MODULE 2

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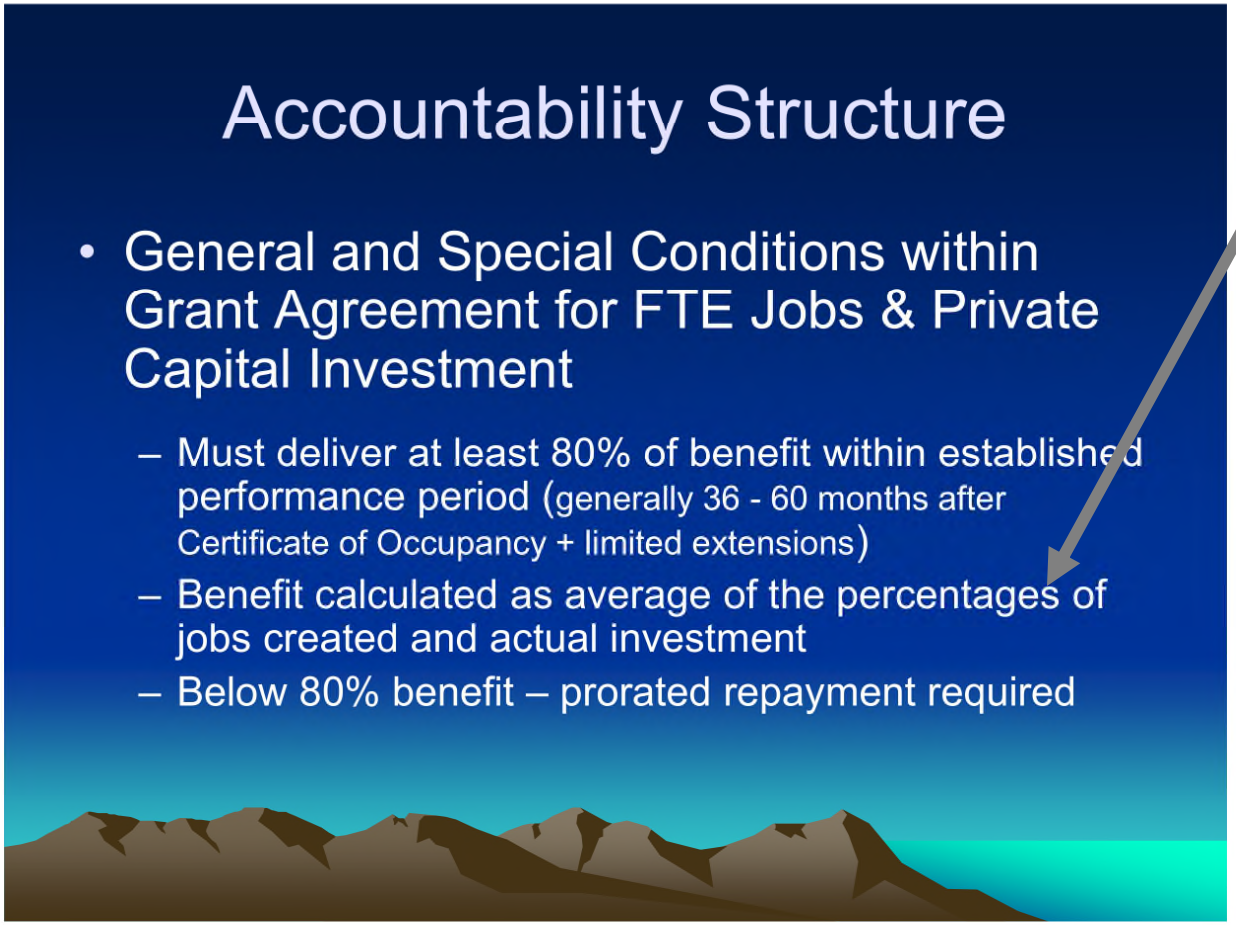
YOU CAN'T- "GIVE THINGS AWAY" BUT YOU CAN- MAKE A BARGAIN the MOU contains the bargain



