IN THE SUPREME COURT OF MISSISSIPPI

CASE NO. 2006-CA-01712

OXFORD ASSET PARTNERS, LLC, PLAINTIFF/APPELLANT,

vs.

THE CITY OF OXFORD, DEFENDANT/APPELLEE,

and

JIM HOOD, ATTORNEY GENERAL
FOR THE STATE OF MISSISSIPPI,
EX REL. THE STATE OF MISSISSIPPI, INTERVENOR/APPELLEE.

ON APPEAL FROM THE CIRCUIT COURT OF LAFAYETTE COUNTY, MISSISSIPPI

BRIEF OF APPELLEES

ORAL ARGUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representatives are made in order that hte Justices of this Court may evaluate possible disqualification or recusal.

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SO CERTIFIED, this the 20th day of April, 2007.

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BRIEF OF THE APPELLEES

STATEMENT OF ISSUES

1. Whether Mississippi Legislature's House Bill 1671 (2006 Regular Session) was enacted for the benefit of a private entity and therefore in violation of Article 4, Section 87 of the Mississippi Constitution.

2. Whether the text of Mississippi Legislature's House Bill 1671 (2006 Regular Session) vacates public grounds and therefore violates Article 4, Section 90(m) of the Mississippi Constitution.

STATEMENT REGARDING ORAL ARGUMENT

Appellee submits that the dispositive issue or set of issues presented by this appeal have been recently authoritatively decided. Furthermore, the facts and legal arguments are adequately presented in the briefs and record in this case. Oral argument would not significantly aid the Court in its decisional process. Appellee respectfully suggests that the Court not schedule oral argument in this case. *See* MISS. R. APP. P. 34(a).

STATEMENT OF THE CASE

A. Nature of the case.

This case is a facial challenge to HB 1671, a statute enacted by the Mississippi Legislature during its 2006 Regular Session.

B. Course of the proceedings.

The City is satisfied with the description of the course of the proceedings below contained in OAP's brief and therefore, pursuant to MISS. R. APP. P. 28(b), the City does not here restate the same.

C. Statement of facts.

On April 5, 2005, the Board of Aldermen of the City of Oxford, Mississippi ("the City") resolved to advertise a request for proposals to increase parking in the downtown area.[1] On April 8, 2005, the City published a request for proposals.[2] This request sought solutions to the City's severe shortage of parking on and around the Square. The City sought solutions that would allow it to increase parking on the Square at no cost to the City, and stated that "the design and construction of the project will be solely financed by the person, firm, or corporation submitting the proposal. The City of Oxford will enter into a ***lease agreement*** ... with the successful proposing person, firm, or corporation."[3] Notice was published again on April 15, 2005.[4]

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[1]R. at 75-77.

[2]R. at 79.

[3]R. at 78. (emphasis added).

[4]R. at 79.

On May 17, 2005, at its regularly scheduled public hearing, the Board received a brief oral report from David Bennett, Director of Public Works, on the three proposals he had received that day in response to the Board's request.[5] On May 19, 2005, Bart Robinson, Assistant Director of Public Works, gave the Board a detailed summary of the three proposals.[6] On June 10, 2005, the three proposals were presented to the board and, on June 21, 2005, the Board formed a Parking Committee to review the proposals and make recommendations to the Board.[7] The Parking Committee included Will Lewis, owner of Neilson's Department Store; Bill Anderson, of the University of Mississippi; and several employees of the City of Oxford, including the City Planner, the City Clerk, and the Director of Public Works.[8] The Board requested the Parking Committee to move forward in considering two of the three proposals, one of which was from the Balk family d/b/a Balk Properties, LLC, from Oxford, and the other from Craig side Leasing Corporation of Greenwood.[9] Both proposals included designs for a hotel to be built in public air space in exchange for construction of a parking facility.[10]

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[5]R. at 80-81.

[6]R. at 82-83.

[7]R. at 84-86.

[8]*Id.*

[9]R. at 87-98

[10]R. at 84-86. Plaintiff appears to be concerned that a new hotel in the downtown area may threaten his business. However, the City believes the additional parking spaces made possible HB 1671 will benefit continued business expansion in the downtown area, enabling greater business opportunities and more visitor traffic of all kinds. In other words, the parking expansion is at least as likely to benefit Plaintiff's business as it is to threaten it, if indeed it affects Plaintiff's business at all. Regardless, it is neither the City's ambition or design to affect any individual business one way or another in its effort to increase parking. Instead, the City is merely responding to what it sees as

