IN THE SUPREME COURT OF MISSISSIPPI
NO. 2006-CA-01177

GLEN SOUTHERN, INC.
AND GEM SOUTHERN, INC. **DEFENDANTS-APPELLANTS**

v.

MARSHALL COUNTY, MISSISSIPPI **PLAINTIFF-APPELLEE**

ON APPEAL FROM THE CHANCERY
COURT OF MARSHALL COUNTY, MISSISSIPPI
HONORABLE EDWIN H. ROBERTS, JR., CHANCERY JUDGE

REPLY BRIEF OF APPELLANTS GLEN SOUTHERN, INC. AND GEM SOUTHERN, INC.

ORAL ARGUMENT REQUESTED

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AMENDED STATEMENT REGARDING ORAL ARGUMENT

In their initial brief, Glen Southern, Inc. and GEM Southern, Inc. ("Glen Southern") did not request oral argument, subject to consideration of the County's statement regarding the same. The County also did not request oral argument.

After further consideration of the issues, however, Glen Southern, Inc. submits that oral argument may be helpful, and therefore requests that the Court schedule oral argument in this appeal.

INTRODUCTION

In its principal brief, Glen Southern demonstrated that (1) the contracts and leases at issue here restrict the use of the Byhalia facility to manufacturing only during the primary term of the leases, *e.g.*, Ex. 1A § 11(m), p. 9; Ex. 5A-2, p. 13, but not thereafter; and that (2) the separate abandonment clause entitles the County to terminate the leases only in the event the facility is "not use[d] or operate[d]" for any purpose for a period of one year. Ex. 1A, § 11(m).

In response, the County spends nearly nine pages[1] on policy arguments. First, the County discusses the unquestioned – but to this dispute, irrelevant – benefits that the State of Mississippi will receive from the recent attraction of the Nissan and Toyota manufacturing plants. Next, it discusses the general purposes of the BAWI Act, pursuant to which (as Glen Southern agrees, *see* Brief of Appellant at 6-7) the facility's construction and expansion were financed. The County spends a further three pages[2] discussing provisions, which Glen Southern similarly does not dispute, that allow Glen Southern to renew each contract on the same terms and conditions as in the initial contract, except that the rent may be increased.

What the County does *not* discuss, or even cite in its Brief, are the contractual provisions at the heart of this case – those that establish that the manufacturing-use restriction is limited to the primary term of each lease, or at most, to Glen Southern's occupancy. But this ostrich-like approach to the central language of the contracts cannot make it disappear. That language controls the result here, and requires that the Chancery Court's judgment be reversed and summary judgment entered in Glen Southern's favor.

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[1] Brief of Appellee at 19, 14-23.

[2] Brief of Appellee at 8-11.

ARGUMENT

The contracts and leases between Glen Southern and the County control the result here. The Court has only to read the relevant provisions – as the *de novo* review of a summary judgment order contemplates – to determine that the manufacturing-use restriction is limited to the primary terms of the leases; and contracts; or in one case, to the time period when Glen Southern occupies the facility. Glen Southern met those requirements.

The County's policy argument does not vary the terms of the contracts and leases. Moreover, the BAWI Act expressly permits other uses for the facility besides manufacturing. And, despite the County's new argument to the contrary, the Act is constitutionally sound.

In the unlikely event the Court finds that evidence of the parties' conduct is necessary to determine their intent, that conduct evidences no intention that the manufacturing-use restriction would continue beyond the primary terms of the leases. Indeed, the parties' conduct establishes just the contrary intent.

Finally, the County's argument that any non-manufacturing use constitutes "abandonment", thereby entitling it to terminate the contracts, is not supported by the plain language of the contracts.

Glen Southern is entitled to summary judgment and the Chancery Court's decision denying that motion, and granting the County's cross-motion for summary judgment, should be reversed.

1. The contractual provisions are not ambiguous. Contrary to the County's characterization, they support Glen Southern's argument that any manufacturing-use restriction is limited to the primary term.

The relevant contractual provisions (which appear nowhere in the County's brief) say, unambiguously, that the manufacturing-use restriction exists "during the . . . primary term" only. *E.g.*, Ex. 1A, § 11(m), p. 9.[3] For example, the original, 1952 contract states:

> m. The Company [Glen Southern] agrees ... that it will operate said premises **during the period of the primary term herein provided for the manufacture of some such product** suitable to the Company.

Ex. 1A, § 11(m), p. 9; Cty. R.E. 00018 (emphasis added). This language could not be more plain: *after* the primary term expired (*i.e.*, after 20 years), the manufacturing-use restriction also expired. Ex. 1B, § 3, at p. 2.

Similarly, the second 1967 contract provides that Glen Southern agrees to use the premises for manufacturing, but only *during the primary term*:

> 3. Employment: Company [Glen Southern], recognizing the intent of the aforesaid Mississippi Statutes to provide employment, hereby covenants and agrees, **during the primary term** of the General Obligation and this Supplemental Lease herein referred to or until all rentals required under the primary term hereof have been paid to District,[4] to exercise due diligence **to maintain and operate a manufacturing, processing or other similar type of industry in the said building**, and to provide steady employment in such operations.

