



NEGOTIATING THE DEAL

ADVANCED!

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PREPARATION



PREPARE TO ANSWER THIS QUESTION: “Why do we have to do bonds in Georgia”

- PROPERTY TAX ABATEMENT IS A LOCAL INCENTIVE
- A TRANSACTION IS REQUIRED BECAUSE OF THE STATE CONSTITUTION
 - "UNIFORMITY OF TAXATION"
 - NO "GIFTS OR GRATUITIES" FROM PUBLIC SECTOR TO PRIVATE SECTOR
 - A BOND IS PART OF THE BARGAIN THAT JUSTIFIES GRANTING THE PROSPECT A \$1 PURCHASE OPTION ON THE PROJECT WHEN IT CONVEYS THE PROJECT TO THE DEVELOPMENT AUTHORITY
 - WITHOUT THAT...

“A gift of any portion of access rights to the property owner would be a prohibited gratuity under the Constitution...” Op. Ga. Att’y Gen. No. 97-14 (April 7, 1997)(GDOT wanted to reconvey access rights to the property owner from whom GDOT had originally acquired the property).



WHY- BONDS FOR TITLE

- **ALSO WANT TO AVOID TAXPAYER SUITS OVER "SHAMS"**
 - SOME QUOTES FROM THE ATTORNEYS FOR THE PLAINTIFF TAXPAYER AND THE DEVELOPMENT AUTHORITY AFTER THE GEORGIA SUPREME COURT RULED IN FAVOR OF THE COUNTY'S 10 YEAR RAMP-UP TAX SAVINGS FORMULA
 - PLAINTIFF: "would expect continuing assaults on this illegal tax abatement scam, not only in Fulton County, but also in Cobb where it is starting to grow like black mold."
 - DEVELOPMENT AUTHORITY: "They might try to go after discrete projects arguing as to whether or not the ramp-up fits the specific transaction in future bond deals..." Source: Fulton Daily Report
- **THE BOND STRUCTURE IS PART OF LEASEHOLD VALUATION**
 - FROM AN AGREEMENT WITH THE ASSESSORS RELATED TO FULTON COUNTY'S FORMULA: [The] ten (10) year schedule... has been determined based on the precedent established in the Harris Case and utilizes approximate percentages to reflect the discounted cash flow analysis, with a seven percent (7%) discount rate over the successive years of said ten (10) year schedule..."

IT'S NOT JUST GEORGIA!

June 28 - July 1, 2015

IPT 39th Annual Conference * San Diego, California

Industrial Revenue Bond/ Tax-Exempt Entity Ownership

- Typically an arrangement structured where a tax-exempt entity holds title to a new facility
- Could allow the tax-exempt entity to construct the facility free of property tax and sales tax
- Actual project owner would enter into a lease with the tax-exempt entity for a certain number of years, may be up to 30
- Property taxes are not assessed; however, PILOTs would typically be made as lease payments
- Everything is negotiated in advance
- This arrangement is typically found in states that allow local tax exempt entities the abilities to enter into such arrangements, including Arkansas, Georgia, Louisiana, Tennessee, and Texas

NO SALES TAX
EXEMPTION
OCCURS IN
GEORGIA

ACTUAL
TAXES
APPLY IF
LEASEHOLD
VALUATION
USED

ALSO
PENNSYLVANIA,
MISSOURI,
KANSAS, etc.



“ONE SIZE FITS ALL”

- Many communities have a long-standing policy about what “abatement” can be offered.
- If so, what do you have left to negotiate?
 - “refreshing Year 1”
 - taxability during the construction period
 - “taking property off the tax digest”



“ONE SIZE FITS ALL”

- investment period
 - how long to invest
- matching the “abatement” period to demonstrated need
 - can’t extend, but can shorten by collapsing deal at certain point
- whether or not personal property is included
- other details



IS “ONE SIZE FITS ALL” STILL TRUE?