On July 5, 2005, and July 7, 2005, the Parking Committee held public meetings concerning the proposals.[11] On August 15, 2005, the Balk proposal was withdrawn.[12] On August 18, 2005, the Parking Committee recommended to the Board that it move forward with the Craig side project and, at that same hearing, the Board authorized counsel to negotiate a ***non-binding*** letter of intent with Craig side.[13] On September 6, 2005, a draft preliminary development agreement was presented to the Board at its regular public hearing, though no action was taken.[14] The Board held a special public hearing to discuss the project on September 13, 2005, and local citizens voiced both support for and concerns about the project.[15]

On October 4, 2005, at its regularly scheduled public meeting, the Board voted to authorize the Mayor to sign the ***non-binding*** Preliminary Development Agreement. In this non-binding agreement, Craig side and the City both explicitly acknowledged that "further research and analysis regarding the appropriate means of transferring these development and air rights must be undertaken and agreed upon prior to execution of a final and binding contract."[16] On October 18, 2005, at its

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a general and obvious public need, and wishes to satisfy that need with as little expense to taxpayers as possible.

[11]R. at 133-134.

[12]R. at 135.

[13]R. at 136.

[14]R. at 137-138.

[15]R. at 139-140. Despite a claim by the Manager of Oxford Asset Partners that he had "followed with concern and dismay the activities of our City Council related to . . . the possible construction of a hotel and parking garage on City property behind Neilson's" (see R. at 141-143), no comment or participation in the public hearing or meeting process was made by Oxford Asset Partners or its members at this meeting, or at other meetings.

[16]R. at 24.

regularly scheduled public hearing, the City announced that it was holding another public meeting in order to discuss the project with the community.[17] On November 1, 2005, that public meeting was held, and again members of the public voiced both support for, and concerns regarding, the project.[18]

During the course of the many public hearings regarding this issue, the issue of the legality of the proposed transaction was raised. To ensure the propriety of the agreement in principle, the City requested an opinion from the Attorney General.[19] The Attorney General opined that there was no legal impediment to the Board of Aldermen entering into a long-term lease, which had been a concern raised at the public hearings, but that such a lease could not result in the construction of a commercial enterprise above the contemplated parking structure.[20] The Attorney General cited MISS. CODE ANN. § 21-37-23, which prohibits a commercial enterprise connected to a municipally-owned parking facility.

Even though Attorney General opinions are not binding precedent,[21] and even though the City might have determined that the Attorney General misunderstood the essentially separate nature of the parking lot and hotel under consideration (the parking lot itself would be expanded, yet no commercial use would be made part of any portion of the lot or garage), the City decided to proceed under the Attorney General's interpretation of MISS. CODE ANN. § 21-37-23 and request legislation

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[17]R. at 144-145.

[18]No minutes were taken of this open public discussion.

[19]R. at 146-148

[20]R. at 149-153

[21]*See, e.g, Shelter Mut. Ins. Co. v. Dale*, 914 So.2d 698, 703 (Miss. 2005); *Billy E. Burnett, Inc. v. Pontoon County Bd. of Supervisors*, 940 So. 2d 241, 245 (Miss. Ct. App. 2006).

that would allow it to cure the critical need for additional downtown parking at no cost to the citizens of Oxford.

On January 17, 2006, the City considered requesting local and private legislation, but took no action.[22] On February 7, 2006, recognizing the utility of local and private legislation that would allow the City to cure its unique need for increased parking on and around the Square, the City requested, by resolution, legislation that would allow it to enter into an agreement such as the one contemplated with Craig side with ***any*** developer on ***any*** City-owned downtown parking facility.[23] Thereafter, on April 5, 2006, the Governor approved HB 1671, local and private legislation to authorize the City to negotiate with public or private entities for the construction, enlargement or expansion of parking facilities, and to convey air and development rights in exchange for the construction of an enlarged or improved parking facility. HB 1671 also provides that in providing such authorized municipal parking facilities, the provisions in MISS. CODE ANN. §§ 21-37-23 and -25 shall not apply.

On or about May 15, 2006, OAP filed its Complaint against the City seeking declaratory and injunctive relief prohibiting the City from acting under HB 1671, enacted during the 2006 Regular Session of the Mississippi Legislature. In its Complaint, OAP avers that HB 1671 violates Article 4, Sections 87 and 90 of the Mississippi Constitution.

Pursuant to MISS. R. CIV. P. 24(d), OAP provided notice to the Attorney General of its constitutional challenge to HB 1671 at the time it filed its Complaint. It is in response to this notice of the constitutional challenge, and pursuant to the authority vested in the Attorney General by MISS.

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[22]R. at 154-155.

[23]R. at 156-157

CODE ANN. § 7-5-1 and MISS. R. CIV. P. 24(d) the Attorney General intervened in this matter and joined in the City's defense of HB 1671.

The Circuit Court heard oral argument on August 31, 2006. On September 14, 2006, the Circuit Court entered an Order on Summary Judgment resolving all pending issues in the City's favor. The Circuit Court entered its final judgment on September 26, 2006. This appeal followed.

