

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

**BRIEF OF THE APPELLANT,
OXFORD ASSET PARTNERS, LLC**

(ORAL ARGUMENT 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 representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

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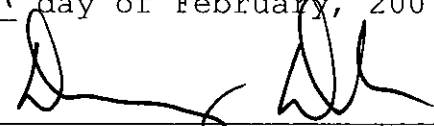
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SO CERTIFIED, this the 6th day of February, 2007.



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BRIEF OF THE APPELLANT, OXFORD ASSET PARTNERS, LLC

I. STATEMENT OF ISSUES

Whether House Bill 1671 unconstitutionally suspends multiple general laws for the benefit of a private entity in violation of Article 4, Section 87 of the Mississippi Constitution.

Whether House Bill 1671 unconstitutionally vacates public property in violation of Article 4, Section 90 of the Mississippi Constitution.

II. STATEMENT OF CASE

A. Nature of the Case.

Appellant, Oxford Asset Partners, LLC, the owner of an existing hotel in the City of Oxford, filed suit in the Circuit Court of Lafayette County challenging the constitutionality of House Bill 1671 ("H.B. 1671"), a local and private bill enacted during the 2006 Regular Session of the Mississippi Legislature.

Oxford Asset Partners contends that H.B. 1671 suspends five (5) general laws for the benefit of a private entity and therefore

violates Article 4, Section 87 of the Mississippi Constitution and is exactly the type of legislative enactment that Article 4, Section 87 prohibits.

Oxford Asset Partners also contends that H.B. 1671 vacates air rights that are public property and therefore violates Article 4, Section 90 of the Mississippi Constitution.

The City of Oxford (the "City") contends this Court has carved out an exception to the prohibitions of Article 4, Section 87 for a local bill that suspends general laws for the benefit of a private entity if the local bill provides a benefit to a municipality. Oxford Asset Partners submits this Court has neither the power to, nor has it, carved out such an exception.

The City also contends that no public property is vacated by H.B. 1671. Oxford Asset Partners submits the facts are to the contrary.

B. The Course of Proceedings and Disposition in the Court Below.

On May 18, 2006, Oxford Asset Partners filed its Complaint for Declaratory Judgment and Injunctive Relief, seeking to have H.B. 1671 found unconstitutional (C.P. Vol. 1 at 1). The City answered on June 6, 2006 and at the same time filed its Motion for Summary Judgment with supporting Brief (the "Oxford Brief") (C.P. Vol. 1 at 63, Oxford Brief at R.E. tab 6).

On June 22, 2006, Oxford Asset Partners took the depositions of Dr. Brett Person, M.D. as the corporate representative of

Craigside Leasing Corporation ("Craigside") and Billy Bowman, Esq., counsel for Craigside. Transcripts of those depositions were filed of record on July 27, 2006 (C.P. Vols. 1-2 at 197-415).

On July 6, 2006 the City filed its Supplement to Defendant's Motion for Summary Judgment (C.P. Vol. 2 at 165).

On July 24, 2006, Oxford Asset Partners filed its Reply to the Motion for Summary Judgment of Defendant, The City of Oxford and Separate Motion for Summary Judgment of Plaintiff, Oxford Asset Partners, LLC with supporting Brief (C.P. Vol. 2 at 170).

On August 7, 2006, the City filed its Combined Reply to Plaintiff's Response to Defendant's Motion for Summary Judgment and Response to Plaintiff's Motion for Summary Judgment (C.P. Vol. 3 at 416).

On August 17, 2006, Jim Hood, Attorney General of the State of Mississippi, filed the Attorney General's Motion to Intervene and Notice of Joinder to Defendant's Motion for Summary Judgment (C.P. Vol. 3 at 422).

On August 24, 2006, Oxford Asset Partners filed their Combined Reply to Defendant's Response to Plaintiff's Separate Motion for Summary Judgment and Response to Attorney General's Joinder in Defendant's Motion for Summary Judgment (C.P. Vol. 1 at 429).

Oral argument was heard in Oxford on August 31, 2006 and on September 14, 2006, the Circuit Court entered its Order Overruling Plaintiff's Motion for Declaratory Judgment and Granting Defendant's Motion for Summary Judgment wherein the Circuit Court

dismissed Oxford Asset Partner's Complaint with prejudice (C.P. Vol. 3 at 446, R.E. at tab 3). Subsequently, a Final Judgment was entered on September 26, 2006 (C.P. Vol. 3 at 448, R.E. at tab 4).

