IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2006-CA-01712

OXFORD ASSET PARTNERS, LLC — Appellant

v.

THE CITY OF OXFORD — Appellee

Appeal from the Circuit Court of Lafayette County, Mississippi

REPLY BRIEF OF THE APPELLANT, OXFORD ASSET PARTNERS, LLC

(ORAL ARGUMENT REQUESTED)

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I. STATEMENT REGARDING ORAL ARGUMENT

Appellant continues its request for an oral argument.

II. STATEMENT CONCERNING FACTS CITED THAT ARE NOT IN THE RECORD

The following sentences must be stricken from the City of Oxford's Brief of Appellees as they are not based upon the record, but instead were included in direct contravention of the Court's Order of April 23, 2007, denying the City's request to supplement the record:

1. Pg. 7, ¶ 2, 1st sentence that begins, "After OAP ..."
2. Pg. 10, ¶ 2, 5th sentence that begins, "Furthermore, ..."
3. Pg. 10, ¶ 2, 6th sentence that begins, "However, ..."
4. Pg. 10, ¶ 2, 5th sentence that begins, "Thus, ..."
5. Pg. 11, ¶ 1, 2nd sentence that begins, "OAP's . . . ."
6. Pg. 15, ¶ 2, 1st sentence that begins, "OAP's . . . ."
7. pg. 16, ¶ 1, 5th sentence that begins, "Furthermore, ..."

III. SUMMARY OF REPLY

There is no constitutional law or case law to support the City's alleged "Thrust Test."[1] The City argues that the prohibition of Article 4, Section 87 of the Mississippi Constitution is tempered when a local and private bill suspends a general law and benefits a public entity along with a private entity. The plain language of Article 4, Section 87 and the case law interpreting it are both to the contrary and dictate that a local and private bill that suspends a general law for the benefit of a private entity is unconstitutional - even if it also benefits a public entity. Therefore, House Bill 1671 is unconstitutional.

The City does not deny that H.B. 1671 puts in place a mechanism that will permit the transfer of air rights owned by the City for any amount. Pursuant to Article 4, Section 90 of the Mississippi Constitution, vacating public grounds in that manner can only be accomplished by a general statute and therefore, for that reason also, H.B. 1671 is unconstitutional.

IV. REPLY TO CITY'S ARTICLE 4, SECTION 87 ARGUMENT

A. There Is No "Thrust Test"

In its Brief of the Appellant, Oxford Asset Partners sets out the facts required to prove that H.B. 1671 is a local and private bill that suspends five general laws and that if H.B. 1671 is

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[1] Br. of Appellee, pp. 15-16.

implemented it will benefit a private entity (Br. of Appellant, pp. 9-11). The City does not deny those facts in its Brief.[2]

With those pivotal facts uncontested, and faced with a constitutional provision that forbids the enactment of a local and private bill that suspends any general law for the benefit of a private entity,[3] the City manufactures a "Thrust Test" to restrict the scope of the Suspend & Benefit Clause of Section 87. The City declares, with no authority at all, that before the restrictions of this Second Clause of Section 87 are applied to a local and private bill that suspends a general law, one must first determine if the local and private bill benefits a public entity. According to the City's argument, if a public entity is benefitted, an "either/or" choice must be made as to whether the bill suspends general laws for the benefit of the public entity or for the benefit of a private entity (Br. of Appellee, pp. 14-15). The City argues that if the "thrust" of a local and private bill is to benefit a public entity then that local and private bill is immune from the Suspend & Benefit Clause even if the that bill also suspends multiple

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[2]Arguably, the City attempts to say that the identity of the particular private entity that will be benefitted is not yet known but the City does not deny, as it cannot, that each time a construction project is implemented using H.B. 1671, some private entity, or entities, will benefit.

[3]Miss. Const., art. 4, § 87. Hereinafter the second clause of Article 4, Section 87 which deals with local and private bills that suspend a general law is referred to as the "Second Clause" or the "Suspend & Benefit Clause" of Section 87.

general laws and conveys a benefit to a private entity (Br. of Appellee, pp. 15-16).

The City cites no applicable authority for this gross distortion of express Mississippi Constitution language.