Ex. 5A-2, p. 13 (emphasis added).

As a corollary, the first 1967 contract provides that the facility will be used only for manufacturing during the time that Glen Southern *occupies* the premises:

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[3] *See also* Appellee's Record Excerpts ("Cty. R.E.") at 00018.

[4] The parties do not dispute that the County received all rentals required under each primary term of each lease. R. 12. The parties also agree that Glen Southern in fact used the premises only for manufacturing during the entire time of its occupancy, *i.e.*, until 1992, R. 15-16, ¶¶ W-X; Ex. 16, p. 64; Ex. 17, ¶¶ 3-4; and during the entire primary term of all the leases at issue, *i.e.*, through 1990. R. 34; *accord* Ex. 6B at p. 5 (primary term of last lease, entered in 1977, is "20 years from October 1, 1970").

> [Glen Southern] acknowledges that in good faith [it] will use [the facility] . . . in connection with the operation of its manufacturing plant . . . **during its occupancy thereof.**

Ex. 5A-1, § 7(r), p. 17; Cty. R.E. 00035 (emphasis added). As Glen Southern has earlier noted, it is thus obligated to occupy the premises (and to use them for manufacturing) only during the primary term. After this, the contract plainly provides that the facility may be sublet to another tenant. *Id.* ("[a]fter the expiration of the primary term, the Company [Glen Southern] may, at its discretion, assign any lease or renewal thereof or sub-let the said premises to any person, firm, or organization").

Glen Southern set out each of these contractual provisions in its principal brief. They are the lynchpin of this case. But the County's response to them is a series of non sequiturs: first, it quotes a seemingly endless series of provisions in the contracts and leases that, unremarkably, allow Glen Southern to renew the contracts or leases for various renewal periods, on the same terms and conditions as set out in the original leases, except that the amounts of rent may change. Brief of Appellee at 8-11. (For convenience, these clauses are referenced herein as "renewal clauses".) Second, the County focuses on the provisions of the leases and contracts that permit Glen Southern to sub-let the facility. Here, the County cites authority that does not support its argument and, in fact, apparently concedes that the manufacturing-use restriction is, at best, limited to the term of Glen Southern's occupancy of the facility, which ended in 1992. Third, the County resorts to its view of the intent of the parties, as supposedly demonstrated by deposition testimony from a non-party, taken after the commencement of this litigation. None of these approaches avails the County.

a. The renewal clauses do not vary the plain terms of the contracts and leases.

The County seems to believe that the language of the renewal clauses[5] somehow voids the plain language, set out above, limiting the manufacturing-use restriction to the primary terms of the leases. Brief of Appellee at 8 ("there is absolutely no contractual authority supporting" a distinction between the primary and renewal terms of the contracts. "Instead, the only distinction between the primary and renewal terms . . . is the difference in rent paid by Glen Southern.").

This argument is specious. The leases provide that Glen Southern will operate the facility for manufacturing during the leases' primary terms. That use restriction is expressly limited to the "primary term". The renewal clauses simply provide, unsurprisingly, that upon renewal of the leases, the original terms of each lease continue unchanged. Those terms include the terms permitting other uses for the facility after the expiration of the primary term.

b. Provisions permitting Glen Southern to sub-let do not alter the terms of the contracts and leases.

Nor does the County gain by its argument that the first 1967 contract requires a sub-lessee to comply with all obligations – including the supposedly permanent manufacturing-use restriction – imposed by the original lease. Brief of Appellants at 11. Glen Southern pointed out in its principal brief,[6] as it has done above, that section 7(q) of the first 1967 contract, Exhibit 5A-1 § 7(q), pp. 16-17, Cty. R.E. 00034-35, permits Glen Southern to sublet the facility after the primary term, at Glen Southern's discretion. That section, moreover, does *not* require that the sublease be for manufacturing purposes.

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[5] For example, the renewal clause in the 1952 Contract, Ex. 1A, § 11(n), p. 9; Cty R.E. 00018, provides,

> The Company shall have the right and option to renew beyond the original twenty (20) year term for three (3) successive twenty (20) year terms each and for a final renewal term of nineteen (19) years upon the same terms and conditions except as to the amount of rent contained in the original primary lease.

[6] Brief of Appellant at 12, 21 (discussing first 1967 contract's subleasing provisions).

The County wishes to apply the manufacturing-use restriction to the section about subleases, in order to apply it to all sub-lessees. Brief of Appellee at 11. Specifically, the County contends that "there is absolutely no language in section 7(q) supporting [Glen Southern's] 'interpretation' of this clause", *i.e.*, that Glen Southern may sub-lease to any tenant after expiration of the primary term, including for purposes other than manufacturing. The County contends that "[w]hen the entire clause is read as a whole, section 7(q) [Exhibit 5A-1, § 7(q), pp. 16-17] actually contains specific language requiring all subleases to comply with all obligations imposed by the previous contracts, including the manufacturing use restriction". Brief of Appellee 11.