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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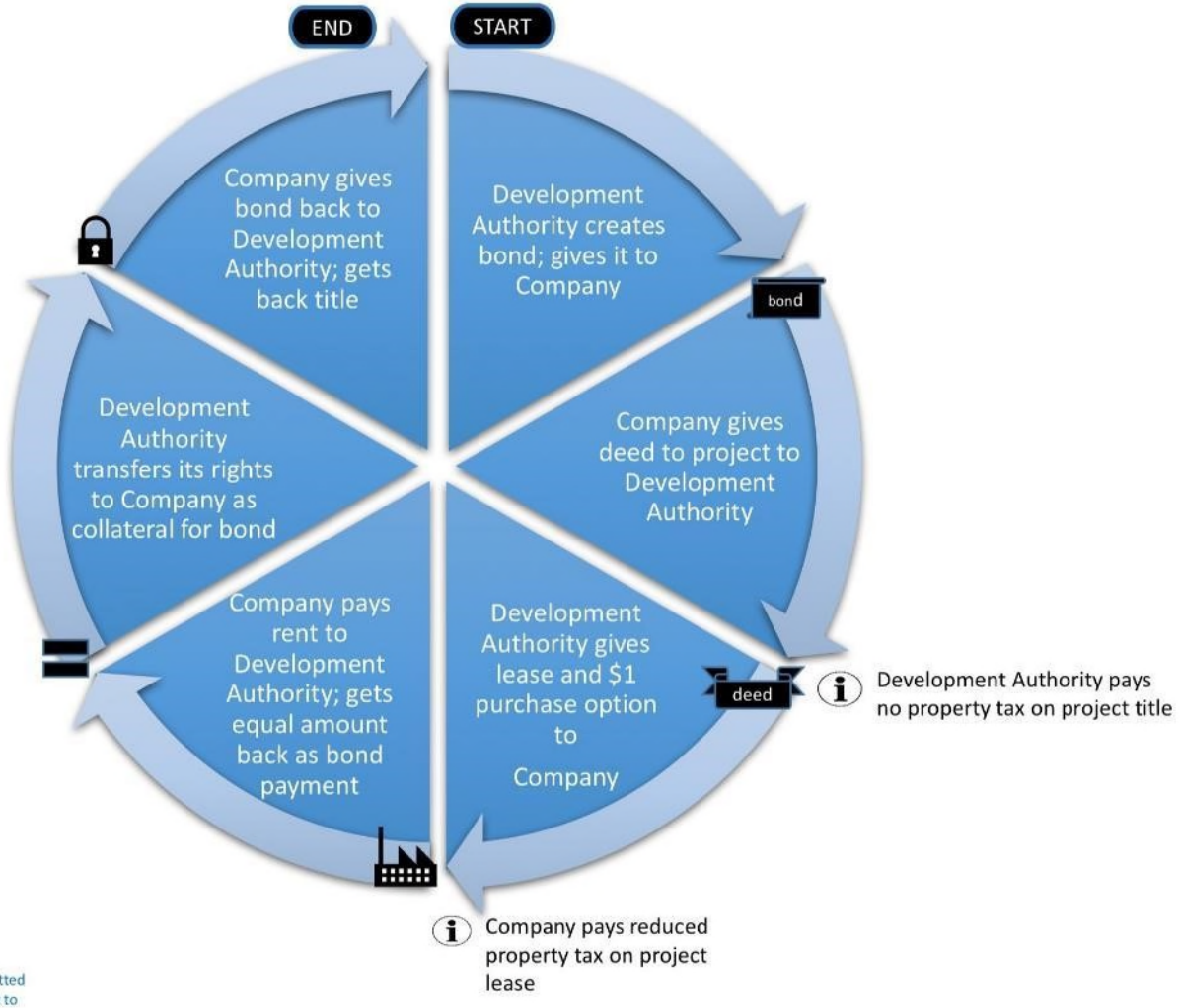
THE DEAL STRUCTURE- "BONDS FOR TITLE"

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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CAN’T- GO BEYOND YOUR POWERS

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CAN YOU CARRY OUT A PROJECT?