The authority the City does use to try to support the "Thrust Test" is Bond[4] and other cases[5] that, as argued extensively in the Brief of Oxford Asset Partners, are inapplicable here because none of them deal with a situation where a local and private bill suspended a general law. There is no Mississippi case dealing with a local and private bill that suspends a general law where both a public and a private entity were benefitted and the restrictions of the Suspend & Benefit Clause of Section 87 were somehow tempered because the public entity was also benefitted. No Mississippi case involving a local and private bill that suspends a general law ever announces or refers to any requirement that the "thrust" of the bill must be determined before the constitutional restrictions are applied.

There is however case law, specifically and generally, that is directly adverse to the City's position.

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[4]Bond v. Marion County Bd. of Sup'rs, 807 So.2d 1208 (Miss. 2001)

[5]Br. of Appellees, pg. 7, nt. 25.

First, there are seven (7) cases[6] specifically dealing with the situation where a local and private bill is held to have suspended a general law where a public entity was benefitted and that fact did not cause this Court to try to find the "thrust" of the local and private bill before deciding if the bill was constitutional. In each case, even though a public entity was benefitted, the local and private bill that suspended a general law was found unconstitutional. State ex rel. Pair v. Burroughs, 487 So.2d 220, 222 (Miss. 1986) (the public entity, Jones County, received the benefit of appointing its hospital board of trustees by the method it chose); Quinn v. Branning, 404 So.2d 1018, 1020 (Miss. 1981) (the public entity, Newton County, received the benefit of deciding whether to grant certain hunting rights); Rolph v. Board of Trustees of Forrest County General Hospital, 346 So.2d 377, 378 (Miss. 1977) (the public entity, Forrest County, received the benefit of choosing to what extent its hospital waived immunity from suit); Smith v. Transcontinental Gas Pipeline Corp., 310 So.2d 281, 285 (Miss. 1975) (the public entity, Jones County, received the benefit of not exposing its citizens to explosions); Beall v. Board of Sup'rs, Warren County, 191 Miss. 470, 480-2, 3 So.2d 839 (1941) (the public entity, Warren County, received the benefit of buying jail supplies without going through the public bid process);

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[6]The seven (7) cases are among the nine (9) cases where this Court has dealt with the situation where local and private bills that suspended a general law were challenged under Article 4, Section 87. See nt. 4 supra.

Miller v. Tucker, 142 Miss. 146, 105 So. 774, 781 (1925) (the public entity, Warren County, got the economic benefit of donations to paupers to remove them from the County); State v. Mobile, J. & K C.R. Co., 86 Miss. 172, 38 So. 732, 739 (1905) (the public entity, the citizens of North and South Pontotoc, received the benefit of better railroad facilities).

In each of these cases, all specifically addressing a local and private bill that suspended a general law, the fact that a public entity was benefitted by the bill was never considered a factor in deciding constitutionality. There is never any mention in any of these cases of any need to determine the "thrust" of the local and private bill before the constitutionality decision is made.

Second, and more generally, the uniformity of the entire body of case law dealing with local and private bills challenged under Article 4, Section 87 proves conclusively that there is a very bright line drawn between local and private bills that suspend general laws and those that do not.[7] The cases and treatises on the subject make it very clear why this distinction is drawn. In Beall, the Warren County Board of Supervisors got a local and private bill passed to suspend the general law that required the

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[7]In the Appellant's Brief, Oxford Asset Partners sets out in detail the uniformity with which this Court has dealt with local and private bills that are challenged under Article 4, Section 87. All of those cases, taken as a group, demonstrate that the manner in which this Court reviews a local and private bill that is challenged under Article 4, Section 87, is directly dependent upon whether a general law is suspended (Br. of the Appellant, pg. 21, nt. 5).

use of public bids to buy jail supplies. This Court struck that local and private bill as unconstitutional and again expressed the reasoning behind the strict enforcement of Article 4, Section 87 when a general law is suspended stating:

> But it is not within the purpose of this sort of legislation [a local and private bill that suspended a general law], nor within the moral principle which is thereby expressed, that all irregularities in the everyday administration of the state shall be thus periodically cured, for the very manifest reason that such a course would in a short time lead to the most unfortunate consequences in its inducements to the conscious and deliberate disregard of those essential requirements of the administrative law without which the general public business cannot be safely conducted.