After OAP properly noticed its appeal and filed its brief, Craig side informed the City that it would not proceed with the project, choosing instead to build a hotel on a different site in Oxford.[24] Thus, Craig side will receive no benefit whatsoever from HB 1671.

SUMMARY OF ARGUMENT

Section 87 prohibits the enactment of special or local laws for the benefit of private individuals or corporations. The Mississippi Supreme Court has repeatedly held that the prohibitions of Section 87 are "wholly inapplicable to entities public in nature," including municipalities.[25] Even if Section 87 did apply in this case, though, there must be no set of circumstances in which the statute could be valid in order for a statute to be held facially unconstitutional.[26] In this case, the only manner in which HB 1671 could conceivably allow an unconstitutional action would be for the City, subsequent to the bill's passage, to breach some ***other***, separate law, either by conveying the property in question in a manner not permitted by law or otherwise acting outside the bounds of the law.

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[24]*See* Appellee's Motion to Supplement the Record.

[25]*Bond v. Marion County Bd. of Supervisors*, 807 So. 2d 1208, 1217 (Miss. 2001); *See also White v. Gautier Utility Dist.*, 465 So. 2d 1003, 1015-16 (Miss. 1985); *City of Greenwood v. Telfair*, 207 Miss. 200, 206-07 42 So. 2d 120, 122 (1949); *Feemster v. City of Tupelo*, 121 Miss. 733, 83 So. 804, 806 (1920).

[26]*See Trainer v. State*, 930 So. 2d 373, 382-83 (Miss. 2006).

Additionally, HB 1671 does not vacate any space. Instead, it allows a subsequent conveyance in accordance with applicable law. There is simply nothing on the face of HB 1671 that offends the Mississippi Constitution, and therefore OAP has failed to overcome the strong presumption of validity afforded HB 1671, under this facial challenge to this law..

ARGUMENT

A. Standard of review.

1. No deference afforded Circuit Court's determination.

The Supreme Court reviews a Circuit Court's determination regarding summary judgment *de novo*.[27] However, in this case the Supreme Court will determine whether HB 1671 is constitutional by applying the same deferential standard applied by the Circuit Court below.

2. Great deference afforded the Mississippi Legislature's determination.

A statute may be found unconstitutional by a reviewing court only when the challenging party proves beyond ***all reasonable doubt*** that the statute in question is in conflict with some plain provision of the constitution:

> Without doubt, our constitutional scheme contemplates the power of judicial review of legislative enactments; however, that power may be exercised affirmatively only where the legislation under review be found "***in palpable conflict with some plain provision of the ... constitution.***" Statutes ... come before us clothed with a ***heavy presumption of constitutional validity***. The party challenging the constitutionality of a statute is burdened with carrying his case ***beyond all reasonable doubt*** before this Court has authority to hold the statute, in whole or in part, of no force or effect. When a party invokes our power of judicial review, it behooves us to recall that the challenged act has been passed by legislators and approved by a governor sworn to uphold the selfsame constitution as are we.[28]

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[27] *Myers v. City of McComb*, 943 So.2d 1, 8 (Miss. 2006).

[28] *Trainer*, 930 So.2d at 377 (quoting *In re T.L.C.*, 566 So.2d 691, 696 (Miss. 1990)) (ellipses in original, internal citations omitted, emphasis added).

The challenging party must not only prove beyond all reasonable doubt that the statute is in palpable conflict with the Mississippi Constitution, but must also show that there are no circumstances under which the Act would be valid.[29] OAP cannot satisfy this high threshold required for reversal.

3. Courts must sever unconstitutional language to give a statute its intended effect.

Even on the rare occasion when a litigant meets the stringent standards set forth above and a statute is found unconstitutional, reviewing courts must sever the unconstitutional portion and give effect to the statute's intent. MISS. CODE ANN. § 1-3-77 states:

> If any section, paragraph, sentence, clause, phrase or any part of any act passed hereafter is declared to be unconstitutional or void, or if for any reason is declared to be invalid or of no effect, the remaining sections, paragraphs, sentences, clauses, phrases or parts thereof shall be in no manner affected thereby but shall remain in full force and effect.
>
> Unless the contrary intent shall clearly appear in the particular act in question, each and every act passed hereafter shall be read and construed as though the provisions of the first paragraph of this section form an integral part thereof, whether expressly set out therein or not.

A recent example of this Court's adherence to MISS. CODE ANN. § 1-3-77 is found in *Lewis v. State*,[30] where the Court struck the unconstitutional portion of MISS. CODE ANN. § 41-29-139(f) and left the remainder of statute "in full force and effect."