- Many communities now chafing at inflexible policies
 - Especially true of cities
- Those communities are increasingly willing to do “off policy” deals
- Need to consider legal basis for abatement
 - Leasehold valuation
 - Need cooperation of Assessors
 - Usufruct
 - Not always based on cooperation of Assessors

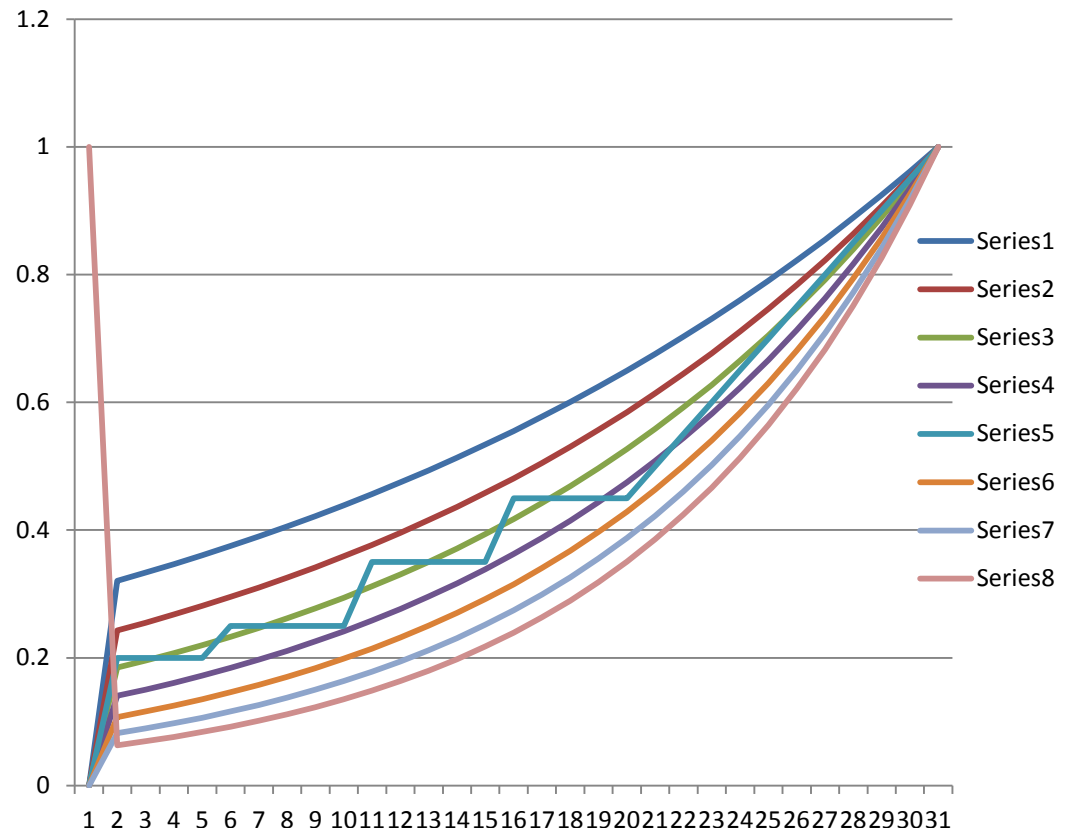


LEASEHOLD VALUATION

- HISTORICAL APPROACH TO PROPERTY TAX “ABATEMENT”
- FULL TAXES ARE PAID ON VALUE OF LEASE
- BUT VALUE IS ENGINEERED TO CORRESPOND WITH NEGOTIATED LEVEL OF “ABATEMENT”
- RECENT GEORGIA SUPREME COURT DECISIONS REQUIRE EVIDENCE THAT THE ABATEMENT SCHEDULE VALUES PROPERTY AT ITS FAIR MARKET VALUE FOR EACH YEAR
- TESTIMONY BASED ON AN APPRAISAL MODEL IS USED TO DO THIS