IN ORDER TO CARRY OUT A PROJECT

THE PROJECT MUST BE AUTHORIZED FOR THE DEVELOPMENT AUTHORITY

AND THE DEVELOPMENT AUTHORITY MUST HAVE THE POWERS TO DO WHAT'S NECESSARY

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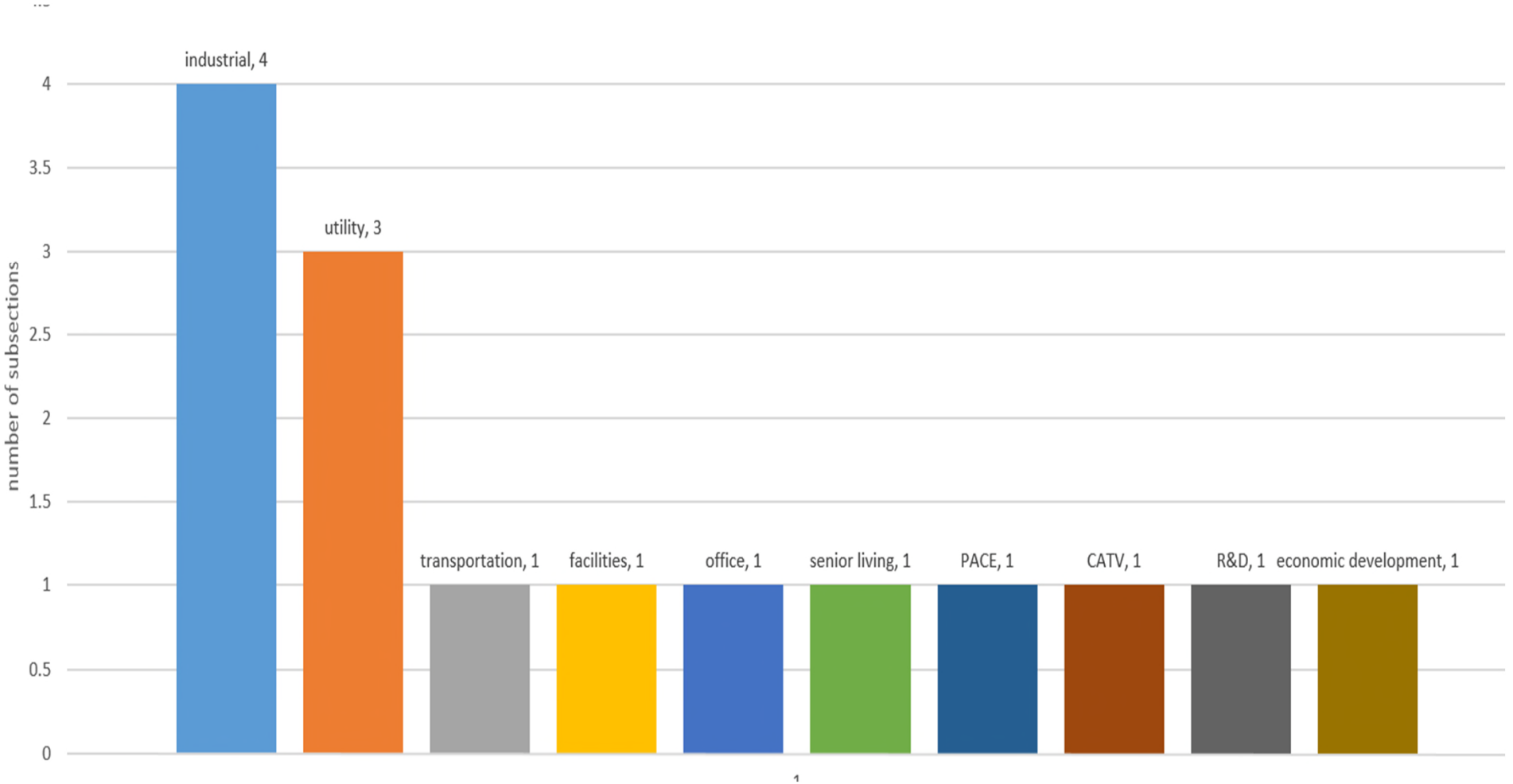
Menu