Under the applicable standards of legal review set out by this Court, the local and private legislation at issue is clearly constitutional and OAP's appeal must be denied.

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[29] *U.S. v. Salerno*, 481 U.S. 739, 745 (1987)."[a] facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid."

[30] 765 So.2d 493, 500 (Miss. 2000).

B. Focus of inquiry.

As it did at the Circuit Court level below, OAP spends much of its brief arguing irrelevant facts in an attempt to obfuscate the matter at hand. OAP's Statement of Issues does not allege any deficiency in the legislative process at either the municipal or State level. Therefore, the large portion of OAP's brief spent detailing the genesis of HB 1671 is irrelevant. Early in 2006, OAP believed there to be some illicit and improper agreement between the City and Craigside Leasing. It filed a complaint in the Circuit Court and engaged in a rigorous discovery process, including the depositions of two non-party witnesses. Instead of confirming that the City had an agreement with Craigside, and that an improper benefit had been conferred and/or the City vacated public grounds, the proof established just the opposite.

When asked if any binding agreement had been consummated between Craigside and the City, Craigside's corporate representative plainly testified that there was no such agreement: "I know of none. I have none. There are no other agreements between me and the City of Oxford in any way shape, form, or fashion, either oral or written."[31] OAP presented absolutely nothing to dispute this testimony. Furthermore, as Craigside has now informed the City that it will not proceed with the project, choosing instead to build a hotel on a different site,[32] it is beyond dispute that Craigside will receive no benefit, direct or indirect, primary or incidental, from the provisions of HB 1671. However, as the City's urgent need for additional downtown parking continues, the City will likely issue another request for proposals in accordance with HB 1671. Thus, consistent with its position from the time this litigation was initiated, the City continues to defend the constitutionality of HB

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[31]R. at 264.

[32]*See* Appellee's Motion to Supplement the Record.

1671 despite Craigside's withdrawal from the project.

As is the case with all facial challenges to a statute's constitutionality, this Court must focus on the four corners of HB 1671 in determining its constitutionality. OAP's intimations of some unspecified impropriety on the part of the City and/or Craigside (which have been factually debunked and rendered moot by Craigside's withdrawal from the project) have no bearing on this constitutional question.

Moreover, Article 4, Section 89 of the Mississippi Constitution sets out the procedure for passage of local and private legislation and states that "[i]f a bill is passed in conformity to the requirements hereof, other than such as are prohibited in the next section, the courts shall not, because of its local, special, or private nature, refuse to enforce it." OAP does not challenge the procedure taken by the Mississippi Legislature in passing HB 1671, and the City is not required to prove the Legislature's compliance with Section 89.[33] "When the legislature has complied with those requisites, 'the courts shall not, because of its local, special, or private nature, refuse to enforce it', unless it contravenes Section 90."[34] In the end, it is precisely the local, special, and private nature of HB 1671 that drew OAP, a competitor of Craigside, to its challenge of this law.

C. House Bill 1671 does not violate Article 4, Section 87 of the Mississippi Constitution.

Plaintiff attacked HB 1671 under Article 4, Section 87 of the Mississippi Constitution, which provides that:

> No special or local law shall be enacted ***for the benefit of individuals or corporations***, in cases which are or can be provided for by general law, or where the relief sought can be given by any court of this state; nor shall the operation of any

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[33]*See Haas v. Hancock County*, 184 So. 812, 813 (Miss. 1938).

[34]*White*, 465 So. 2d at 1016.

> general law be suspended by the legislature ***for the benefit of any individual or private corporation*** or association, and in all cases where a general law can be made applicable, ***and would be advantageous***, no special law shall be enacted.

MS Const. Art. 4, § 87 (emphasis added).[35]

Plaintiff's argument related to this Section can be distilled to two contentions: (1) HB 1671 is unconstitutional because it was enacted for the benefit of a private corporation, and (2) HB 1671 is unconstitutional because the ends achieved could have been achieved by general law. Neither contention has any merit.

1. House Bill 1671 was not enacted for the benefit of an individual or a private corporation or association.

In *Bond v. Marion County Board of Supervisors*,[36] this Court addressed the precise issues presented by this appeal, but under more dubious facts than those presented in this case. In that case, Hood Cable Company ("Hood") informed the Marion County Board of Supervisors ("the Board") and the Marion County Economic Development District ("EDD") of its interest in locating a manufacturing facility in Marion County, with the caveat that it needed a facility on very short notice.[37] One Thomas Wallace ("Wallace") agreed to build the facility on his property at his own

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[35]The Mississippi Supreme Court has repeatedly held that local and private legislation can benefit a municipal corporation, such as the City of Oxford, and that Section 87 prevents the enactment of local and special laws only "for such corporations as were *not* public in their nature." *In re Validation of $7,800,000 Combined Utility System Revenue Bond, Gautier Utility Dist., Jackson County, Dated as of Date of Delivery*, 465 So.2d 1003, 1015-1016 (Miss. 1985) quoting *Feemster v. City of Tupelo,* 121 Miss. 733, 743 (1920) and *In re Validation of $15,000,000 Hospital Revenue Bonds,* 361 So.2d 44, 48 (Miss. 1978) (emphasis in original).