Of course, section 7(q) says what it says. Nothing that either the County or Glen Southern argues can change the section's plain language. And the Court's review of the section will confirm that § 7(q) is neither ambiguous, nor does it contain *any* "specific language requiring all subleases to comply with . . . the manufacturing use restriction", as the County now contends.

Section 7(q) is set out in the County's brief, and it provides:

> (q) Said lease [i.e., the lease contemplated by the first 1967 contract] shall also provide that *during the primary term* of the lease the Company may, with prior consent of the Agricultural and Industrial Board of the State of Mississippi, or its successors, and said District, assign the lease or sub-let the premises to any person, firm or corporation, but no such assignment or sub-letting shall release the Company from any of its obligations thereunder or the contract giving rise thereto unless the District in writing expressly agrees to said release with the consent of the Agricultural and Industrial Board of the State of Mississippi, or its successors. *After the expiration of the primary term*, the Company may, at its discretion, assign any lease or renewal thereof or sub-let the said premises to any person, firm or corporation.

Ex. 5A-1, § 7(q), pp. 16-17, Cty. R.E. 00034-35 (emphasis added).

Glen Southern's only point about this section – that Glen Southern is permitted to sublet the facility "to any person, firm or corporation" after the primary term is over – is set out straightforwardly in the last sentence of § 7(q). Despite the County's wishful thinking, nothing about that sentence engrafts a manufacturing use restriction onto the sublease after the expiration of the primary term. Nor does the language the County emphasizes ("no such assignment or sub-letting shall release the Company from any of its obligations thereunder or the contract giving rise thereto", in the first sentence of the quoted section) make any difference. As Glen Southern noted in its principal brief, this language simply protects the County's investment in the facility during the primary term of the lease, when its consent, and that of the MDA, is required for any sublease. Brief of Appellant at 12 & n. 13. Once the County's investment is repaid, at the end of the primary term, the County's need – and right – to control ceases. Thus, both the use and the subleasing restrictions also cease.

The sole case that the County cites in support of its argument regarding the subleasing provision is a 1941 case, *Lloyd's Estate v. Mullen Tractor & Equip.*, 4 So. 2d 282, 285 (Miss. 1941). Brief of Appellee at 12. *Lloyd's Estate* held that a provision in an oil and gas lease, which allowed the lessee to renew the lease perpetually (but also to assign it), was valid. 4 So. 2d at 284-85. But the holding of *Lloyd's Estate* has no bearing on the provisions at issue here, and does not support the County's argument. Glen Southern does not challenge the restrictions that required it to obtain approval for any assignments during the primary term; nor does it dispute that it is permitted – as was the lessee in *Lloyd's Estate* – to assign the lease pursuant to its explicit terms.

c. To the extent that contracts or leases contain an "occupancy restriction" that requires Glen Southern to use the facility for manufacturing during its tenancy, that requirement has been satisfied.

Inexplicably, the County next appears to concede an important point. It argues that the manufacturing-use restriction that it seeks to impose is "an 'occupancy use' restriction, not a 'continuous use' restriction" which the County concedes is disfavored. *See* Brief of Appellee at 12. An "occupancy use" restriction, the County asserts, is an "express restriction permitting only a specific type of use (manufacturing) for the premises *during the tenant's occupancy*." *Id.* (emphasis added).

The County's construction is precisely what the first 1967 contract provides: Glen Southern commits that it "will use [the facility] . . . in connection with the operation of its manufacturing plant . . . *during its occupancy thereof*." Ex. 5A-1, § 7(r), p. 17, Cty. R.E. 00035 (emphasis added). Glen Southern does not dispute that this language imposes the type of "occupancy restriction" that the County's brief contemplates. There can be no question that Glen Southern satisfied any such restriction; the facility in fact *was* used solely for manufacturing during the entire time that Glen Southern occupied it. *See supra* n. 3.[7]

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[7] The only other legal authority the County cites in support of its argument that the leases and contracts require the facility to be used only for manufacturing in perpetuity, including by sub-lessees, is a law review article. Francis N. Mastroianni, *Caveat Lessor: Courts' Unwillingness to Find Implied Covenants of Continuous Use in Real Estate Leases*, 24 Real Est. L.J. 236 (1996) (cited in Brief of Appellee at 12).

The County contends that the Mastroianni article – cited by Glen Southern in its brief at 21 & n. 17 – provides an "illustrative example of a continuous use restriction", as follows: "Rather than operate at a loss when business conditions deteriorate, sometimes a shopping mall tenant chooses to cease operations and continues to pay minimum rent until its lease expires." Brief of Appellee at 12. But the quote, taken out of context, in fact is simply the introduction to the article. The article goes on to point out that in shopping mall leases an anchor tenant's decision to cease operations and pay only the required base rent may cause "an unhappy landlord" – like the County here – "to look to the lease for an explicit or implied covenant of continuous use. . . ." Mastroianni, *Caveat Lessor*, at 236.