APPRAISAL MODEL

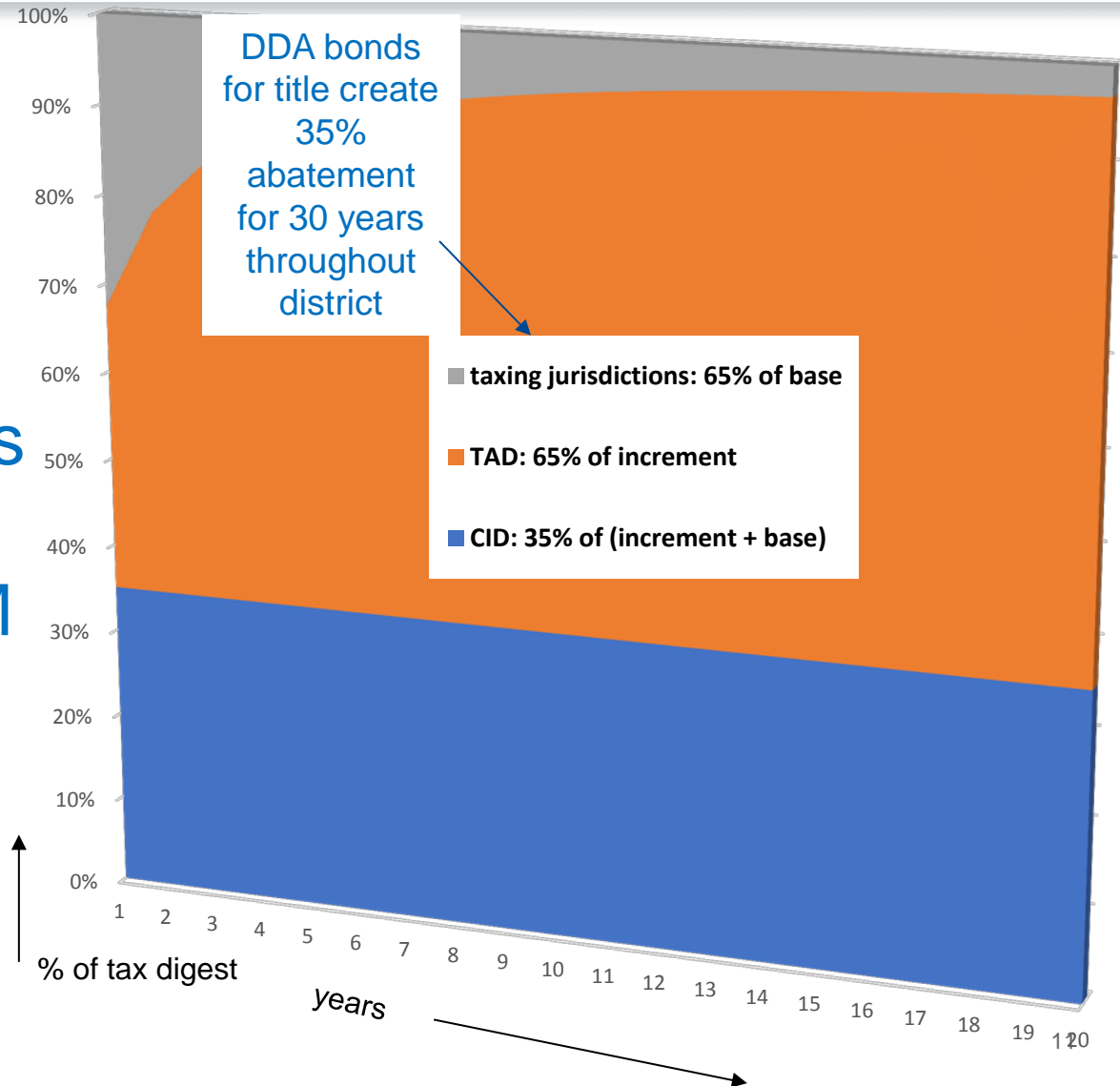
Do you have one of these for each bond deal?



WHAT DORAVILLE DID FOR GM SITE REDEVELOPMENT AND SERTA SIMMONS HQ PROJECT

deeper abatement for HQ project co-exists with monetization of district property taxes to pay for infrastructure for GM site redevelopment

- further reduction in revenues from deeper abatement for Serta Simmons HQ project
- reduction partially offset by PILOT payments by Serta Simmons (= abated city, county and CID taxes)





PILOTs

- PILOTs = payments in lieu of taxes
- In order to have PILOTs, have to reduce or eliminate property taxes
- Bonds for title transaction required
 - Non-taxable lease = usufruct
 - Non-taxability is validated in court when bonds are validated



PILOTs

- Have to structure transaction so compliance with PILOT Restriction Act not required
 - There are “loopholes” in the PILOT Restriction Act
- Normal bonds for title transaction not subject to PILOT Restriction Act