[36]807 So.2d 1208, 1217 (Miss. 2001).

[37]807 So.2d at 1211.

expense, and the Board agreed to enter into a lease-purchase agreement for the property.[38] The Board simultaneously sought the issuance of general obligation bonds to fund the project and requested local and private legislation authorizing the EDD to directly borrow the funds.[39] The Legislature passed the requested legislation.[40] After the bond issue was rejected in a special election, the Board utilized the local and private legislation.[41] The EDD borrowed about $2.5 million from Citizens Bank to purchase the land, then leased it to Hood.[42]

A group of citizens, led by Wiley A. Bond ("Bond"), sued the Board and the EDD, claiming violations of due process, equal protection, and MISS. CONST. art. IV, §§ 87-90. The circuit court granted summary judgment to the Board and the EDD, and this Court affirmed on appeal. Though this Court ultimately found that the local and private legislation in that case did not suspend the general law, the Court also addressed the issue of whether the legislation at issue was enacted "for the benefit of" Hood:

> Section 87 has been held repeatedly to apply only where there has been a local or private law enacted for the benefit of private individuals or corporations. ***Section 87 is wholly inapplicable to entities public in nature***, such as the Board and the EDD.
>
> Apparently in an attempt to skirt the inapplicability of § 87 to the Board and the EDD, Bond argues that S.B. 3269 was enacted for the benefit of Wallace and Hood. This argument is specious. S.B. 3269 provides the Board with an alternative mechanism for funding. ***Its aim is not the appropriation of public moneys for the***

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[38] *Id.*

[39] *Id.*

[40] *Id.* at 1212.

[41] *Id.*

[42] *Id.*

> ***benefit of Wallace or Hood. The record indicates that the Board sought to fund the Hood project because it would bring jobs to the residents of Marion County and benefit the County economically.*** The EDD was, in fact, formed for the purpose of developing industry in the County, and § 19-5-99 permits the EDD to acquire and develop real estate for this purpose. ***Certainly, Hood and Wallace may benefit indirectly from the Board's ability to fund the project. That fact, however, makes the project no less a public improvement project.*** The thrust of S.B. 3269 is the Board's ability to borrow money to finance industrial development projects for the benefit of the County.[43]

OAP, recognizing that *Bond* shoots holes through all its arguments, raises numerous red herrings in an attempt to skew the Court's analysis. First, it claims that the City's argument that a private entity could indirectly benefit from local and private legislation was improper and ill-founded.[44] Specifically, OAP claims that the contemplated benefit to private entities is "as 'direct' as possible" because it involves a transfer of property rights to such an entity.[45] However, the benefits to the private parties in *Bond* (which this Court blessed) were also substantial - Hood benefitted through the construction and leasing of a new facility, and Wallace benefitted through the direct payment of $2.5 million from the EDD for his property.

Also, OAP accuses the City of making "no attempt to define what the difference between a 'direct' and 'indirect' benefit would be."[46] As mentioned above, this Court in *Bond* expressly held that an "indirect" benefit to private parties did not trigger the prohibition of Section 87. The City has not sought to define the terms "direct" and indirect" with respect to this provision because this Court's holdings make clear the distinction and because the driving purpose behind HB 1671 is

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[43] *Id.* at 1218.

[44] Appellant's Br., at 17-18.

[45] *Id.* at 17.

[46] Appellant's Br., at 17.

abundantly clear. In *Bond*, this Court held that an indirect benefit was permissible when "[t]he thrust of S.B. 3269 [was] the Board's ability to borrow money to finance industrial development projects for the benefit of the County."[47]

This common-sense interpretation of Section 87 is far more reasonable than OAP's apparent position that absolutely no private entity whatsoever may benefit in even the smallest way as a result of a suspension of a general law. Put simply, HB 1671 did not suspend general laws "for the benefit" of a private entity; it suspended general laws in the interest of public well-being. Through all the many public hearings held on this matter, and at the Circuit Court below, it was never disputed that there is a shortage of parking near the Square in Oxford. Even those most opposed to building a hotel downtown agree that there is a critical parking shortage, and that steps must be taken to increase parking. In response to this need, the City's elected officials asked for legislation that would allow the City to dramatically increase parking without spending money from City coffers. The direct beneficiaries of the legislation are the citizens of Oxford, and all those who visit Oxford from around the State and nation.