The article's author acknowledges that in the usual case, a shopping mall tenant's rental payments include a minimum base rent plus a percentage rent if the store is operated, so that the landlord may lose significant income if the tenant closes the store and pays only the minimum base rent. But, even in that

d. The Court need not look beyond the contracts and leases to determine the intent of the parties; even if intent is considered, the County's argument fails.

Finally, the County cites deposition testimony from a non-party to support an argument that "[t]he intent of the parties to create a permanent manufacturing restriction is not only found in the terms of the contract, but was also understood by Glen Southern and those companies who sub-let the premises." Brief of Appellee at 13. Of course, ordinary canons of contract interpretation allow the Court to consider extrinsic evidence of the parties' intent only when it has made a determination that the contracts at issue are ambiguous, *e.g.*, *Cherry v. Anthony, Gibbs, Sage*, 501 So. 2d 416, 419 (Miss. 1987); *Delta Wildlife & Forestry, Inc. v. Bear Kelso Plantation*, 281 So. 2d 683 (Miss. 1973).[8] The contracts here are not ambiguous; but even if the Court reaches to consider the County's wishful thinking about the parties' intent, that evidence does not support the County's argument.

The County quotes, at pages 13-14 of its Brief, deposition testimony from Glen Bailey, a representative of Hunter Fan, which sub-let the facility from Glen Southern after this suit was filed in 2003. Brief of Appellant at 9-10; *see* Ex. 15 (Hunter Fan Sublease). Bailey's testimony is that an unidentified individual or individuals, at some unknown time, *told* him that the "master

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context, the article notes that "[a]bsent an *express provision requiring continuous use*, courts are reluctant to impose implied obligations of continuous use." *Id.* (emphasis added). Here, the distinction between minimum base rent and percentage rent does not exist. The annual lease payments do not vary depending on how the facility is used. *See* Exhibit 18.

Moreover, the article notes, where the lease in question "contains an express right-to-assign clause", like the contracts and leases at issue here, "the presence of [such a clause] weighs against finding an implied covenant of continuous use." *Id.* at 241; *see also id.* at 242-43 (citing cases). The conclusion of the article is instructive, and not helpful to the County: "Lessor's counsel should carefully draft an express lease covenant ensuring that the lessee will continually occupy the premises and operate its exact type of business for the duration of the lease . . . However, even *with* an express covenant of continuous use, a lessor cannot expect a court to enforce the specific performance of such a covenant." *Id.* at 245-46 (emphasis added).

[8] That the parties disagree about the terms does not make them ambiguous. *IP Timberlands Operating Co. v. Denmiss Corp.*, 726 So. 2d 96, 104 (Miss. 1998).

lease" between Glen Southern and the County contained a provision that required any sublease to be for manufacturing. Brief of Appellee at 13-14; Ex. 16 (Bailey Deposition) at 28, 36; *see* Cty. R.E. 00037-38. Importantly, however, Bailey's testimony nowhere says or implies that Glen Southern, on the one hand, *or* Bailey and Hunter Fan, on the other, ever agreed or understood that this supposed restriction was a correct interpretation of the contracts. Nor does it say that Hunter Fan agreed only to use the premises in such a manner.[9] Rather, in the next several responses (testimony that the County conveniently does not quote), Bailey says that the County's representatives, Mike Thornton and Keith Taylor, *agreed* to Hunter Fan's use of the facility for warehousing, rather than for manufacturing:

> Q. And what was your justification for going ahead and entering a lease knowing that you [Hunter Fan] were not a manufacturer?
>
> A. Because Mike Thornton and Keith Taylor said go ahead and use it, and the county and Glen Southern would settle their issues in court.

Ex. 16 at 28-29.[10] Asked when this conversation occurred, Bailey testified that it was in April or May 2003, "[b]efore the lease was signed." *Id.* at 29.

Bailey's testimony establishes only that Hunter Fan was on notice of the dispute over use of the facility for warehousing. That avails the County nothing. What *is* significant about Bailey's testimony is that it shows that the County did nothing to stop Hunter Fan from moving into the facility and warehousing goods there.

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[9] Glen Southern certainly did not agree with this position: its corporate representative testified that Glen Southern did not regard the contracts and leases as requiring that the sublease to Hunter Fan be for manufacturing uses only. Deposition of Edward G. Lampman, as Miss. R. Civ. P. 30(b)(6) representative of Glen Southern, Ex. 7 at 52.

[10] Taylor was a member of the County's board of supervisors; Thornton was director of the County's Economic Development Authority. R. 64. The County noted in the trial court that Taylor and Thornton were not authorized to act for the County, which must act only through its Board of Supervisors. *Id.*; *see e.g.*, *Burdsal v. Marshall Cty.*, 937 So. 2d 45, 48 (Miss. App. 2006). Glen Southern agrees that Taylor and Thornton, acting independently, were not empowered to approve the sublease to Hunter Fan on behalf of the County. Nevertheless, their comments to Mr. Bailey, especially those quoted *infra*, provide a clear window through which to see the County's real intentions and its acceptance of warehousing as the highest and best use of the facility.