- A “MENU” OF POWERS IS PROVIDED IN THE DEVELOPMENT
- AUTHORITIES LAW AND IN THE DOWNTOWN DEVELOPMENT AUTHORITIES LAW
- THESE POWERS HAVE TO MEET CONSTITUTIONAL STANDARDS
  - YES, JUST BECAUSE IT’S IN THE CODE DOESN’T MEAN IT’S VALID
  - A LAW HAS TO BE CONSTITUTIONAL, TOO

MORE SUBSECTIONS OF THE DEVELOPMENT AUTHORITIES LAW AUTHORIZE "INDUSTRIAL" THAN ANY OTHER TYPE OF PROJECT



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CAN'T- GO BEYOND YOUR POWERS 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."

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

THE MAIN ARGUMENTS

- DOES THIS SECTION OF THE DEVELOPMENT AUTHORITIES LAW LIMIT BELOW FMV SALES TO SALES OF UNUSABLE PROPERTY TO THE STATE?
- O.C.G.A. Sec. 36-6-6-(7.1) Notwithstanding any other provision of this chapter to the contrary, to dispose of any real property for fair market value or any amount below fair market value as determined by the board of directors of the authority, regardless of prior development of such property as a project, whenever the board of directors of the authority may deem such disposition to be in the best interests of the authority if the board of directors of the authority prior to such disposition shall determine that such real property no longer can be used advantageously as a project for the development of trade, commerce, industry, and employment opportunities and if title to such real property is to be transferred to the state;

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THE MAIN ARGUMENTS

- DOES THIS SECTION OF THE DEVELOPMENT AUTHORITIES LAW GENERALLY AUTHORIZE BELOW FMV SALES?
- O.C.G.A. Sec. 36-6-6(6) To sell, lease, exchange, transfer, assign, pledge, mortgage, dispose of, or grant options for any real or personal property or interest therein for any such purposes;

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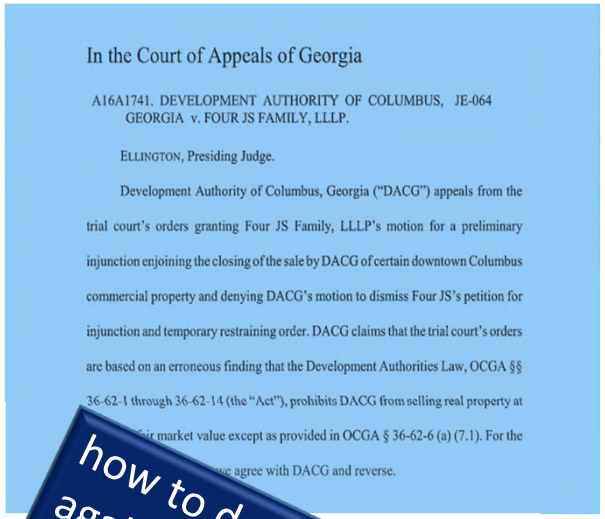
SAVED BY A FOOTNOTE

- GEORGIA COURT OF APPEALS ALLOWS INCENTIVES DEAL (BELOW FMV LAND SALE)
- FOOTNOTES CONSTITUTIONAL PROHIBITION OF "GIFTS OR GRATUITIES"
- PETITIONER DIDN'T PRESENT "GIFTS OR GRATUITIES" ISSUE TO TRIAL COURT
- COURT OF APPEALS APPLIES DEVELOPMENT AUTHORITIES LAW JUST AS IT READS



In the Court of Appeals of Georgia

A16A1741. DEVELOPMENT AUTHORITY OF COLUMBUS, GEORGIA v. FOUR JS FAMILY, LLLP. JE-064

ELLINGTON, Presiding Judge.