OAP's claim that the indirect benefit that may ***or may not*** have been conferred upon Craigside (we now know the latter to be true) by virtue of its ability to build a hotel in exchange for construction of the parking facility is insufficient as a matter of law to violate Section 87. In fact, as the City has noted, there will be *no benefit whatsoever* conferred upon Craigside. There was never a binding agreement that requires the City of Oxford to utilize Craigside for the construction authorized under HB 1671. However, ***even if there had been a binding agreement in place***, the legislation in question ***still*** would not offend Section 87.

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[47] *Bond*, 807 So.2d at 1218.

The "thrust" of HB 1671 is *undeniably* to expand public parking facilities for the benefit of the citizens of Oxford. In fact, the very fact that the City is pursuing this appeal after Craigside's withdrawal is proof positive that the sole purpose of HB 1671 is to expand public parking facilities within the City of Oxford.

OAP also cites a 1903 case for the proposition that the relevant prohibition of Section 87 is "absolute and unconditional,"[48] but fails to note that the other two prohibitions of that section are expressly conditioned on some other occurrence.[49] The clause at issue, then, is only "absolute and unconditional" in the sense that it "specifies the sort of special law prohibited absolutely, and not conditioned on whether a general law can be applicable."[50] The notion that Section 87 disallows any and all tangential benefit to a private third party as a result of a local bill is simply unsupported by the language of the provision and this Court's interpreting case law.

Another red herring raised by OAP is that the City is simply seeking to be "more efficient in addressing its perceived parking problems."[51] The case cited by OAP for the proposition that "some perceived increase in efficiency" does not justify suspension of general laws, *Myers v. City*

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[48] *Yazoo & M. V. R. Co. v. Southern R. Co.*, 36 So. 74, 78 (Miss. 1093).

[49] The first clause of Section 87 holds that "[n]o special or local law shall be enacted or the benefit of individuals or corporations, ***in cases which are or can be provided for by general law, or where the relief sought can be given by any court of this state.***" The third clause provides that, "***in all cases where a general law can be made applicable, and would be advantageous***, no special law shall be enacted." The second clause, which is at issue here, prohibits "the operation of any general law be[ing] suspended by the legislature for the benefit of any individual or private corporation or association."

[50] *Yazoo & M. V. R. Co.*, 36 So. at 78.

[51] Appellant's Br., at 18.

of McComb,[52] does not even mention Section 87. Rather, it is a separation of powers case in which a municipality sought removal of a city selectman who was also serving as a state legislator.[53] In any event, HB 1671 was not requested as a matter of efficiency; rather, the City undisputably sought to alleviate a source of significant public concern - a lack of available public parking. This argument lacks merit.

In perhaps its most dramatic argument, OAP has asserted to this Court that the City seeks a judicial exception to Section 87 that would allow "the enactment of a local bill that suspends general laws for the benefit of a private entity if a municipality is also benefitted (the alleged 'Municipal Exception')."[54] This alleged exception is purely a figment of OAP's imagination. The City has asked for no such exception, and has never contended that the Mississippi Constitution or applicable case law supports the existence of such.

The City has already shown that Section 87 does not apply to any public entity, including municipalities. OAP argues that this Court's prior holdings to this effect do not "somehow mak[e] municipalities immune from Section 87."[55] Unfortunately, this is not the case. As is the case with all other public entities, municipalities *are* immune from Section 87.[56]

In a footnote, OAP glibly remarks that "[e]very bill passed for a municipality presumably

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[52]943 So. 2d 1 (Miss. 2006).

[53]*Id.* at 1.

[54]Appellant's Br., at 19.

[55]Appellant's Br., at 27.

[56]*See Bond*, 807 So. 2d at 1218 ("Section 87 is wholly inapplicable to entities public in nature.").

benefits the municipality. Therefore, as a practical matter, the proposed Municipal Exception would exempt all local bills from Article 4, Section 87 coverage."[57] This footnote displays OAP's fundamental misunderstanding of the issues it has presented to this Court – if the intended benefit of a local bill flows to a public entity, that local bill *is* exempt from Section 87. As a practical ***and a legal*** matter, every local bill that suspends general laws "for the benefit" of a public entity rather than "for the benefit" of a private entity passes muster under Section 87.

In a last-ditch attempt to prevent the Court from looking to *Bond* for guidance, OAP asserts two faulty conclusions as to its holding and applicability. First, OAP quotes that case out of context for the proposition that, "[i]f the [local] act suspends the general law, it offends § 87."[58] This, of course, is not the law. A local bill that suspends a general law offends Section 87 ***only if*** the local bill was passed "for the benefit" of a private entity. Because, HB 1671 was not passed "for the benefit" of a private entity, but rather "for the benefit" of the citizens of Oxford, it is constitutional.