Beyond that, Bailey's testimony explains why the County made no effort to stop Hunter Fan from moving into the facility and using it for warehousing – if the County wins this lawsuit, it intends to lease the facility to Hunter Fan for precisely that use:

> Q. And then what about Mike Thornton, what conversations did you have with him about approval of the lease agreement?
>
> A. We had the same type of conversation with him concerning what was the Industrial Board going to do, were they going to approve it, what did we need to do to be able to complete the lease agreement. And his basic answers were the same, that the county was not going to approve or sign any agreement, and that whatever we did between us and Glen Southern was whatever leases that lease agreement we wanted to make was our business, and that whatever the outcome would be from the legal actions or that Hunter Fan would be okay and don't worry about it. *And that if the county took over the facility, that they would negotiate a lease with Hunter Fan at that time.*

Ex. 16 at 33.

If evidence of the County's conduct or intent is considered, it is apparent that this lawsuit has nothing to do with the County's wanting a manufacturing tenant in the facility. It has everything to do with the County wanting to claim for itself the benefits of Glen Southern's lawful sublease to Hunter Fan, and Hunter Fan's lawful use of the facility.

2. The BAWI Act does not require the facility to be used only for manufacturing; it permits warehousing and other uses, which are not unconstitutional.

The County devotes nine and a half pages of its brief to an argument that the Balancing Agriculture With Industry Act ("BAWI" or the "Act"), Miss. Code §§ 57-1-1 to 57-1-70 (1972), requires that the facility be used only for manufacturing, because the original, 1936 version of the Act contained such a limitation. *See* Brief of Appellee at 14-24. The County, remarkably, contends for the first time on appeal that any other use is actually unconstitutional. *Id.* at 21.

As it did in its principal brief, Brief of Appellant at 6-7, Glen Southern agrees that the initial construction of the facility, as well as the later expansions, were financed through bond

issues pursuant to the BAWI program; and that the Act was designed to "promot[e] and develop commercial, industrial, agricultural, and manufacturing enterprises", *Board of Supervisors of Lamar Cty. v. Hattiesburg Coca-Cola Bottling Co.*, 448 So. 2d 917, 919 & n. 2.

The County cites a number of the contractual provisions which, not surprisingly, reference the manufacturing facility that Glen Southern agreed to construct and operate during the primary term. Brief of Appellee at 17-19. This language is not dispositive of any issue in dispute. Glen Southern *agrees* that the municipal bonds and other incentives that permitted it to construct the facility, and later to expand it, were intended to provide financing for the construction and expansion of its manufacturing operation. *See, e.g., Gem, Inc. v. United States*, 192 F. Supp. 841, 842 (N.D. Miss. 1961); Brief of Appellant at 7-9. Glen Southern also agrees that, for this reason, the County and the MDA properly restricted Glen Southern's use of the facility to manufacturing during the primary terms of the leases; and retained oversight of any subleases until such time as the bonds were repaid, also during the primary terms. *See id.* at 842 ("maturity schedules and rental payments were so arranged [by the parties as to] . . . completely pay and retire the bonds and the interest coupons thereon" during the primary terms of the leases); *see also* Ex. 5A-1, § 7(c), (d), at pp. 6-8; Ex. 5A-2, ¶ 2, pp. 11-12 (describing repayment terms). As is evident from the Act, the contracts and the leases, the County and the MDA had an interest in controlling the use of the facility during the primary terms of the six leases, for it was during those primary terms that the bonds were to be repaid from the lease payments. *See* R. 10, 12 (Motion of Defendant for Summary Judgment, ¶ ¶ C and M).[11]

Nothing in the Act, however, requires that a facility constructed through its incentive program remain permanently frozen in time, and never used for any other purpose than the ones

[11] The County received from Glen Southern every lease payment to which it was entitled during each of those primary terms. Those payments fully retired the bonds and paid off the construction costs, together with the expenses of issuing the bonds, thus satisfying the County's investment in the facility.

initially contemplated by the Legislature in 1936. Indeed, the Act, since at least 1960, has not only permitted, but *promoted* non-manufacturing projects, including "any enterprise for storing or *warehousing* products", projects for research and development, and so on. *See* Miss. Code Ann. §§ 57-3-5(2)(b) *through* 57-3-5(3) (emphasis added). The Byhalia facility was used exclusively for manufacturing until 1992. Since then, it has also been used for warehousing, which – along with a number of other permissible uses – also falls within the ambit of the Act.[12] *Id.* And the County expressly approved that use on at least two occasions.

The County now makes a new argument, not presented to the Chancery Court: that the use of the facility for any purpose other than manufacturing is "patently unconstitutional". The County submits that allowing Glen Southern or another entity to "us[e] the leased premises for its own pecuniary benefit and allowing employment on the premises to dwindle" amounts to "taxing the people of Mississippi for a private purpose" in contravention of Article 7, § 183 of the Mississippi Constitution. Brief of Appellee at 20-21 (citing *Albritton v. City of Winona*, 178 So. 799 (Miss. 1938) and *Miller v. Tucker*, 105 So. 774, 780-81 (Miss. 1925)). This argument, while novel, is not well-founded.