Development Authority of Columbus, Georgia ("DACG") appeals from the trial court's orders granting Four JS Family, LLLP's motion for a preliminary injunction enjoining the closing of the sale by DACG of certain downtown Columbus commercial property and denying DACG's motion to dismiss Four JS's petition for injunction and temporary restraining order. DACG claims that the trial court's orders are based on an erroneous finding that the Development Authorities Law, OCGA §§ 36-62-1 through 36-62-14 (the "Act"), prohibits DACG from selling real property at [illegible] market value except as provided in OCGA § 36-62-6 (a) (7.1). For the [illegible] agree with DACG and reverse.

how to defense against a "gifts or gratuities" claim

all this documents that the public sector is receiving non-cash consideration in addition to any cash consideration

GET A FEASIBILITY STUDY (when appropriate)

GET A FISCAL IMPACT STUDY

ADOPT FINDINGS THAT THERE IS NET PUBLIC BENEFIT EVEN AFTER THE INCENTIVE*

*** and determine the transaction to be a "project"**

NEGOTIATE AND ENTER INTO AN MOU

HAVE CLAWBACKS

Data Visualization: Dan McRae

CAN- BARGAIN FOR BOTH CASH AND NONCASH CONSIDERATION

"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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CAN’T- CARRY OUT PUBLIC PROJECTS

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FROM “NO” TO “IT DEPENDS”

GEORGIA SUPREME COURT

- PROHIBITED PUBLIC PROJECT

  “This Project is designed to fulfill the governmental functions of improving streets and of providing facilities for municipal administration and police and jail services. Accordingly, it does not appear to fit within the definitions of commerce, trade, or industry.” *Odom* case, 1983.

- PERMITTED PUBLIC/PRIVATE PROJECT

  “This court held that the scope of [the *Odom*] 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." …. 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**. *Nations I*, 1985.

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BUT- "THE FUNDAMENTAL THINGS [STILL] APPLY…"

Posted: Tuesday, December 29, 2015 11:23 am | Updated: 11:26 am, Tue Dec 29, 2015.

By Dick Williams For The Crier |

In a surprising move, the Brookhaven City Council voted to reverse its previous decision to approve a $3.3 million bond issue to buy the former Skyland school property. Mayor Rebecca Chase Williams asked for a special called meeting when questions were raised about whether Councilman Joe Gebbia had a conflict of interest in the first vote. He is also a board member for the proposed charter school, Brookhaven Innovation Academy, which had been considered a possible tenant for the building.

Even though Gebbia announced his resignation from the BIA board, the conflict of interest became a side issue as the council focused on the funding mechanism for the project. The city's bond attorney, Earle Taylor III, had proposed using a separate non-profit as the buyer in order to get around the prohibition that forbids cities from using development authorities from purchasing city facilities.

In a 1983 Georgia Supreme Court case, Odom v. Union City Downtown Development Authority, the court ruled that it is unconstitutional for development authorities to purchase and rent property directly to a municipality because development authorities are intended to promote economic development, not support the government. Taylor said that the Georgia Board of Regents uses a third party non-profit to build dorms through development authorities, but admitted there could be some legal risk.

Taylor had found an out-of-state non-profit which agreed to be the tenant that would sublease the building to a third party. The council was concerned both about the propriety of such an arrangement as well as the lack of control by the city.

Councilwoman Linley Jones said that the city's development authority had thoroughly vetted the proposal and that "it would be a mistake not to take the deal."

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BUT- "THE FUNDAMENTAL THINGS [STILL] APPLY…"

Councilman John Park explained that after previously voting in favor of the project, that he had, "some consternation of the city being left holding the bag. There are no guarantees especially with no confirmed end user." He said upon further reflection and re-reading the Odum decision he had decided to vote against the project.

Mayor Williams explained, "In my mind there are a number of conundrums. Even if the work-around the Odum ruling is legal, does it appear to be a sham? It starts to look like the "back-door general obligation bond" that was previously outlawed to keep DeKalb County from using its development authority to build a performing arts center."

In the end, Williams said that while she personally thought Skyland would be a good, cost-saving place to locate city hall, that she was no comfortable with the city being "in the real-estate business."