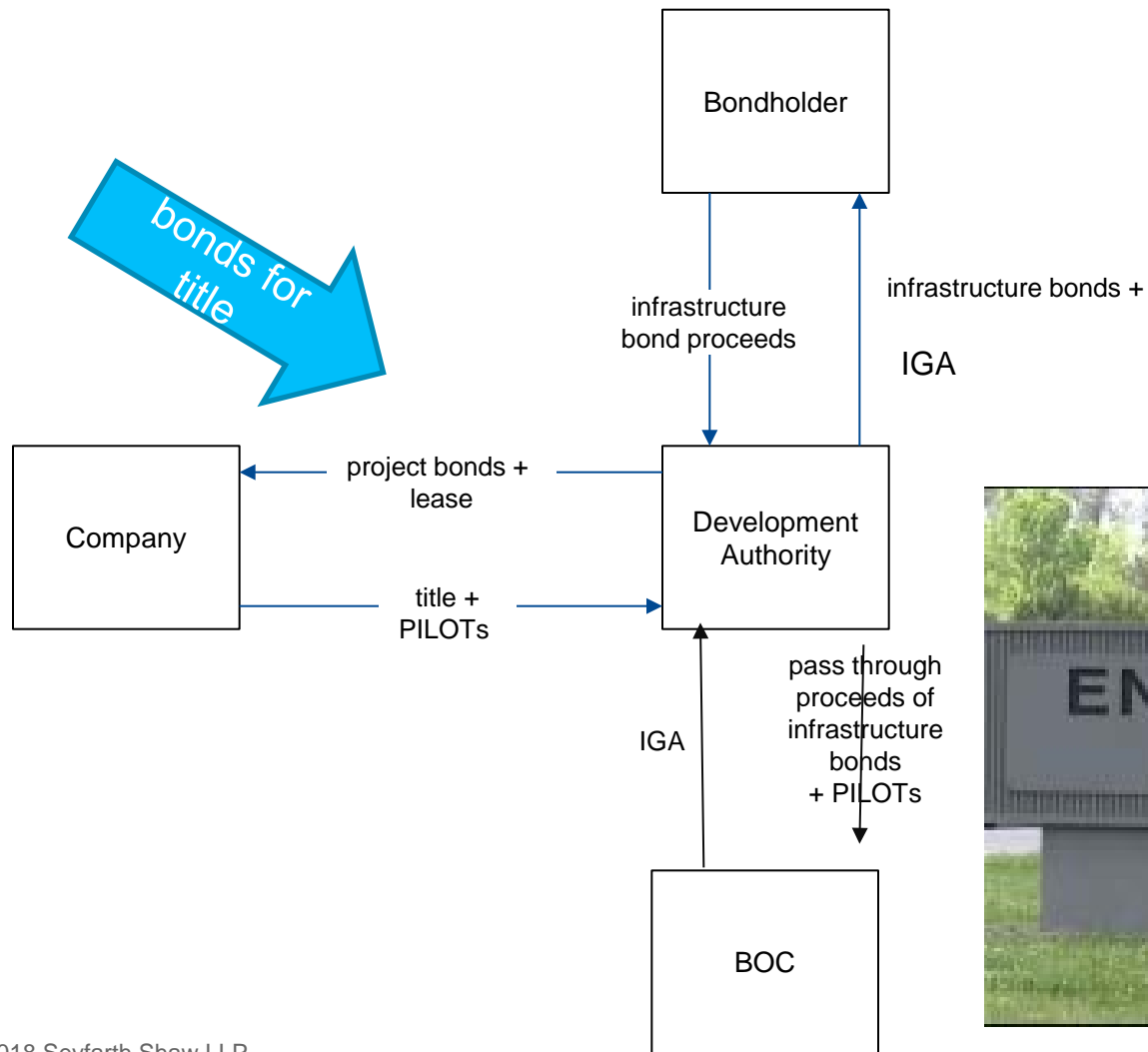
PILOTs

- Trend- development authorities retain PILOTs to fund their programs or to finance facilities
- Particularly the case with DDAs and city development authorities

PILOT BONDS- ONE EXAMPLE

Won GEDA “Deal of the Year”

DALTON-WHITFIELD JDA



PROCESS

“TEACHABLE MOMENT” 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.”