OAP also claims that, "[t]o correctly analyze H.B. 1671, it must be weighed by the standards from cases that address instances where the Section 87-challenged local bill suspended a general law for the benefit of a private entity."[59] Specifically, OAP claims that *Bond* is inapposite as to the issues at bar because the Court ultimately held that the local bill in that case suspended no general laws.[60] OAP ignores the fact that the *Bond* Court ***also*** held that the local bill at issue in that case was not passed "for the benefit" of Hood and Wallace. This Court often renders more than one holding and

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[57]Appellant's Br., at 29 n.8.

[58]Appellant's Br., at 27 (quoting *Bond*, 807 So. 2d at 1217-18).

[59]Appellant's Br., at 29.

[60]OAP has not contended that *Bond* was wrongly decided.

addresses more than one topic in its opinions. The City knows of no precedent that prevents it from discussing both of the aforementioned holdings from *Bond.*

2. *The ends of House Bill 1671 did not have to be achieved by general law.*

Article 4, Section 87 states that general laws should be used in place of local and private laws where a general law would be advantageous. The determination of whether a general law should be used in place of a local and private law is left to the ***sole*** discretion of the Legislature, and is not subject to judicial review.[61]

As this Court then noted, "[m]atters appropriate for legislative attention do not divide themselves into two neat categories – those which legally may be dealt with only by general laws and those which may only be subject to local and private laws. There is obvious overlap, as many subjects may be dealt with lawfully and acted upon by either form of legislation."[62] In the event of such overlap, this Court has held that ***it is for the Legislature alone to determine the proper course of action***. In this case the Legislature chose to enact the legislation through a local and private law.[63] This legitimate exercise of discretion does not render HB 1671 unconstitutional. Plaintiff is asking the Court to substitute its judgment for that of the Legislature. Such action would constitute a clear

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[61] *See, Gautier Utility Dist., supra, quoting Harris v. Harrison County Board of Supervisors,* 366 So.2d 651 (Miss.1979) ("***[T]he function of deciding the wisdom and propriety of enacting special laws is in the legislature and not in the courts***, and courts will not refuse to enforce such [private] laws merely because it may be felt that a general law would have been more suitable.").

[62] *Gautier Utility Dist., supra,* at 1016.

[63] The City requested local and private legislation, and not a general law. If the Legislature had indicated, at any point, that the ends sought were better achieved by general law, the City would gladly have amended its request to seek a general law. The City requested a local and private law because it believed the parking shortage on the Square to be somewhat unique to Oxford, and therefore determined that a general law would not be "advantageous" as contemplated by Section 87.

violation of the doctrine of separation of powers.[64] The Attorney General and the City respectfully submit that this Court must give deference to the Legislature's determination that the desired ends were appropriately achieved through Local and Private Legislation. Plaintiff's request that the Court set aside the legislative action in question should be rejected.

D. House Bill 1671 does not violate Article 4, Section 90 of the Mississippi Constitution.

OAP also argues that the legislation in question violates Article 4, Section 90 of the Mississippi Constitution. There are certain limited subject matters that may only be addressed by "general" laws, and which may not be addressed by "local, private, or special laws". In these limited instances, the Legislature is not vested with the discretion to pursue local and private legislation. These specific subject matters are explicitly set out in Section 90, which states, in pertinent part::

> The legislature shall not pass local, private, or special laws in any of the following enumerated cases, but such matters shall be provided for only by general laws, viz.:
> . . .
> (m) Vacating any road or highway, town plat, street, alley, or public grounds;
> . . .

MISS. CONST. art. 4, § 90(m).

OAP claims that "House Bill 1671 vacates public grounds in the form of the air rights above publically owned real estate."[65] This statement is false. HB 1671 does not vacate any public grounds.[66] OAP has sought to have this statute declared ***facially invalid***, on grounds that there

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[64]*Tuck v. Blackmon*, 798 So.2d 402, 405 (Miss. 2001) ("With respect to the separate powers of each branch of governments, the courts will generally refrain from interfering with the Legislature's interpretation and application of its procedural rules and with its internal operations.")

[65]Appellant's Br., at 30.

[66]The City notes that a literal read of Section 90(m) does not preclude vacating air space ***above*** public grounds. However, solely for the sake of argument and reserving all rights, the City addresses the merits of Plaintiff's contention that HB 1671 "vacates" some public space.

might, conceivably, at some later date, be a conveyance that violates Section 90(m). "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since ***the challenger must establish that no set of circumstances exists under which the Act would be valid.***"[67]

Not only does OAP fail to allege that there are no circumstances under which HB 1671 would be valid, OAP alleges the converse: that, conceivably, a situation could arise under which improper municipal action might be taken in connection with the construction allowed by HB 1671. This allegation fails as a matter of law because, even if true, it would not render HB 1671 unconstitutional. OAP's concession that there is a single act which may or may not be undertaken in the future that would be unconstitutional is a tacit concession that HB 1671, on its face, is constitutional.