As an initial matter, the County's constitutional argument has been waived. It was not presented to the trial court. *See* R. 57-66 (County's cross-motion for summary judgment; no mention of constitutional violation). Nor was the County's brief served on the Attorney General of the State of Mississippi, as required by Miss. R. Civ. P. 24(d) and Miss. R. App. P. 44(a). *E.g.*, *In re S.A.M.*, 826 So. 2d 1266, 1277-78 (Miss.2002) (failure to raise constitutional question

[12] The County disregards the subsequent amendments to the Act permitting (and promoting) non-manufacturing uses, asserting baldly that not only the initial contract, but "each subsequent contract and lease agreement references the BAWI Act of 1936." Brief of Appellant at 15 & n. 1. Not surprisingly, the County fails to include record citations for this statement. In fact, the later contracts and leases unremarkably reference the Act "as recompiled" or "as amended", *e.g.*, Ex. 5A-1, § 4(b), at pp. 3 ("recompiled), *see id.* at p. 25 (referring to Act "and amendments thereto"); Ex. 5A-2, p. 2 ("Whereas" clause, referencing Act "and amendments thereto"); Ex. 6A, at 3 (County will apply for certificate of public convenience and necessity pursuant to the Act "as amended"); etc.

at trial level and to notify Attorney General of challenge bars the challenge on appeal); *Oktibbeha County Hosp. v. Mississippi State Dept. of Health*, 2007 WL 1438786, at *3 (Miss. 2007) (citing cases; requirement of notice to Attorney General is "strenuous" and failure to comply with it results in a procedural bar to the challenge); *Pickens v. Donaldson*, 748 So. 2d 684, 692 (Miss. 1999).

Considered on its merits, the constitutional challenge also fails. The Act *permits* the very use that the County disdains. Miss. Code Ann. § 57-3-5(2)(b) (Act promotes and permits "warehousing"). This provision of the Act permitting warehousing has never been declared invalid; nor has it ever been held to benefit private industry at the expense of any taxpayer. Indeed, on at least one occasion, the Court has noted that contracts and leases entered into under the Act sometimes may provide that the private entity who benefits from the Act's provisions can *purchase* the entire facility – presumably, to operate it *solely* for the private entity's benefit – when the bond indebtedness has been retired. *Morco Industries, Inc. v. City of Long Beach*, 530 So. 2d 141, 142 (Miss. 1988) ("principal and interest of the revenue bonds" issued for construction of facility under BAWI program "were to be retired by rent receipts from appellant over the fifteen-year term of the lease, and at the expiration of the term appellant would have the option to purchase everything.") If the County's argument were correct, the arrangement in *Morco Industries* surely would not pass constitutional muster, as it evidently did.

In any event, the bond issues and "tax breaks" that the County offered to Glen Southern have long since been repaid in their entirety during the primary term of the contracts and leases at issue, the last of which ended 15 years ago. R. 12; Ex. 6B, p. 5. The purposes of the Act have been satisfied, and any monetary obligation arising from the bond issuance has been repaid.[13]

[13] Any obligation to provide manufacturing jobs similarly was fulfilled pursuant to the terms of the contracts. Indeed, as late as 1967 Glen Southern specified that it did not "agree[] to any definite increase in employment" through the construction and expansion of its facility, but did acknowledge its "intent to

3. The parties' course of conduct, if considered, does not evidence an intention to require a permanent manufacturing-use restriction.

As already noted, the Court need not look to the parties' conduct for evidence of their intentions with respect to a manufacturing-use restriction, unless the Court determines that the contracts are ambiguous. *E.g.*, *Cherry*, 501 So. 2d at 419; *Sharpsburg Farms, Inc. v. Williams*, 393 So. 2d 1350, 1354 (Miss. 1978) (court's object is to determine parties' intent as expressed by the language used in the contract, not to determine the unexpressed intent of the parties); *Barnett v. Gettie Oil Co.*, 266 So. 2d 581, 586 (Miss. 1972) (if parties' intentions are clear and unambiguous based on a reading "of the instrument itself", the court should "look solely to the instrument" and enforce the agreement as written). The parties' conduct, however, tells a different story as to their intentions than the County presents.

The County sets out six "facts" that, it contends, support its argument that the parties at all times intended that the facility be used only for manufacturing. Glen Southern takes no issue with the first three items – (1) that the original purpose of the contracts was to build a facility that Glen Southern would use for manufacturing; (2) that Glen Southern was using the facility for manufacturing when each lease was executed; and (3) that Glen Southern (and, the County says, "its sub-lessors" [sic]) used the facility for manufacturing "during the entire period of its [sic] occupancy of the premises" (as well as during the entire primary term of the leases at issue), *i.e.*, at least through 1992. Brief of Appellee at 22.

The County then goes on to discuss its interpretation of the parties' intentions at the time of the sublease to Hunter Fan, Brief of Appellee at 22. Glen Southern has addressed this argument above at pages 9-11. But the County's account of the supposed facts concerning the parties' intentions omits two critical facts, which completely undercut its argument.

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furnish employment to persons in and about the County of Marshall *during its occupancy*" of the facility. Ex. 5A-1, § 7(r), at p. 17, Cty. R.E. 00035 (emphasis added).