LUCKY BREAK

COURT OF APPEALS APPLIED DEVELOPMENT AUTHORITIES LAW AS WRITTEN

IF PROPERTY NOT A PROJECT, AUTHORITY HAS POWER TO-

- 1. 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)
- 2. dispose of any real property for fair market value or any amount below 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 ... and if title to such real property is to be transferred to the state. O.C.G.A. Sec. 36-62-6(a)(7.1)

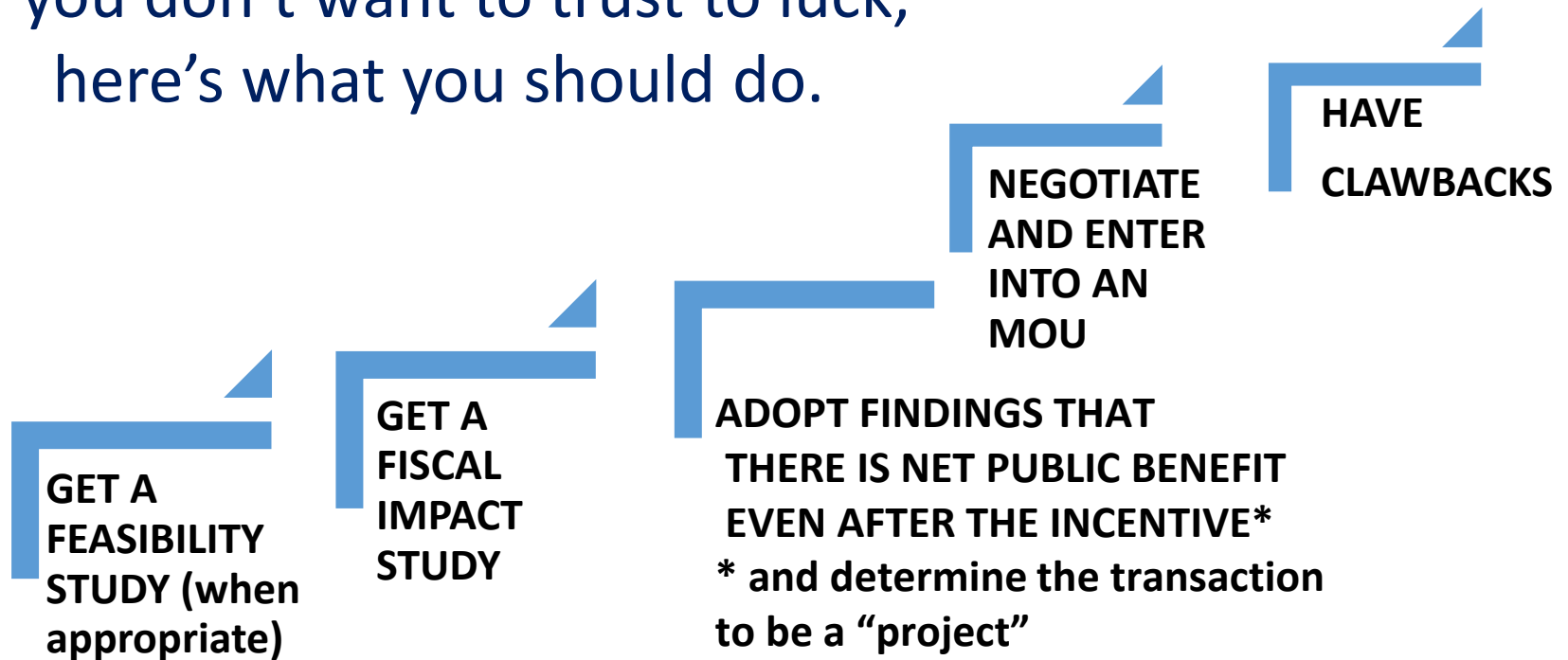
- IF PROPERTY IS A PROJECT, PRICE NOT AN ISSUE UNDER DEVELOPMENT AUTHORITIES LAW
- **BUT** PROHIBITION OF “GIFTS AND GRATUITIES” UNDER CONSTITUTION STILL APPLIES
- DEVELOPMENT AUTHORITY “DODGED A BULLET”
- HOTEL OWNER FAILED TO TIMELY RAISE “GIFTS AND GRATUITIES” ISSUE

WHAT TO DO- MAKE A BARGAIN, NOT A GIFT

“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.”
Op. Ga. Atty. Gen. No. 97-14

HOW TO DO IT

If you don't want to trust to luck,
here's what you should do.