C. Statement of the Facts.

1. On or about April 8, 2005, the City published a legal notice for the stated purpose of soliciting proposals for "Design and Construction for Additional Parking Facilities Located in Existing City of Oxford Parking Lots." (C.P. Vol. 1 at 21).

2. On May 16, 2005, Craigside submitted a non-responsive proposal that required the City to convey a specific downtown parking lot behind City Hall (the "City Hall Parking Lot") and air rights above the City Hall Parking Lot to Craigside in exchange for Craigside's promise to build a three-level parking garage and a three-story "112-room boutique hotel, spa and culinary institute" on the City Hall Parking Lot and then to re-convey the parking garage back to the City (the "Project") with Craigside permanently retaining ownership of the air rights above the City Hall Parking Lot (C.P. Vol. 1 at 22). Craigside's proposal made no attempt to establish any mechanism to objectively determine the difference between the value of the real estate and air rights to be conveyed to Craigside by the City and the value of the parking garage Craigside would attempt to construct for the City.

3. On October 10, 2005, the City entered into a Preliminary Development Agreement with Craigside agreeing that the City and Craigside, after further research and analysis, would enter into

the transactions required to construct and convey the Project (C.P. Vol. 1 at 23). The Preliminary Development Agreement makes no provision for any mechanism to objectively determine the difference between the value of the real estate and air rights to be conveyed to Craigside by the City and the parking garage Craigside would attempt to construct for the City. The Preliminary Development Agreement also did not establish any standards for procedures to be followed to protect the City's and the public's interests during the process whereby the asset exchange would occur.

4. On November 15, 2005, in an attempt to determine whether or not the general laws of the State of Mississippi would permit the transactions required to implement the Project, the City asked the Attorney General for his opinion. (C.P. Vol. 1 at 37). On December 19, 2005, the City submitted additional questions and withdrew previously submitted questions to the Attorney General's office (C.P. Vol. 1. at 40).

5. On January 26, 2006 the Mississippi Attorney General's office issued an opinion in response to two requests from the City regarding the legality of the transactions required to implement the Project (C.P. Vol. 1 at 39). The Attorney General's Opinion quotes from the City's first letter to the Attorney General dated November 15, 2005 (C.P. Vol. 1 at 37). In that letter, the City details the role of the "private developer" who had already been tentatively selected as Craigside, and states, "The Project would require the City to initially convey the site to [Craigside] under

an applicable provision in the Mississippi Code. [Craigsides] would then construct the [hotel and parking garage] and, after completion, convey back to the City the floors designed for parking." (C.P. Vol. 1 at 37).

6. The Attorney General responded that implementation of the Project would contravene multiple general laws of the State of Mississippi. Specifically, the Attorney General stated in pertinent part as follows:

a. When asked if the City could convey development/air rights above the City Hall Parking Lot under Miss. Code Ann. § 57-7-1, the general law governing the disposal of surplus airport or other municipal property, the Attorney General responded that Miss. Code Ann. § 57-7-1 does not authorize such a conveyance (C.P. Vol. 1 at 40).

b. When asked if the Project could be accomplished under Miss. Code Ann. § 21-37-23, the general law governing the construction and operation of municipal parking facilities, the Attorney General responded that Miss. Code Ann. § 21-37-23 did not authorize the transactions required to accomplish the Project. As part of the analysis concerning the applicability of Miss. Code Ann. § 21-37-23, the Attorney General affirmatively stated that construction of a parking facility pursuant to Miss. Code Ann. § 21-37-23 must be done under the competitive bidding requirements of Miss. Code Ann. § 31-7-13 (C.P. Vol. 1 at 41).

c. When asked if the land transfers required by the Project must be conducted following procedures in Miss. Code Ann. § 21-17-1, the general law providing the general grant of powers to municipalities, the Attorney General opined that the planned transfer would be governed by Miss. Code Ann. § 21-37-23, dealing specifically with municipal parking facilities, and not Miss. Code Ann. § 21-17-1 dealing with the powers of municipalities in general (C.P. Vol. 1 at 43).

d. When asked whether the City was required to abide by the procedures dictated by Miss. Code Ann. § 21-37-25, the general law governing the notice requirements for construction and operation of municipal parking facilities, the Attorney General responded saying the Project is not authorized by Miss. Code Ann. § 21-37-23 and for that reason Miss. Code Ann. § 21-37-25 would not apply (C.P. Vol. 1 at 43).