Beall v. Board of Sup'rs, Warren County, 191 Miss. 470, 482, 3 So.2d 839, 841 (1941). That reasoning, and the admonition it contains, is sound and is applicable to all local and private bills that suspend a general law and benefit a private entity, including H.B. 1671.

Mississippi case law proves that the evil the Suspend & Benefit Clause of Section 87 is designed to address is the evil of (1) using a local and private law to suspend general law and (2) allowing a private entity to benefit as the result of such suspension. None of that case law, and none of the authority or treatises those cases cite, ever gives even the slightest indication that if the general law suspended by the local and private bill benefits a public entity and also benefits a private entity the results are somehow tempered. House Bill 1671 falls

squarely into the category of local and private bills prohibited by the Second Clause of Section 87 and is therefore unconstitutional. As a matter of law, the fact that the City might allegedly somehow benefit from the implementation of H.B. 1671 is immaterial.

B. H.B. 1671 Cannot be Saved by Truncation

The unconstitutional elements of H.B. 1671 including the terms that suspended five (5) general laws, are integral to, and prevalent throughout the bill. There are only nine (9) Sections to H.B. 1671 and six (6) directly address suspensions of general law and/or the resulting benefit to a private entity. If the unconstitutional elements are stricken, H.B. 1671 will be meaningless, therefore, H.B. 1671 should be found unconstitutional in its entirety.

C. Reply to Other Assertions/Omissions

Because there is no support for the City's sole determinative argument, the existence of the alleged "Thrust Test," the remainder of the City's Article 4, Section 87 arguments carry no weight. However, there are factual statements and omissions contained in the City's Brief that each, when analyzed, strengthen Oxford Asset Partners' position and those are reviewed here:

1. The City is silent on a critical point

The positions taken by the City, both by what the City says and what it does not say, makes it apparent that the City simply wants to either ignore the known problems that will arise because

of the general laws H.B. 1671 suspends or the City wants to divert attention away from those issues.

On that subject, what may speak loudest from the City's Brief is the City's complete failure to respond to a factual assertion squarely raised in the Brief of Oxford Asset Partners. Oxford Asset Partners' Brief itemizes and details multiple, major public safeguards that are eliminated by H.B. 1671. (Br. of the Appellant, pg. 10, nt. 2). Those safeguards including public bid laws that insure citizens pay the lowest and best price they can for construction projects and other general laws requiring appraisals, that insure citizens receive all they should when they sell public property, are catalogued as the major public safeguards that are eliminated by H.B. 1671.

The City completely ignores those assertions and ignores the purpose for those safeguards, i.e., to protect the public.

The City does not deny the fact that these safeguards are being summarily eliminated and the City does not even attempt to justify why this is acceptable. This omission demonstrates that the City is ignoring the gravity of the consequences when safeguards such as these are set aside. By doing that, the City demonstrates why local and private bills that suspend general laws are so disfavored.

2. Oxford Asset Partners' motives and participation are not issues here

In multiple places, the City makes some derogatory inferences from Oxford Asset Partners' alleged lack of participation in the early hearings on the proposed project that led to the enactment of H.B. 1671 and from Oxford Asset Partners' motivation for challenging H.B. 1671. (Br. of Appellee, pg. 4, nt. 15 and pg. 11). The City's remarks in that regard have no bearing at all on whether H. B. 1671 is constitutional and those remarks are also apparently designed solely to distract attention from the legal issues involved.

Again, the City cites to no authority to explain why Oxford Asset Partners' motives, in challenging an unconstitutional bill, are in anyway germane to the issues at hand.

3. The Attorney General's Opinion is not summarized correctly

Throughout this litigation, the City and the Attorney General have been quick to down play the fact that the Attorney General's Opinion requested by the City found that there were multiple reasons the parking garage project(s) the City hoped to do was unlawful. Previously, the City and the Attorney General have tried to reduce the impact of the Attorney General's Opinion by both noting that an Attorney General's Opinion is not the law. (Oxford Brief at R.E. tab 6, pg. 5 and C.P. Vol. 3 at 425). Now, in the City's Brief, the City again tries to minimize the impact of the

Attorney General Opinion by grossly mis-characterizing what it opines. On page 5 of the City's Brief, the City states:

> 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. The Attorney General cited MISS. CODE ANN. § 21-37-23, which prohibits a commercial enterprise connected to a municipally-owned parking facility.