PARAMETERS

THE GOLDEN
RULE-
INCENTIVES
SHOULD
NEVER
EXCEED
JUSTIFICATION

INCENTIVES

JUSTIFICATION

COST

BENEFIT



EXCESS PROJECT COSTS CAN BE A JUSTIFICATION FOR INCENTIVES

... the cumulative amount of **saved ad valorem property taxes... shall not exceed** the sum of the **Excess Construction Costs** (defined below) and the **Eligible Brownfield Costs** (defined below). The “**Excess Construction Costs**” shall be excess costs (**not to exceed \$4.5 million in the aggregate**) that are incurred by the Company in connection with the construction of the Project, that are identified in, and that qualify under, paragraph 6, below, without duplication of any Eligible Brownfield Costs, and that are **substantiated to the DDA by a certification by the Company’s architect or engineer** submitted to the DDA with the report by the Company required below and as required by the DDA from time to time. “**Eligible Brownfield Costs**” shall have the meaning ascribed to such term by O.C.G.A. Section 48-5-7.6(a)(3) and as certified by the Environmental Protection Division of the Georgia Department of Natural Resources (“EPD”), but for purposes of this paragraph 5, shall **not exceed \$3.0 million in the aggregate**. The Excess Construction Costs and the Eligible Brownfield Costs are collectively referred to herein as the “**Property Tax Credits**”. (**Note- To do this, PILOTs have to be used.**)

PROVISIONS FOR THE MOU



ADMINISTRATIVE PROVISIONS- PILOTs

- SIMPLE IF PROPERTY TAX “ABATEMENT” IS BASED ON LEASEHOLD VALUATION
 - NORMAL PROPERTY TAX RULES APPLY
- NOT SIMPLE IF PAYMENTS ARE PILOTs
- IF PAYMENTS ARE PILOTs, THEN WITHOUT ADMINISTRATIVE PROVISIONS-
 - WHERE DOES DATA COME FROM?
 - WHO DOES WHAT?
 - WHAT RIGHTS DOES COMPANY HAVE?
- YOUR MOU NEEDS ADMINISTRATIVE PROVISIONS



ADMINISTRATIVE PROVISIONS- with cooperation

- ADMINISTRATIVE PROVISIONS FOR PILOTs ARE NOT AS COMPLICATED IF BOARD OF ASSESSORS AND TAX COMMISSIONER ACKNOWLEDGE MOU
 - OR AT LEAST COOPERATE
- IF SO, ASSESSORS CAN DETERMINE FMV AND ASSESSED VALUE AND CAN PROVIDE THAT TO TAX COMMISSIONER, WHO CAN BILL AND COLLECT PILOTs DUE
 - SOME TAX COMMISSIONERS ARE WILLING TO DO THIS
 - SOME ARE NOT



ADMINISTRATIVE PROVISIONS- without cooperation

- ONE EXAMPLE OF ADMINISTRATIVE PROVISIONS IF ASSESSORS AND/OR TAX COMMISSIONER DO NOT COOPERATE
- The Parties acknowledge that neither the BOTA nor the Tax Commissioner are parties hereto and therefore are not bound hereby. In the event that either the BOTA or the Tax Commissioner should fail or refuse to perform any task ascribed to them in this Schedule 3.3, then, the Authority may at its option, at the request of the Company and upon confirmation that the indemnity in the applicable Lease includes any liability incurred in performing such task, perform the same task (on its own behalf, and not on behalf of the BOTA or the Tax Commissioner), and the Company will so indemnify the Authority against any liability for doing so.



ADMINISTRATIVE PROVISIONS- Company's rights

- THE COMPANY WILL OBJECT TO THE ADMINISTRATIVE PROVISIONS IF THE MOU DOES NOT HAVE A CLAUSE SOMETHING LIKE THIS-
- The Board of Assessors and the Authority shall have all of the rights and remedies (including, without limitation, audit rights) related to payments in lieu of taxes, interest and penalties, as they would have in the case of ad valorem taxes (including, without limitation, delinquent ad valorem taxes), and the Company agrees upon request of the Board of Assessors or the Authority to grant any security lien or security interest necessary such that the taxing authorities have the equivalent of tax liens for such purposes, subordinate to any prior security titles or security interests permitted elsewhere herein, provided that such subordinate lien or security interest is allowed by the terms of the instruments governing such prior security titles or security interests. Likewise, the Company shall have all of the same rights and remedies as it would have in the case of a dispute over ad valorem property taxes, including, without limitation, the right to dispute the valuation used by the Board of Assessors.