7. The Attorney General's Opinion thus clearly states that if the Project was implemented as planned, the transactions required would violate Miss. Code Ann. §§ 57-7-1 and 21-37-23. In addition, the Attorney General's Opinion made it clear that if somehow the prohibition of those two statutes could be avoided, the requirements of Miss. Code Ann. §§ 31-7-13, 21-17-1 and 21-37-25 must also be met.¹

8. On March 9, 2006, in an attempt to overcome the impediments identified in the Attorney General's Opinion, Noel Akins, representative for House District 12 Lafayette County which includes the City, introduced H.B. 1671 (C.P. Vol. 1 at 50, R.E. at tab 5). House Bill 1671 seeks by local and private legislation to suspend each and every general statute, as identified in the Attorney General's Opinion (C.P. Vol. 1 at 39), that stood in the way of the City's pursuit of this Project or any project at any parking lot anywhere in the City. House Bill 1671 makes no provision for any mechanism to objectively determine the difference

¹Though the City did not ask, and therefore the Attorney General did not opine as to whether the Project as planned would also violate Miss. Code Ann. §§ 31-7-13, 21-17-1 and 21-37-25, it is clear that those statutes would be violated.

between the value of the real estate and air rights to be conveyed to Craigsides by the City and the parking garage Craigsides would attempt to construct for the City. House Bill 1671 also did not establish any standards for procedures to be followed to protect the City's and the public's interests during the process whereby the asset exchange would occur.

9. Craigsides, not the City, paid a private lawyer to draft H.B. 1671 and paid a private lawyer to appear and speak on behalf of its passage before the Senate Local and Private Committee and Craigsides paid a lobbyist to procure its passage (C.P. Vol. 2 at 208, 215-16).

10. House Bill 1671 passed both houses of the 2006 Mississippi Legislature Regular Session and was signed by Governor Haley Barbour (C.P. Vol. 1 at 50, R.E. at tab 5).

11. House Bill 1671, although allegedly passed as the means to implement one project at one location in the City contains absolutely no language restricting it to a single project or a single location. While H.B. 1671 does limit its application to projects located on parking facilities, it is not restricted to just the City Hall Parking Lot and, in Section 1.(c) a parking facility is broadly defined only as follows:

(c) "Parking facility" means any property owned by the City of Oxford, Mississippi and used as a public parking lot.

(C.P. Vol. 1 at 50, R.E. at tab 5) (emphasis added).

12. The scope of H.B. 1671 is not limited at all as to what types of business could be built in conjunction with any expanded parking project. There is no sunset date contained in H.B. 1671.

13. House Bill 1671 authorizes the City to sell or trade the air rights above any real estate the City designates as a public parking facility for any amount the City so chooses. That authority is given, in Section 3, where the City is given the authority to sell or trade the air rights "under such terms and conditions and for such periods of time as the governing authorities deem proper." (C.P. Vol. 1 at 50, R.E. at tab 5). Further, in Section 6, the City is given the authority to trade the air rights "in exchange for the construction of such enlarged or improved parking facility" by a private entity with no requirement that the enlarged or improved parking facility have a value equal to the conveyed air rights (C.P. Vol. 1 at 50, R.E. at tab 5).

14. There is no restriction to keep the City from using H.B. 1671 to construct a project on any property that the City designates, at the City's sole discretion, as a public parking lot. In the Oxford Brief, the City alleges H.B. 1671 was requested by the City to ". . . cure its unique need for increased parking on and around the Square . . ." (R.E. at tab 6, page 5) but there is nothing in H.B. 1671 that limits application to just property "around the Square."

15. To try to deal with the issues raised by the Attorney General, H.B. 1671 expressly suspends all or part of four (4)

general laws of this State and by reference suspends at least one
(1) more.

a. § 21-37-23² and § 21-37-25² are expressly suspended in Section 2 where H.B. 1671 states: "In providing municipal parking facilities as authorized by this act, the provisions of Section 21-37-23 and Section 21-37-25 regarding the establishment and operating of parking facilities and the legislative process for parking facilities shall not apply."

b. § 21-17-1² is expressly suspended in Section 3 where H.B. 1671 states: "In conveying parking facilities under the provisions of this act, any provisions of Section 21-17-1 regarding the disposition of municipal property shall not apply."