- In 1992, two years after expiration of the last primary term in the leases, *see* R. 34 *and* Ex. 6B at p. 5, the County and the MDA approved use of the facility for warehousing. Glen Southern subleased the facility to E.D. Smith, Ex. 10, **and the County approved the E.D. Smith sublease, as did the MDA.** Exs. 11, 12. That sublease explicitly provided that E.D. Smith could use the premises "only for the *warehouse and/or manufacture* of food and health and beauty aids, *or for any lawful purpose. . . .*" Ex. 10, § 5.01, p. 18 (emphasis added).

- And, four years later, the County again approved use of the facility for warehousing. More specifically, before E.D. Smith's ten-year sublease expired, it sold its assets to Havatampa, Inc. In 1996, therefore, Glen Southern and Havatampa entered into a sublease, which *also* provided that Havatampa could use the facility for warehousing, manufacturing, or any other lawful purpose. Ex. 13. **Again, the County approved these uses.** Ex. 14.[14]

In simplest terms, the County should not now be heard to insist that it has always required only a manufacturing use for the facility. Glen Southern *in fact* used the facility only for that purpose; E.D. Smith and Havatampa did not, but (consistent with Glen Southern's interpretation of the contracts and leases) the County expressly *approved* their use of the facility for warehousing *once the last primary term of Glen Southern's leases expired.*

4. Using the premises for anything other than manufacturing does not constitute "abandonment", and therefore does not entitle the County to cancel the contracts.

The County admits that its argument that any non-manufacturing use equals "abandonment" is premised on a finding that the contracts and leases indeed require that the facility always be used for manufacturing. Brief of Appellee at 24. The contracts and leases, as already discussed, do not so require. Even the abandonment clause of the original 1952 contract (discussed in Glen Southern's principal brief at pages 10-11) acknowledges this fact. It is quoted, in part, in the County's brief at page 25; but (after protesting that Glen Southern has

[14] The MDA did not approve the Havatampa sublease, but the Chancery Court found that this failure was not chargeable to Glen Southern, because the County's prior conduct led Glen Southern to expect that the County would obtain MDA approval if required. The Chancellor therefore ruled that the failure to obtain MDA approval could not be construed to be a breach by Glen Southern. R. 103-04. The County did not appeal this ruling.

omitted "choice portions" of the clause) the County's quoted language conveniently omits the sentence just before the sentence it relies upon. Lest there remain any confusion, the *entire* section reads:

> m. The Company [Glen Southern] agrees that as promptly as is reasonably possible with due diligence after delivery to it of possession of the premises it will complete the installation of such additional machinery and equipment as it shall deem necessary to the operation of a factory for the purpose of manufacturing dust mops, wet mops, and other yard and textile products of cotton or other fibre as it may see fit, and further agrees that it will operate said premises *during the period of the primary term* herein provided for the *manufacture* of some such product suitable to the Company. With the express provision that if the Company should abandon said premises and fail to use or operate them for a period of one continuous year except such temporary cessation as may be caused by matters not within the control of the Company, such as damage, strikes, and force majeur [sic], then at the option of the County this agreement may be terminated without further liability to either party.

Ex. 1A, § 11(m), at p. 9, Cty. R.D. 00018. (Emphasis added.) The promise to use the premises for manufacturing during the primary term is plain; so is the abandonment provision, which is a separate sentence. It is not connected to the manufacturing-use restriction, and it clearly contemplates circumstances when the facility would not be used *at all* (hence the exceptions for "temporary cessation" due to strikes, damage, etc.). This language simply cannot logically be read to equate any use *other than manufacturing* as "abandonment" – particularly given that the County has twice expressly approved the very type of use that it now contends constitutes "abandonment".

The *Albritton* case, upon which the County again relies, Brief of Appellee at 26, is not to the contrary. It notes that leases entered into under BAWI programs may safeguard against the lessee's "holding the property without carrying out the purposes for which [the property] was acquired" by including in the lease a clause which allows termination "if the lessee fails within a specified time to equip and operate the industry as described in the lease or discontinues for a specified time thereafter to so operate it." *Albritton*, 178 So. at 808, quoted in Brief of Appellee

at 26. The County contends that *Albritton* thus creates an "implied obligation to operate the premises for a BAWI public purpose." Brief of Appellee at 26. But even if this language could be said to create such an "implied obligation", warehousing *is* (as already discussed) a permissible purpose under BAWI.

Moreover, the contracts in fact contain *exactly* the language that *Albritton* contemplates – both in the form of this abandonment language, which prohibits the facility from standing entirely idle, and in the form of clauses such as those earlier in the same subsection 11(m), which require Glen Southern to exercise due diligence to equip and operate the facility promptly after taking possession. Ex. 1A, § 11(m), at p. 9, Cty. R.E. 00018. Glen Southern has not violated either provision.