Williams added she had numerous conversations with the Mayor-Elect John Ernst to know that he would vote against it when the final bond vote came back to the council in January. She said it was better to kill the deal now rather than spend more time and money on the project that would likely die in January.

After casting the deciding, "nay" vote, Williams added that, "This is just not appropriate. We should not be using our Development Authority to build or renovate public facilities."

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APPLYING THE FUNDAMENTALS

- PUBLIC/PRIVATE PARTNERSHIPS (P3) ARE VERY POPULAR NOW
- ONE OF THE EARLIEST SUCCESS STORIES IN GEORGIA WAS IN HENRY COUNTY!
- THE MERCER PROJECT
  - SATELLITE ACADEMIC BUILDING
  - GRADUATE DEGREES

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THE MERCER PROJECT

- THE HCDA ACTED AS PROJECT MANAGER
- HCDA WAS ALSO CONDUIT FOR ISSUANCE OF TAX-EXEMPT BONDS
  - NO HCDA OR COUNTY RESPONSIBILITY FOR REPAYMENT
  - BONDS ARE BEING REPAID BY LEASE OF PROJECT TO MERCER FOUNDATION
- COUNTY PROVIDED LAND VIA GROUNDLEASE
- CHOATE CONSTRUCTION PAID CONSTRUCTION COSTS AND WAS REPAID OUT OF BOND PROCEEDS
  - "DESIGN-BUILD-FINANCE" P3 MODEL

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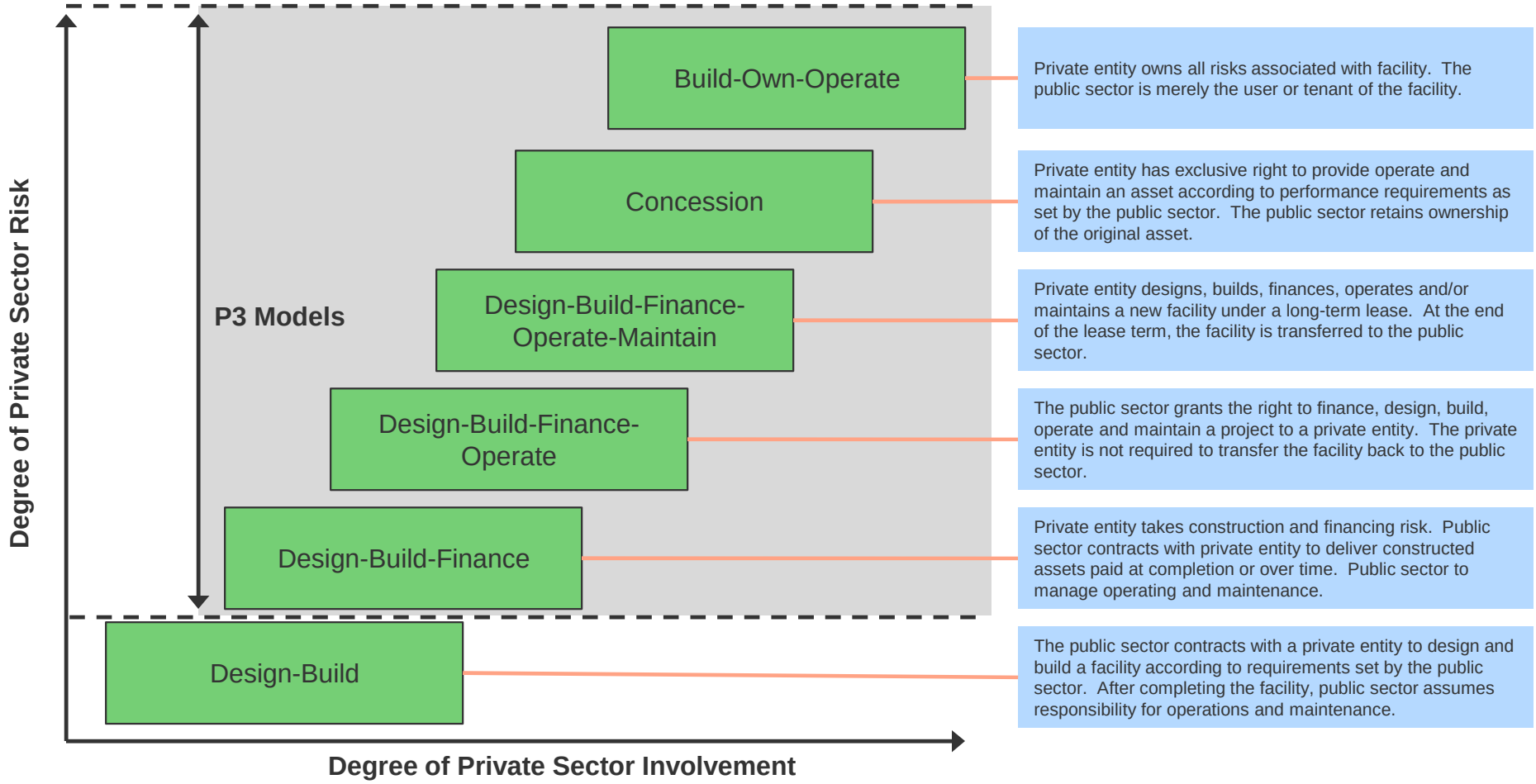
P3 CONSTRUCTION DELIVERY MODELS

