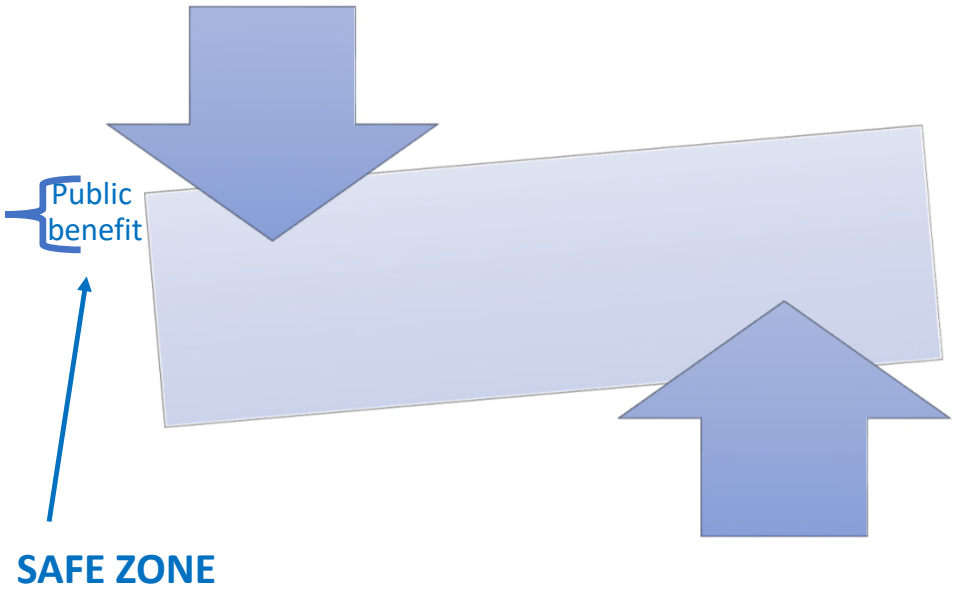
NOT OK



- 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-

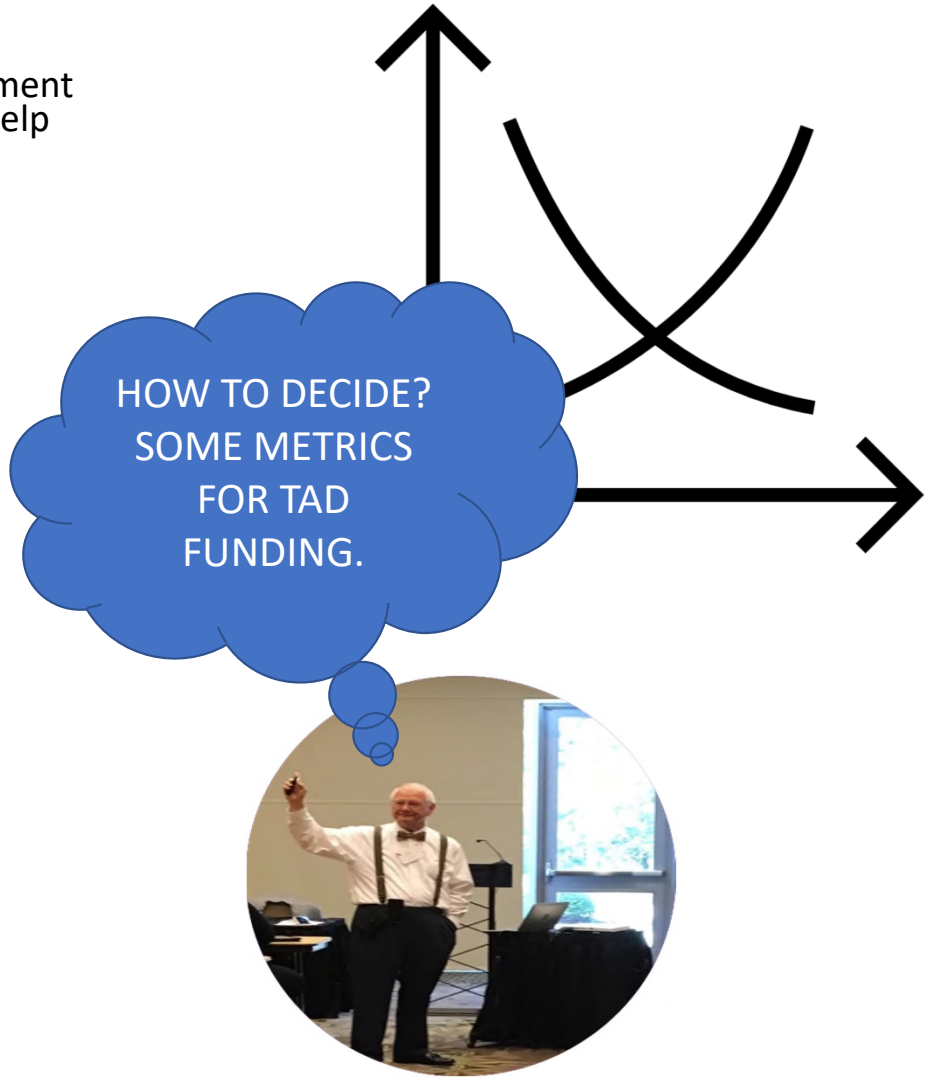
1. Primary Ways to Determine:

- 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):

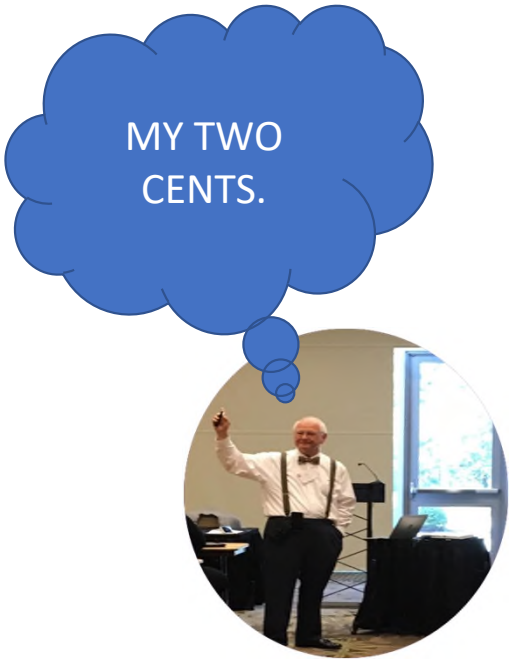
- Subsidy as % of Incremental Property Tax to be generated
- Subsidy as % of Project Cost (Public funds "leverage" private)
- $ Amount Per Job Attracted/Retained

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.