ASSIGNING THE PROJECT

- THE LEASE AND USUALLY THE MOU WILL CONTAIN PROVISIONS ABOUT WHEN THE COMPANY CAN ASSIGN THE LEASE AND OTHER BOND DOCUMENTS.
- BE SURE THAT THE AUTHORITY CONTINUES TO BE INDEMNIFIED FOR PRE-ASSIGNMENT CLAIMS BY SOMEONE WHO WILL BE AROUND AND HAVE ASSETS.
- Risk if assignee only picks up responsibility for post-assignment claims and assignor dissolves or disappears.



PLEDGING THE PROJECT

Leasehold Mortgage

- If the Company wants to finance the Project with a lender, the lender will want the Project for collateral.
- In a bonds for title structure, the bond documents represent the Company's beneficial title to the Project, so it will want to be able to pledge its interest in them to its lender.
 - “Leasehold mortgage.”



PLEDGING THE PROJECT

foreclosure sale

- A pledge of the Company's interest in the bond documents to the Company's lender should be OK, but try to restrict in the Lease to whom the lender can sell the Project if there is a foreclosure sale.
 - Try to define "Exempt Assignee" in the Lease and limit foreclosure sales only to them.
- If the Company owes clawbacks to the development authority, it still owes them
- Company won't be able to pay
- The foreclosure purchaser will resist assuming them



PLEDGING THE PROJECT

fee pledge

- The Company's lender often wants a pledge of the legal title to the Project.
 - "fee pledge"
 - In a bonds for title structure, that can't be done unless the development authority does it, because the development authority holds title.
- If the development authority agrees to the pledge, it should always be without financial liability to the development authority.
 - "Non-recourse."
 - Be sure that you are not accidentally pledging to the lender the development authority's "Unassigned Rights" such as indemnification
- Do Not pledge the development authority's rights under the MOU!



PLEDGING THE PROJECT

big issues

- If the development authority has provided the land, or has a cash or in-kind investment in the Project (like site preparation), that investment is at risk.
 - foreclosure sale
 - there is always the risk of the Company going bankrupt
- Best protection for the development authority in a bonds for title structure: groundlease the land to the Company in a separate groundlease
 - project leased to Company by bond lease
 - only Company's groundlessee interest is part of the Project, not the development authority's groundlessor interest (title)