c. § 31-7-13² is expressly suspended in Section 4 where H.B. 1671 states: "The requirements of the general laws of the State of Mississippi governing the advertisement of bids and the letting of public construction contracts by municipalities shall not apply to transactions authorized by this section."

d. § 57-7-1² is suspended by reference in Section 5, 6, and 7 where, in direct contravention of § 57-7-1, H.B. 1671 gives the City carte blanche to

²The general laws suspended by H.B. 1671 are not insignificant statutes. They contain multiple, major public safeguards. Those safeguards range from a mechanism to objectively determine the value of assets a public entity conveys (via an appraisal process) to a process to objectively value assets a public entity acquires (via a bidding process). The safeguards also include mechanisms to protect the public during the process of conveying or acquiring property such as use restrictions and appeal processes. Those safeguards are non-existent on any and all projects the City seeks to implement via H.B. 1671. Specifically, §§ 21-37-23 and 21-37-25 contain use restrictions, notice and hearing requirements, debt service requirements and judicial appellate procedures (including a potential appeal to this Court) that would normally be required during construction and operation of a municipal parking garage. Section 21-17-1 contains use restrictions, notice requirements, financial restrictions, appraisal requirements and bid requirements that would normally constrain the general authority of all municipalities attempting to purchase, hold or convey real estate. Section 31-7-13 contains the State's major public bid restrictions. On any project Oxford chooses to implement under H.B. 1671, everyone, including the citizens of Oxford, is denied the protection of all these major safeguards.

convey, under any terms they wish, all of the City's interests in the air rights and development rights in any property owned by the City that is used for public parking.

(C.P. Vol. 1 at 50, R.E. at tab 5).

16. In oral argument in the Court below, counsel for the City stated the purpose of H.B. 1671 when he said, "Exactly what special and local and private laws are suppose to do is suspend the general laws." (Vol. 4 T-10:16).

17. House Bill 1671 suspends the operation of these general laws for the benefit of a private entity as follows:

a. Through the express language of Section 3, a private entity can obtain title to public property with no objective evaluation of monetary value of the property to be conveyed;

b. Through the express language of Section 4, a private entity can be awarded a contract to construct a public building at a contract price not determined by competitive bidding; and,

c. Through the express language of Sections 3, 4 and 6, a private entity can obtain fee simple title, in perpetuity, to public property owned by the City in exchange for construction work whether or not the construction work is as valuable as the public property so acquired.

(C.P. Vol. 1 at 50, R.E. at tab 5).

III. SUMMARY OF ARGUMENT

A. House Bill 1671 violates Article 4, Section 87 of the Mississippi Constitution.

House Bill 1671 must be held unconstitutional because it violates the Mississippi Constitution Article 4, Section 87

prohibition against local and private bills which suspend general law and benefit an individual, private corporation or association.³

In the case at bar, H.B. 1671 expressly suspends four (4) general laws:

Miss. Code Ann. § 21-37-23;

Miss. Code Ann. § 21-37-25;

Miss. Code Ann. § 21-17-1; and,

Miss. Code Ann. § 31-7-13 and, suspends at least one more,

Miss. Code Ann. § 57-7-1, by reference.

(C.P. Vol. 1 at 50, R.E at tab 5).

In the case at bar, H.B. 1671 expressly benefits a Private Entity by (1) permitting the transfer of public property to a Private Entity with no objective evaluation of the value of the public property transferred, (2) permitting the construction of a public parking garage by a Private Entity without requiring competitive bidding, and (3) permitting the conveyance, to a Private Entity, in perpetuity, of fee simple title to the air rights above publically owned real estate in exchange for construction work, done by the Private Entity, regardless of the value of the construction work.

This Court has consistently, in nine (9) previous cases, been true to the language of Article 4, Section 87 and has always held that where a local and private bill suspends a general law for the

³The entity or entities that constitutionally cannot benefit are referred to herein as a "Private Entity" or "Private Entities."

benefit of a Private Entity, such legislation is violative of Article 4, Section 87 of the Mississippi Constitution.

In these nine (9) cases, this Court has applied a bright line test that turns on whether or not a general law is suspended. When a local bill just augments, and does not suspend, a general law, deference is given to the Legislature to determine if the local bill is needed and those local and private bills are consistently found to be constitutional. However, each and every time there has been a challenge to a local bill that suspends a general statute for the benefit of a Private Entity, this Court has found that those local and private bills clearly fell within the "evils" that Article 4, Section 87 was enacted to prevent. This Court has consistently held those local and private bills unconstitutional. Likewise H.B. 1671 must be held unconstitutional.

