MODULE 2

SOME THINGS DEVELOPMENT AUTHORITIES CAN’T DO

and some workarounds to do them anyway
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
CAN’T- CONFER A “GIFT OR GRATUITY”
"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
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).
YOU CAN’T- “GIVE THINGS AWAY” BUT YOU CAN- MAKE A BARGAIN
the MOU contains the bargain

Accountability Structure

• General and Special Conditions within Grant Agreement for FTE Jobs & Private Capital Investment
  – Must deliver at least 80% of benefit within established performance period (generally 36 - 60 months after Certificate of Occupancy + limited extensions)
  – Benefit calculated as average of the percentages of jobs created and actual investment
  – Below 80% benefit – prorated repayment required

• 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?

Source: DCA
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. § 32-6-133(b), the fair market value of such rights or other substantial benefit in aid of the performance of the Department's governmental mission.”

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.
CAN’T- GO BEYOND YOUR POWERS
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
• 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
“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.”

hotel owner said all below fmv sales have to be to the state

O.C.G.A. Sec. 36-62-6(a)(7)
to 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)

WHAT THE COURT OF APPEALS DECIDED

RULES FOR “IS NOT A PROJECT”

• HOTEL WAS A PROJECT
• SALE BELOW FMV AUTHORIZED BY DAL
• THE DEVELOPMENT AUTHORITY “DODGED A BULLET”
• THE COURT OF APPEALS ONLY FOOTNOTED THE CONSTITUTIONAL PROHIBITION OF “GIFTS OR GRATUITIES”
• THE HOTEL OWNER DIDN’T PRESENT “GIFTS OR GRATUITIES” ISSUE TO TRIAL COURT; TOO LATE IN APPEALS COURT

HOW TO “DODGE A “BULLET”

In the Court of Appeals of Georgia

A6A1241. DEVELOPMENT AUTHORITY OF COLUMBUS, JE-064 GEORGIA V. FOUR JS FAMILY, LLLP,

ELLINGTON, Presiding Judge.

Development Authority of Columbus, Georgia (“DACG”) appeals from the trial court’s order 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 injunctive 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 36-62-15 (the “Act”), prohibits DACG from selling real property at less than market value except as provided in OCGA § 36-62-6.1 (c)(2). For the reasons set forth below, we agree with DACG and reverse.

how to defense against a “gifts or gratuities” claim

NEGOTIATE AND ENTER INTO AN MOU

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”

GET A FEASIBILITY STUDY (when appropriate)

HAVE CLAWBACKS

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

Data Visualization: Dan McRae
CAN’T- CARRY OUT PUBLIC PROJECTS
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.

Note: Some LCA’s authorize purely public projects for some Constitutional development authorities.
PUBLIC/PRIVATE PARTNERSHIPS (P3)

- PUBLIC/PRIVATE PARTNERSHIPS (P3) ARE VERY POPULAR NOW
- A RECENT 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
SUCCESSFUL P3 STRUCTURE
Won GEDA “Deal of the Year”

PRIVATE

Company

project bonds + lease

title + PILOTs

Development Authority

infrastructure bond proceeds

infrastructure bonds + PILOTS + IGA

PUBLIC

BOC

IGA

pass through proceeds of infrastructure bonds

ENGINEERED FLOORS
CAN’T- CARRY OUT ROAD PROJECTS WITH LOCAL GOVERNMENT
TAKE DOUGLAS COUNTY’S FOXHALL PROJECT, FOR EXAMPLE

<table>
<thead>
<tr>
<th>Project Components</th>
<th>Original Project</th>
<th>Updated Project</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hotel</td>
<td>350 rooms</td>
<td>200 rooms</td>
</tr>
<tr>
<td></td>
<td>6-story</td>
<td>5-story</td>
</tr>
<tr>
<td>Lodge &amp; Villas</td>
<td>100 rooms</td>
<td>250 rooms</td>
</tr>
<tr>
<td></td>
<td>(50 villas)</td>
<td>(125 villas)</td>
</tr>
<tr>
<td>Golf Course</td>
<td>18-hole</td>
<td>&quot;golf experience&quot;</td>
</tr>
<tr>
<td>Conference Center</td>
<td>80,000 sf</td>
<td>50,000 sf</td>
</tr>
</tbody>
</table>

Source: PFM

PRIVATELY FINANCED AND OWNED

FINANCED BY DEVELOPMENT AUTHORITY AND PUBLICLY OWNED

ROAD PROJECT

ALSO- ROADS, STREET IMPROVEMENTS, WATER, SEWER
• 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.
CAN’T- EXCEED JURISDICTION
3 EXAMPLES OF PROJECTS WHERE THE FACILITY LOCATION INVOLVED TWO COUNTIES

3 DIFFERENT SOLUTIONS
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
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
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
CONCLUSION
“DEAL STRUCTURING” IS HOW DEVELOPMENT AUTHORITIES GET IT DONE

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

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