The County also cites *Independent Healthcare Mgt., Inc. v. City of Bruce*, 746 So. 2d 881, 888-89 (Miss. App. 1999), which it claims supports its argument that failure to use the facility for manufacturing constitutes an abandonment. Brief of Appellee 27-28. Glen Southern has addressed this argument completely at pages 24-25 & n. 25 of its principal brief. The lease in the *City of Bruce* expressly required the defendant to operate a hospital throughout the term of the lease, and the Court found that the defendant's failure to do so at all constituted a breach; whereas failure to carry out particular activities – running an emergency room, for example – did not. 746 So. 2d at 885. As Glen Southern has pointed out, the contracts and leases here do *not* require that the facility be used for manufacturing in perpetuity. Indeed, the County approved other uses. This can hardly be interpreted to mean that the facility has thereby "effectively ceased to operate as a viable operation." Brief of Appellee at 28 (quoting *City of Bruce*, 746 So. 2d at 888.[15]

[15] The County contends that failure to use the facility for manufacturing amounts to an abandonment and that this factual situation is the same as that presented in *Farm Services, Inc. v. Oktibbeha County Bd. of Supervisors*, 860 So. 2d 804, 805 (Miss. 2003) (discussed in Brief of Appellant at 28-29 and Brief of

Finally, the County argues that, *if* the Court finds that the facility was required to be used only for manufacturing at all times, and *if* a failure to do so constitutes abandonment, then termination is the appropriate remedy.[16] Brief of Appellee at 29-30. While this may be technically correct, Glen Southern has pointed out that termination is disfavored as an equitable remedy, *e.g.*, *Columbus Hotel v. Pierce*, 629 So. 2d 605, 609-10 (Miss. 1993) (citing cases). In part, this is because termination is a radical remedy that would produce "harsh, unreasonable, expensive, and unintended consequences." *UHS Qualicare v. Gulf Coast County Hosp.*, 525 So. 2d 746, 755-56 (Miss. 1987).[17]

If the Court finds that termination is appropriate here (which Glen Southern of course denies), then it should consider some of those unintended consequences. If the contracts between Glen Southern and the County are terminated, for example, the County would possess an outdated and essentially land-locked facility ill-suited for the very operation that the County claims it requires.[18] Further, over the years, Glen Southern has purchased, at its own expense, the real property surrounding the facility on three sides, with the fourth side abutting a railroad. *See* Ex. 15 at p. 1 & Ex. 15, Exhibit A at p. 21. Any tenant the County could find for the facility

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Appellee at 28). To the contrary: the facility in *Farm Services* was completely unused for any purpose for more than a year; it employed no one; and Farm Services had begun to dismantle it and had defaulted on its rent. *Id.* *None* of those conditions exists here. While the abandonment clause here requires non-use for a minimum of "one continuous year," the subject premises have been continuously occupied and used for all but two or three months. R. 15-16.

[16] It is precisely because the County has no damages that the sole remedy claimed is termination. The County does not dispute it has received all rental payments due under the contracts. *Cf.* R. 78-79 (Am. Complt.; no prayer for money damages); *and cf., e.g., Favre Property Mgmt., LLC v. Cinque Bambini*, 863 So. 2d 1037, 1044 (Miss. Ct. App. 2004) (listing "money damages" as one required element of an action for breach of contract).

[17] Other provisions of the contracts at issue require that the County give Glen Southern notice and an opportunity to cure a default before the County is entitled to termination, *e.g.*, Ex. 1A, § 11(o), p. 10.

[18] The facility "is not designed for modern industry", in part because of its age: "major waste water treatment improvements – or a new waste water treatment facility – are needed". All of these factors contributed to the decision that the best use for the facility was warehousing or some non-manufacturing use. Ex. 17 (Affidavit of Harry Smith, at ¶¶ 5-6).

– or the County itself – thus would be required to negotiate with Glen Southern regarding parking and access issues. Presumably, the result of such negotiations would not benefit the County, but would instead provide Glen Southern with precisely the type of private income that the County apparently believes it should not be entitled to receive.

Glen Southern submits, however, that the facts here do not warrant termination. Rather, a *de novo* review of the contracts and leases – and, if necessary, of the conduct of the parties as a "measuring tape for discerning the intent of the parties", Brief of Appellee at 22 – will demonstrate (1) that Glen Southern has not breached any of the contracts or leases; (2) that a non-manufacturing use such as warehousing (which the County has twice approved) is consistent with those documents and with the purposes of the BAWI Act; (3) that no "abandonment" of the premises has occurred; and (4) that Glen Southern is entitled to summary judgment.

CONCLUSION

For the reasons set out above, Defendants-Appellants Glen Southern, Inc. and GEM Southern, Inc. respectfully request that the Court reverse the Chancery Court's denial of their Motion for Summary Judgment; and that the Court enter a judgment in favor of Glen Southern, Inc. and GEM Southern, Inc.

RESPECTFULLY SUBMITTED, this the 31st day of May, 2007.

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CERTIFICATE OF SERVICE

I, Margaret Oertling Cupples, certify that I have this day caused to be served a true and correct copy of this document by United States mail, postage prepaid, on the following:

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THIS, the 31st day of May, 2007.

MARGARET OERTLING CUPPLES

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