The City's argument, joined by the Attorney General, that this Court has the power to, and has, carved out a municipality exception to the prohibition in Section 87 of the Mississippi Constitution prohibiting local and private bills that suspend general laws for the benefit of a Private Entity so that the prohibition does not apply if a municipality is benefitted, is totally unsupported by any precedent and completely contrary to the express language of Section 87. All of the cases the City and the Attorney General rely upon to support this alleged exception are cases where a municipality used a local bill to augment, not suspend, a general law. Those cases are inapplicable here.

B. House Bill 1671 violates Article 4, Section 90 of the Mississippi Constitution

House Bill 1671 must be held unconstitutional because it violates the Mississippi Constitution Article 4, Section 90 prohibition against enactment of a local and private bill which vacates public grounds.

House Bill 1671 expressly allows for the sale of, or trade of, fee simple title to air rights owned by the City with no requirement that the City receive fair compensation, or for that matter any compensation, for that public property (C.P. Vol. 1 at 50, R.E. at tab 5). Therefore, H.B. 1671 provides a mechanism for the City to transfer all of, or some part of, the air rights above City owned real estate, for no value if they chose to do so. Article 4, Section 90(m) prohibits enacting a local bill to so vacate public grounds. Therefore, H.B. 1671 must be held unconstitutional.

IV. ARGUMENT

Standard Of Review

This Court reviews errors of law, including summary judgments, de novo. Myers v. City of McComb, 943 So.2d 1, 8 (Miss. 2006).

In this case, the Lafayette County Circuit Court ruled:

Plaintiff seeks to have the Court declare House Bill 1671 unconstitutional. A reviewing court may declare a statute unconstitutional only if the challenging party proves beyond all reasonable doubt that it is unconstitutional. Thus the burden of proof is upon Plaintiff and the Court finds that

Plaintiff failed to meet its burden, therefore
Plaintiff request for Declaratory Judgment
should be and same is hereby dismissed.

(C.P. Vol. 3 at 446). Oxford Asset Partners respectfully submits
that the Circuit Court's ruling is, as a matter of law, incorrect.

Questions of whether legislative enactments are contrary to
the constitution are legal questions, constitutional questions, to
be decided by the judicial department and the highest tribunal of
a state is the paramount authority for such interpretation of the
state's constitution. Myers, 943 So.2d at 12.

A. Issue No. 1: **WHETHER H.B. 1671 UNCONSTITUTIONALLY SUSPENDS
MULTIPLE GENERAL LAWS FOR THE BENEFIT OF A PRIVATE ENTITY IN
VIOLATION OF ARTICLE 4, SECTION 87 OF THE MISSISSIPPI
CONSTITUTION.**

Article 4, Section 87, of the Mississippi Constitution,
states:

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 relief sought can be
given by any court of this state; nor shall
the operation of any 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.

Miss. Const. art. 4, § 87 (emphasis added). The emphasized second
prohibition of Section 87 prohibits the enactment of any local and
private bill that suspends a general law for the benefit of a
Private Entity. It is one of three prohibitions contained in

Section 87. The purpose of the second prohibition, like all of the prohibitions of Section 87, is to insure that the Legislature only passes legislation that is for the benefit of the State as a whole. Smith v. Transcontinental Gas Pipeline Corp., 310 So.2d 281, 282 (Miss. 1975). However, the second prohibition is unique because it is specifically drafted to address the "evil" of "suspending" a general statute for the benefit of a Private Entity while the suspended general statute continues its application as to everyone else. City of Jackson v. Deposit Guaranty Bank & Trust Co., 160 Miss. 752, 133 So. 195, 197 (Miss. 1931).

Yazoo & M.V.R. Co. v. Southern Ry. Co. in Mississippi, 83 Miss. 746, 36 So. 74, 78 (1904) explains the stark difference between the three prohibitions contained in Section 87 as follows:

Section 87 contains three distinct clauses. The first is that 'no special or local laws shall be enacted for the benefit of individuals or corporations, in cases which are or can be provided by a general law, and where the relief sought can be given by any court of the state.' The second is, 'Nor shall the operation of any general law be suspended by the Legislature for the benefit of any individual or private corporation or association.' The third is, 'And in all cases where a general law can be made applicable and would be advantageous, no special law shall be enacted.'