Taken From: KeyBank- Identifying P3 Projects and Knowing the Atmosphere



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CAN'T- CARRY OUT ROAD PROJECTS WITH LOCAL GOVERNMENT

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TAKE DOUGLAS COUNTY'S FOXHALL PROJECT, FOR EXAMPLE

PRIVATELY FINANCED AND OWNED

FINANCED BY DEVELOPMENT AUTHORITY AND PUBLICLY OWNED

ROAD PROJECT

Project Components	ORIGINAL PROJECT	UPDATED PROJECT
Hotel	**350 rooms** 6-story	**200 rooms** 5-story
Lodge & Villas	**100 rooms** (50 villas)	**250 rooms** (125 villas)
Golf Course	18-hole	"golf experience"
Conference Center	**80,000 sf**	**50,000 sf**

Source: PFM

ALSO- ROADS, STREET IMPROVEMENTS, WATER, SEWER

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STREETS AND ROADS

DO WE HAVE THE POWER AND THE AUTHORIZATION?

- THE GEORGIA CONSTITUTION DOES NOT ALLOW A STATUTORY AUTHORITY TO "CONSTRUCT, IMPROVE OR MAINTAIN" ROADS OR STREETS IN CONCERT WITH A LOCAL GOVERNMENT.
- SO, THE DEVELOPER WILL CONSTRUCT THE STREETS AND ROADS, AND THE DEVELOPMENT AUTHORITY WILL PURCHASE THEM UPON COMPLETION AND DEDICATE THEM TO THE STATE OR THE COUNTY.
  - ANOTHER ALTERNATIVE WOULD HAVE BEEN TO USE A CID.
  - SOME "CONSTITUTIONAL" DEVELOPMENT AUTHORITIES HAVE THE POWER TO DO STREETS AND ROADS PROJECTS.