That description conveniently omits critical portions of the Attorney General's Opinion where the Attorney General itemizes multiple statutory impediments standing in the way of getting the proposed parking garage project done. In this mis-characterization of what the Attorney General opined, the City does not own up to the major problems the Attorney General found with what the City wanted to do. Among other things, the City's summary fails to disclose key items like the Attorney General's statement that if the parking garage was built, it would have to be built pursuant to the public bid laws. For the City to summarize the Attorney General's Opinion in this fashion again attempts to avert attention from the severity of what H.B. 1671 really does.

When the Attorney General of the State of Mississippi opines that a municipality's project requires the use of public bid laws, and the municipality's response is to get a local and private bill passed suspending <u>all</u> public bid laws in a manner that will necessarily benefit a private entity, the result is an absolutely

square on point example of why the drafters of the Mississippi Constitution put the Second Clause of Section 87 in the Constitution.

4. This Court, not the City, interprets the Constitution

Finally, there is another unsupported legal assertion made by the City that has to be addressed. In its Brief, Oxford Asset Partners analyzed Bond on which the City relies so heavily. In that analysis, Oxford Asset Partners correctly states that this Court in Bond first considered whether the local and private bill at issue suspended a general law. A further review of this Court's Opinion in Bond shows that before arriving at the part of the Opinion containing the municipality language upon which the City seizes, this Court made it clear, repeatedly, that local and private bills are judged by different standards depending upon whether they suspend a general law. The Bond Court explained that different Sections (Section 87 and Section 89) of Article 4 apply depending on whether any general law is suspended (Section 87 is applied if a general law is suspended and Section 89 is applied if no general is suspended). Bond, 807 So.2d at 1218.

After that discussion, this Court, knowing the local and private bill in Bond did benefit a private entity, then summarized and held "If the [local] act suspends the general law, it offends Section 87." Bond, 807 So.2d at 1217-1218. It was a one line holding that was in fact not critical in Bond because this Court

went on to hold that the local and private bill did not suspend any general laws. It was, however, a very simple and concise holding dictating that if a local and private bill, like the one in Bond benefitting a private entity, does suspend - it offends. Oxford Asset Partners cites that one line holding from Bond on page 27 of its Appellant's Brief to support that exact legal position.

Then, the City, on page 18 first full paragraph of its Brief, concludes, with no authority, "This, of course, is not the law." However, putting aside the City's bare assertion, this holding is exactly the law and if it is applied here as it should be, H.B. 1671 must be found unconstitutional pursuant to Article 4, Section 87.

V. REPLY TO CITY'S ARTICLE 4, SECTION 90 ARGUMENT

Again it is important to review what the City does not say in its Brief about the constitutionality of the transfer of air rights that will occur if H.B. 1671 is implemented. First, the City does not deny that air rights owned by the City will be transferred if H.B. 1671 is implemented. Second, the City does not deny that H.B. 1671 authorizes the City to sell or trade those air rights for any amount and under any terms the city so choses. Finally, the City does not try to argue that H.B. 1671 makes any provision to establish a process to make any determination as to the fair market value of the air rights that are transferred.

With those facts unchallenged, the City has admitted that H.B. 1671 is a local and private bill which puts in place a mechanism

whereby the City could convey the air rights over any public grounds used as a parking facility for $0. Pursuant to Article 4, Section 90 of the Mississippi Constitution, such a transfer must be authorized by a general law and therefore, H.B. 1671 is unconstitutional pursuant to Article 4, Section 90.

VI. CONCLUSION

The efficiencies the City hopes to gain by the implementation of H.B. 1671 do not justify the nullification of the public safeguards that will be lost when H.B. 1671 is implemented. (See Br. of the Appellant, pp. 31-32). The City, by both what it did say and what it did not say in its Brief, has not refuted and has in fact supported that conclusion. House Bill 1671 should therefore be found unconstitutional in its entirety.

DATED: May 16, 2007.

Respectfully submitted,

OXFORD ASSET PARTNERS, LLC

By its attorneys

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CERTIFICATE OF SERVICE

I, Danny A. Drake, do hereby certify that I have this date hand delivered a true correct copy of the above and foregoing Reply Brief of the Appellant, Oxford Asset Partners, LLC, to the following:

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