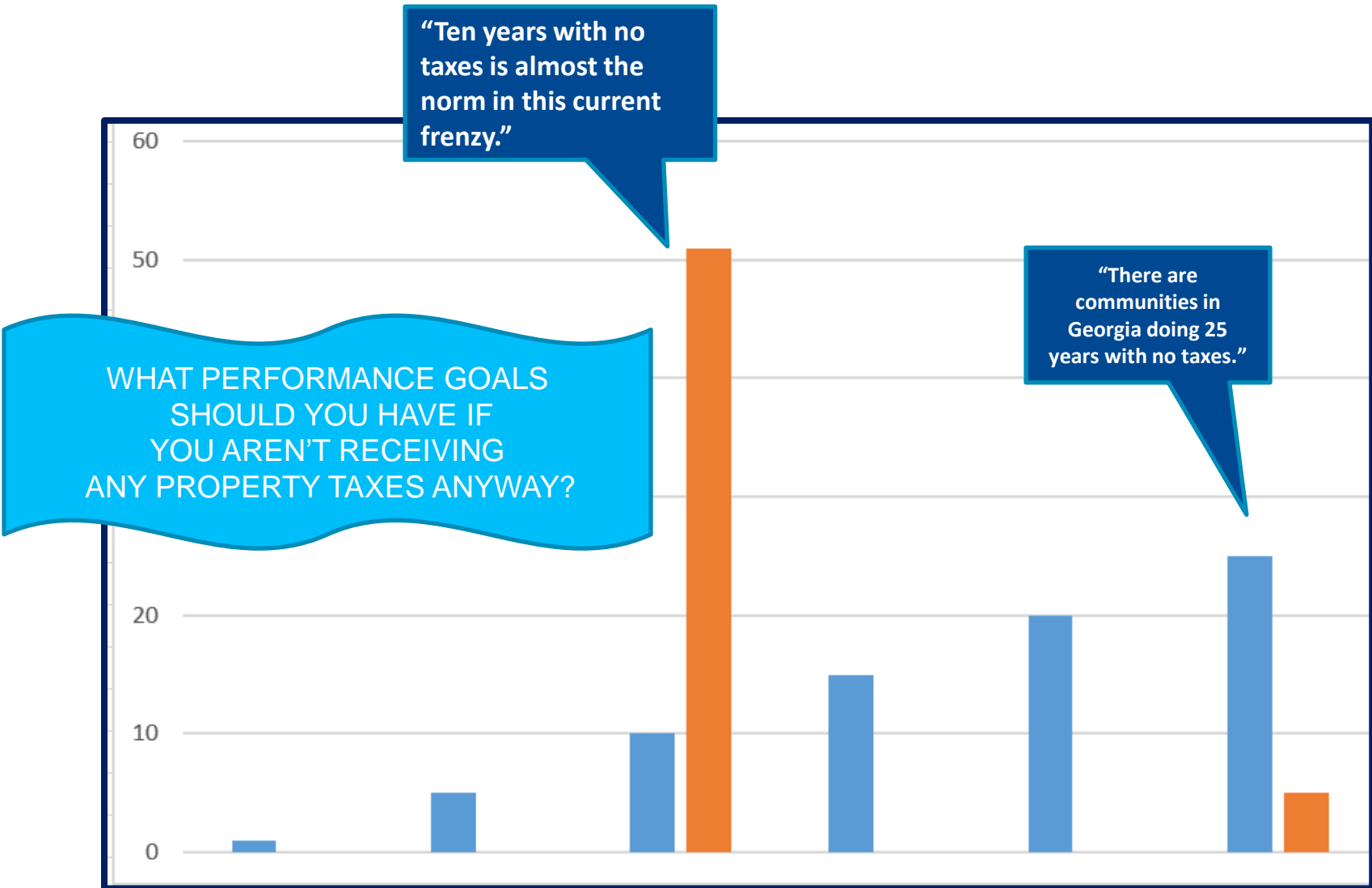
PLEDGING THE PROJECT

big issues


- If a State grant has been invested in the Project, a foreclosure sale will take the Project out of public ownership.
- If this occurs before close out of the grant, the development authority is at risk of having to pay a clawback to the State, if the Company does not pay it.
- Try to build in protections against this-
 - “Stand still” from lender in favor of development authority.
 - Security from Company to pay clawback to the State.
 - For example, letter of credit

PERFORMANCE

YOU MAY NEED TO CUSTOMIZE YOUR PERFORMANCE GOALS



Data source:
http://www.northeastgeorgia.com/business/competition-is-intense-to-attract-new-jobs-big-industries-to/article_11af-c054-1960-11e6-b4d0-1f07ce6120cb.html?code=jqm



YOU CAN ALSO CUSTOMIZE YOUR REMEDIES

In case you don't get the performance you bargained for

The Company further acknowledges and agrees that the failure of the Company to achieve any one of the milestones on the Development Schedule, on or before the related deadline for same provided on the Development Schedule, or to construct, equip, install and maintain the Project in compliance in all material respects with the requirements of this Agreement, will constitute sufficient basis for the Authority, in its sole discretion, to suspend future utilization, in whole or in part, of the Savings Schedule, and to increase the amounts payable by the Company (which the Company agrees to pay) under the applicable Savings Schedule from time to time, in any increment that the Authority sees fit in its sole discretion, up to 100% of normal taxes on the Project for the remaining term of the Leases, provided that the Authority likewise may, in its sole discretion, from time to time, in any increment that the Authority sees fit, rescind any such increase.

Note- This clause would require the use of PILOTs.

MORE INFORMATION



QUESTIONS?

If you have any questions or comments on this presentation, please do not hesitate to let me know.

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