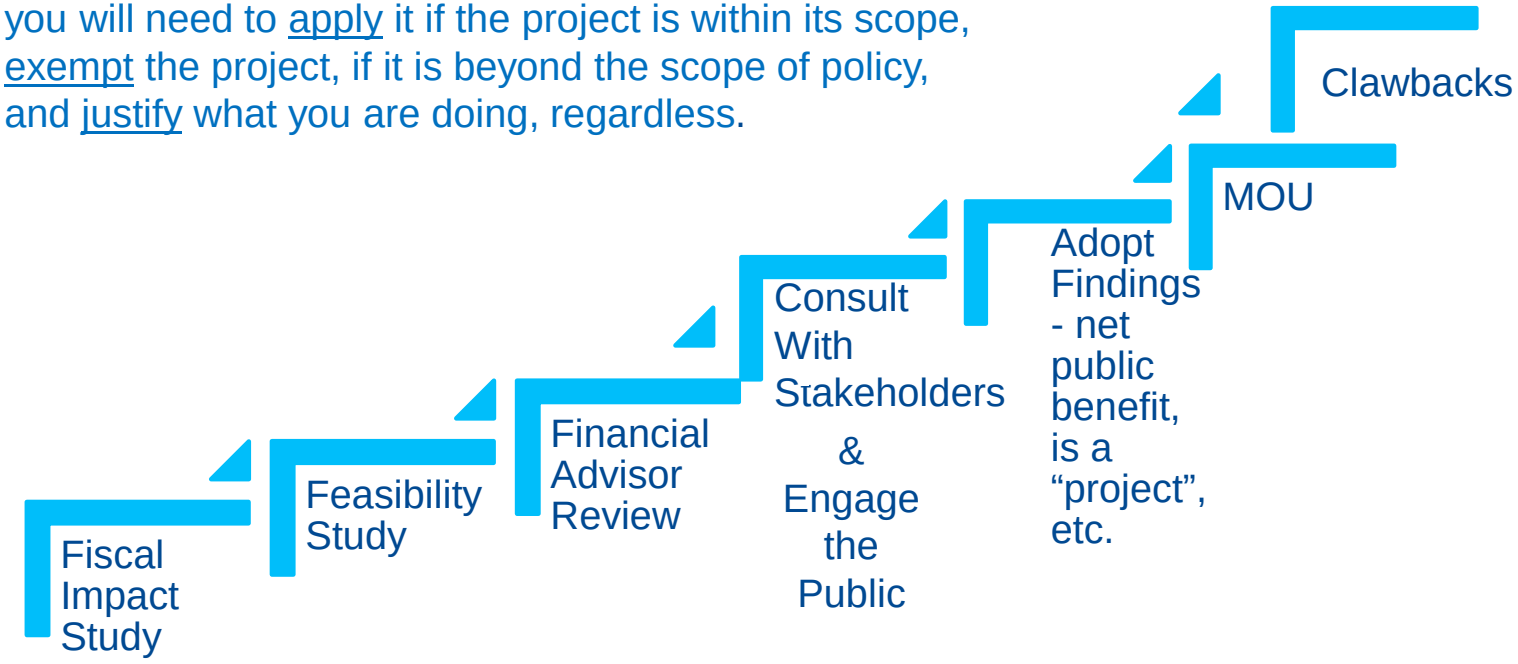
2

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

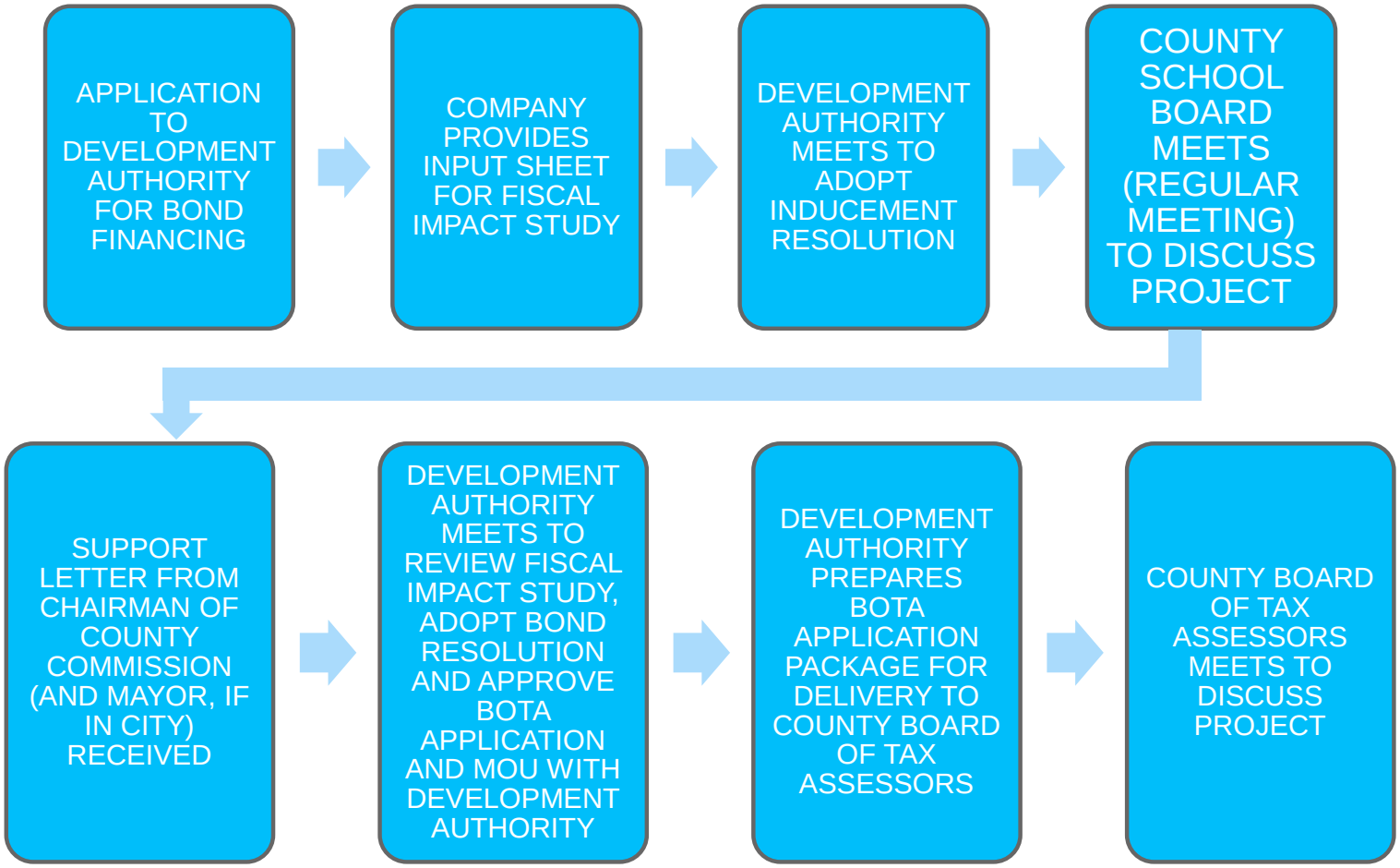
"2 STEPS YOU CAN TAKE TO PROTECT YOURSELF.
NO . 1 HELPS YOU BEFORE YOU CLOSE.
NO. 2 HELPS YOU AFTER YOU CLOSE."