The first and third clauses are conditional. The second is absolute and unconditional, and positively inhibits the legislation mentioned in it.

(emphasis added).

There is no question that the second prohibition applies here because five (5) general laws are suspended by H.B. 1671 and a private entity will be benefitted by the suspension of those general laws. Therefore, this Court must hold H.B. 1671 unconstitutional.

The intent of the drafters of this section of the Constitution, and the evils they were trying to prevent, are clear from the language as drafted. The plain meaning dictates that the Legislature cannot suspend a general law for the benefit of a Private Entity. Miss. Const. art. 4, § 87. Constitutional interpretation principals followed by this Court dictate enforcing that intent. Myers, 943 So.2d at 19 (quoting Moore v. Gen. Motors Acceptance Corp., 155 Miss. 818, 822, 825 So. 411, 412 (1930)).

In the Court below, the City's first argument to avoid this prohibition was to change the plain meaning of the word "benefit." The City argued the prohibited benefit must be a "direct benefit" to the Private Entity (C.P. Vol. 3 at 417-19). That argument is without merit for two reasons: First, where as here there is a direct City to Private Entity transfer of fee simple title to the City's air rights above the parking garage, the benefit is as "direct" as possible. Second, the City made no attempt to define what the difference between a "direct" and "indirect" benefit would be, but any such difference, if any, is of no import because the language of the second prohibition does not quantify or qualify the benefit that is forbidden. If there was to be some threshold to be

met to be a prohibited benefit, the Legislature could, and would, have so stated.

We do know, from prior Supreme Court cases, that the prohibited benefit can be as little as three hundred and thirty dollars (\$330.00) paid to a sheriff for jail supplies he did not put out for bids, Beall v. Bd. of Sup'v, Warren County, 191 Miss. 470, 3 So.2d 839 (1941); and can be as indefinite as the benefit a railroad company may get from being allowed to consolidate two railroad lines. Yazoo & MVR Co., 36 So. at 74. The applicable case law, involving cases where a general law was suspended, puts no restrictions on the scope of the prohibited "benefit."

There is no case law to indicate that the intent of the drafters of Article 4, Section 87 of the Constitution was anything other than, as the plain meaning of the prohibition states, to bar the suspension of any general law to provide any benefit to a Private Entity. Miss. Const. art. 4, § 87. It is absolute and unconditional. Yazoo & M.V.R. Co., 36 So. at 78. As Yazoo & M.V.R.Co. points out, it is not the size or the type of "benefit" that this section of the Constitution is trying to address but rather this constitutional prohibition is in place "because it was always pronounced by text-writers unwise legislation to suspend the operation of general laws for private advantage. . . ." Id. at 79.

At its roots, the City's argument is that the City can be more efficient in addressing its perceived parking problems if it can just ignore the public safeguards contained in five (5) general statutes that apply to every other city in Mississippi. This

"efficiency" issue was very succinctly stated, and addressed, in the Myers case where this Court stated:

The broad issue before the Court is "whether [Article 4, Section 87] should be interpreted faithfully to accord with its language or whether it should be interpreted loosely so that [projected] efficiency in government through [the suspension of multiple public safeguards] becomes paramount to the written word.

Myers, 943 So.2d at 11-12. Here, as in Myers, some perceived increase in the efficiency of the executive branch of a municipal government does not outweigh a constitutionally-mandated prohibition and the plain language of the Constitution must be followed. Myers, 943 So.2d at 25. House Bill 1671 is in direct and "palpable conflict with" a very plain provision of the Mississippi Constitution and is therefore unconstitutional. Trainer v. State, 2004-CA-01955-SCT (§15) (Miss. 2006) (quoting In re: T.L.C., 566 So.2d 691, 696 (Miss. 1990)).

The City's second attempt, in the Court below, to avoid Section 87's unconditional prohibition against local and private bills that suspend general law for the benefit of a Private Entity was to argue that this Court has carved out an exception to the prohibitions of Article 4, Section 87 that would permit 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").

The City, relying upon Bond v. Marion County Bd. of Sup'rs, 807 So.2d 1208 (Miss. 2001), attempts to manufacture the Municipal

Exception to the second prohibition in Section 87 to apply if a municipality benefits from the suspension of general laws by a local bill (C.P. Vol. 3 at 419). On its face, the Bond case does not espouse any such Municipality Exception but, to fully show why the Bond case does not support, and is actually contra to, the City's Municipality Exception argument, the Bond case must be put in context.