However, even if HB 1671 did convey occupancy rights, which it explicitly does not, it is not the case that a municipality may never allow a third party to occupy public space. For example, it is undisputed that a municipality has the ability to lease land under its control.[68] Not only does a municipality have the power to convey interest in real estate, it also has the power to convey less

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[67] *U.S. v. Salerno, supra* (emphasis added).

[68] *See, e.g., Bond, supra; Davis v. Forrest Royale Apartments*, 938 So. 2d 293, 295 (Miss. Ct. App. 2006) ("[U]nder a political subdivision's broad power to purchase and hold real estate, the lesser power to lease is necessarily implied."); *American-LaFrance v. City of Philadelphia*, 183 Miss. 207 (1938) ("Under [the power of a municipality to purchase and hold real estate], it is a general rule of interpretation that there is embraced and included the lesser power to lease"); *JLG Concrete Products Co., Inc. v. City of Grenada,* 722 So.2d 1283, 1287 (Miss. App. 1998) ("[A]ll municipalities have the general authority to buy, sell or lease real property.")

than all of its rights in a piece of real estate.[69] Because the City has no private partner in this venture, it is not certain what form the conveyance of necessary rights would take. However, Mississippi law makes clear that a municipality may allow private enterprise to occupy public space.

HB 1671 allows the City of Oxford to permit construction in connection with a municipal parking facility that, in the Attorney General's opinion, otherwise would not be allowed. Surrendering occupancy or possession of municipal property is not an impermissible action. Again, even if it were, HB 1671 ***does not transfer possession of any public space,*** nor has the City yet conveyed any such rights on any third party. However, even if the City does eventually convey rights a private entity that allow occupancy and construction in the air rights above a City parking lot, that conveyance of rights would be a valid municipal action.

E. If the Court finds a portion of HB 1671 facially unconstitutional it should sever said portion and give effect to the remainder of the statute.

In light of the foregoing, HB 1671 is, in its entirety, constitutional. However, in the event this Court finds some portion thereof to be unconstitutional, the Court should sever the offending portion pursuant to MISS. CODE ANN. § 1-3-77 and allow the City of Oxford to permit commercial enterprise in connection with its parking lots.[70]

CONCLUSION

Plaintiff closes its attempts to avoid the four corners of HB 1671 with a quote from the Federalist papers, inferring that the governmental entities in question are out of control, and due to

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[69]*See Davis, supra,* and, for a similar situation to the question at bar, see *R. E. Short Co. v. City of Minneapolis,* 269 N.W.2d 331, 335 -336 (Minn. 1978) (Minneapolis built a parking structure at its own cost and then leased certain rights therein to an adjacent hotel).

[70]*See, e.g., Lewis v. State,* 765 So.2d 493, 500 (Miss. 2000).

be checked by this Court.[71] Not only does this argument show a fundamental misunderstanding of the separation of powers, by inviting the judiciary to substitute its judgment for that of the legislature, it also ignores the remarkable level of process afforded Plaintiff over the past two years.

There were myriad public hearings. The bill was heavily debated in the Legislature, where Plaintiff retained a private lobbyist to represent its interests. After passing through all necessary channels, the bill was signed into law by the Governor of the State. Dissatisfied by the results of the legislative process, Plaintiff filed an unfounded lawsuit and engaged in extensive discovery in the hopes that it would uncover something, anything, that would support its claims. It found nothing. At oral argument to the Circuit Court, it took the remarkable tack of asking the Court to ignore this Court's most recent binding precedent, and when it lost its oral argument it filed this appeal. Far from being the innocent victim of a government run amok, Plaintiff has taken advantage of every conceivable means to forestall and delay the City's exploration of a means through which it might, possibly, remedy its parking situation. This Court should look to the four corners of HB 1671 and, by affirming the Circuit Court, determine that HB 1671 is constitutional on its face.

Respectfully submitted,
CITY OF OXFORD, MISSISSIPPI

POPE S. MALLETTE (MSB NO. [redacted])
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[71]The entire quote is: "But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions." James Madison, *Federalist Paper* No. 51.

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CERTIFICATE OF SERVICE

I, Paul B. Watkins, Jr., one of the attorneys for Appellee, the City of Oxford, do certify that I have this date delivered by United States mail, postage fully prepaid, a true and correct copy of the above and foregoing Brief of Appellees to:

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THIS, the 20th day of April, 2007.

PAUL B. WATKINS, JR.