IF YOUR PROJECT IS LARGE OR CONTROVERSIAL
OR
IF “BUT FOR” IS AN ISSUE

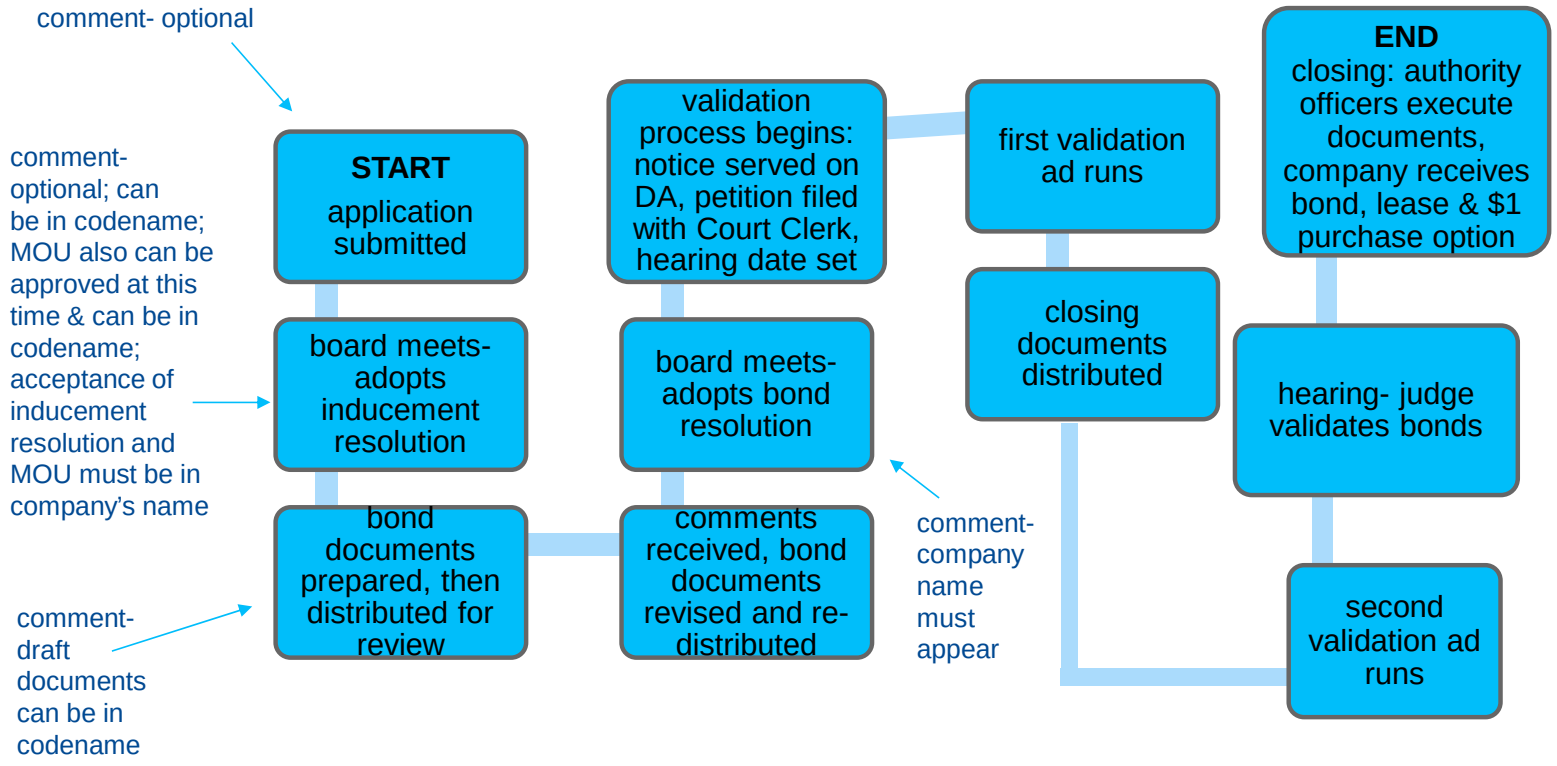
If you have a written incentives policy,
you will need to apply it if the project is within its scope,
exempt the project, if it is beyond the scope of policy,
and justify what you are doing, regardless.



LOCAL PROCESSES-COUNTY DA EXAMPLE



BONDS FOR TITLE
STEPS IN THE PROCESS



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THE FACE YOU MAKE WHEN YOU'RE AHEAD OF THE GAME
memegenerator.net

THE 2020'S IN A NUTSHELL:
BUT WAIT, THERE'S MORE!
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SR 809

THAT'S NOT NICE!

WHEREAS, such authorities have issued billions of dollars worth of tax abatements across the State of Georgia; and

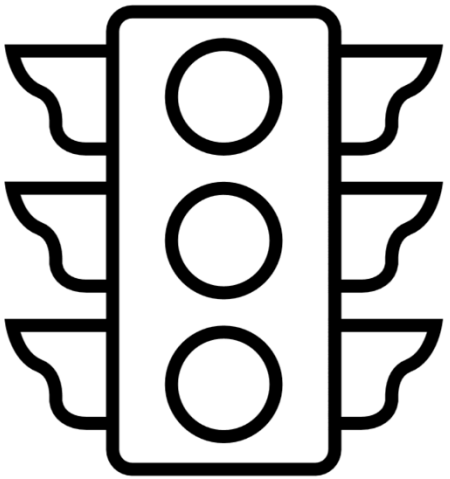
WHEREAS, the practices and procedures of some development authorities have raised questions regarding the nature and benefit of certain tax abatements; and

WHEREAS, there is little to no state-wide or centralized oversight or data available regarding operations of local development authorities and downtown development authorities; and

WHEREAS, a thorough study of the creation, operation, and management of development authorities and downtown development authorities is long overdue to determine what appropriate revisions are needed to state law to prevent the abuse of the citizens and taxpayers of this state.

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.