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CAN'T- EXCEED 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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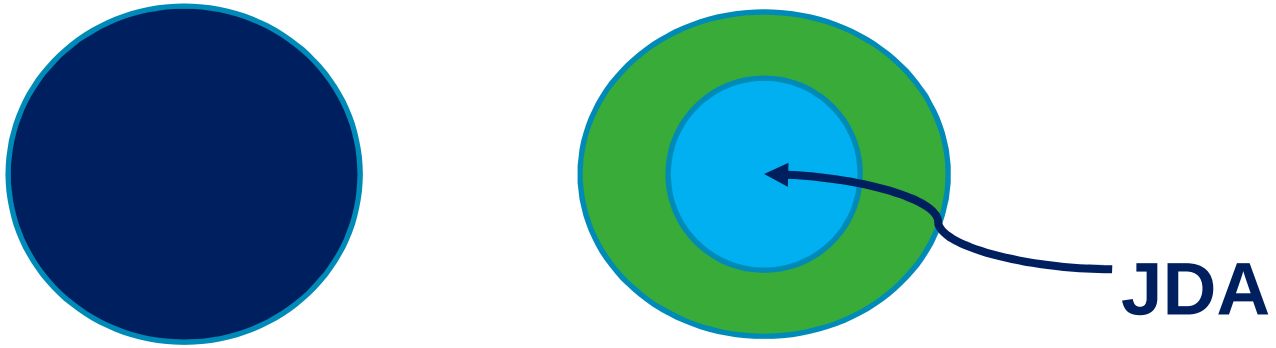
MANDO AUTOMOTIVE SUPPLIER
MERIWETHER COUNTY: OWNED PARK
TROUP COUNTY: SITE OF PARK



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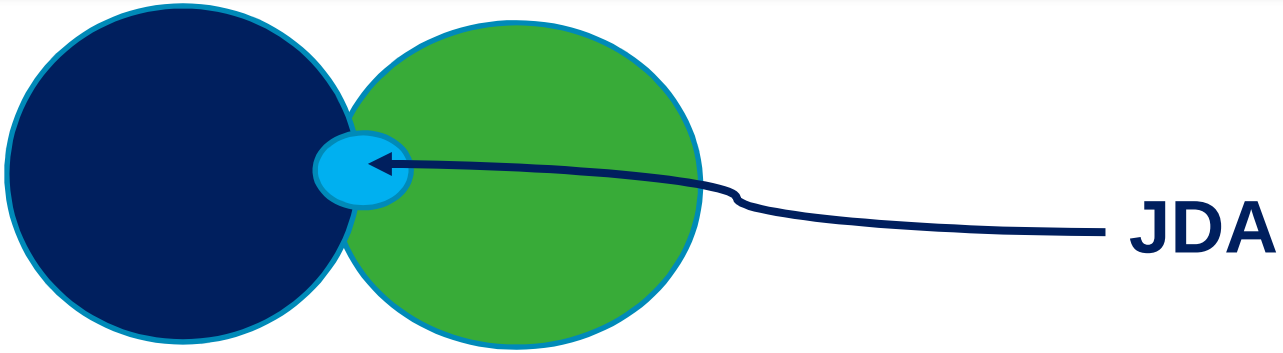
DOLLAR GENERAL DISTRIBUTION CENTER
FACILITY LOCATED IN BOTH BUTTS COUNTY AND SPALDING COUNTY



- 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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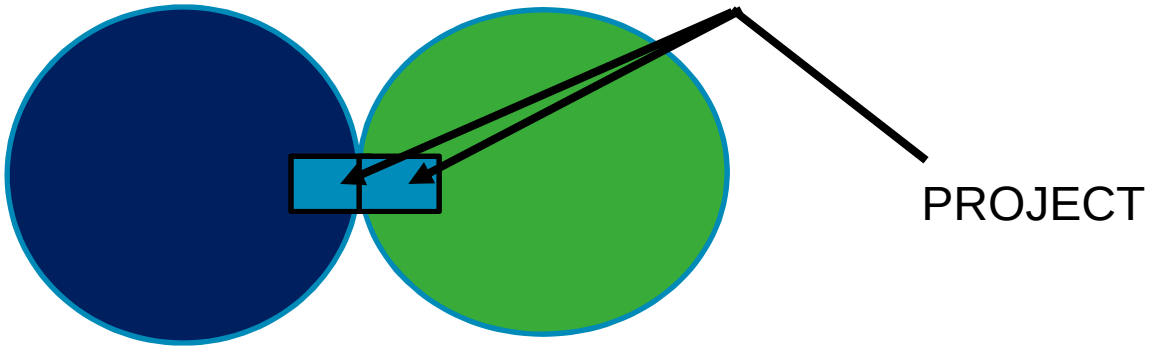
CATERPILLAR CONSTRUCTION EQUIPMENT MANUFACTURING PLANT

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

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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