THE ARTICLE 4 SECTION 87 CASES

An exhaustive search of all the Mississippi cases mentioning Article 4, Section 87 of the Mississippi Constitution finds fifty one (51) cases. In fifteen (15) of those cases, there is only an incidental or non-majority mention of Section 87⁴ and therefore those cases are not included in the following analysis.

In the remaining thirty six (36) cases, the bills that were Section 87-challenged fall into three distinct categories:

CATEGORIES

1. CHALLENGED LOCAL BILL SUSPENDS A GENERAL LAW
2. CHALLENGED LOCAL BILL IS HELD A GENERAL LAW

⁴Those cases with just an incidental mention of § 87 are Lipscomb v. Columbus Mun. Separate School Dist., 1996 WL 671715, at *1 (N.D. Miss. July 23, 1996); Phipps v. Irby Const. Co., 636 So.2d 353 (Miss. 1993); Collins v. Trinity Industries, Inc., 671 F. Supp. 449 (S.D. Miss. 1987); In re Validation of \$175,000 General County Funding Bonds, 185 So.2d 420 (Miss. 1966); Stennis v. Board of Sup'rs of Clay County, 232 Miss. 212, 98 So.2d 636 (1957); Bisphoric v. City of Jackson, 196 Miss. 720, 16 So.2d 776 (1944); Gulley v. Lumber Men's Mut. Cas. Co., 176 Miss. 388, 166 So. 541 (1936); Love v. Yazoo City, 162 Miss. 65, 138 So. 600 (1932); Miller v. Lamar Life Ins. Co., 158 Miss. 753, 131 So. 282 (1930); State v. Sansome, 133 Miss. 689, 95 So. 682 (1923); State v. Board of Sup'rs of Stone County, 131 Miss. 415, 95 So. 845 (1923); Hewes v. Langford, 105 Miss. 375, 62 So. 358 (1913); Connor v. Gray, 88 Miss. 489, 41 So. 186 (1906); North British & Mercantile Ins. Co. v. Edwards, 85 Miss. 322, 37 So. 748 (1905).

3. CHALLENGED LOCAL DOES NOT SUSPEND A GENERAL LAW

Which category a Section 87-challenged bill falls into ultimately determines what level of deference this Court gives to the Mississippi Legislature in enacting a particular local and private bill. As a result, the category a local and private bills falls into also, as a practical matter, determines whether the bill is constitutional.

CHALLENGED LOCAL BILL SUSPENDS A GENERAL LAW

Out of the remaining, pertinent thirty-six (36) cases, there are nine (9) cases where a challenged local bill is found to have suspended a general law.⁵ In this group of cases, because of the unconditional nature of the second prohibition in Section 87, which prohibits the suspension of a general law for the benefit of a Private Entity, and because of the equal protection principals that the second prohibition protects, the "no benefit" requirement is strictly enforced. Yazoo & M.V.R. Co., 36 So. at 78-79. As a result, all nine of the challenged local bills that suspended a general law for the benefit of a Private Entity were uniformly stricken as unconstitutional.

Not relevant

⁵Those cases where the challenged local bill suspends a general law are State ex rel. Pair v. Burroughs, 487 So.2d 220 (Miss. 1986); Quinn v. Branning, 404 So.2d 1018 (Miss. 1981); Rolph v. Board of Trustees of Forrest County General Hospital, 346 So.2d 377 (Miss. 1977); Smith v. Transcontinental Gas Pipeline Corp., 310 So.2d 281 (Miss. 1975); Beall v. Board of Sup'rs, Warren County, 191 Miss. 470, 3 So.2d 839 (1941); Columbian Mut. Life Ins. Co. v. Gipson, 185 Miss. 890, 189 So. 799 (1939); Miller v. Tucker, 142 Miss. 146, 105 So. 774 (1925); State v. Mobile, J. & K.C.R. Co., 86 Miss. 172, 38 So. 732 (1905); Yazoo & M.V.R. Co. v. Southern Ry. Co. in Mississippi, 83 Miss. 746, 36 So. 74 (1904).

In one of these cases, Smith v. Transcontinental Gas Pipeline Corp., 310 So.2d 281, 282 (Miss. 1975), in a cite with approval to the Circuit Court Opinion concerning a local bill that excluded Jones County from a general law, the Court states:

This Court is of the opinion that [the local bill] is a violation of [§] 1 of the 14th Amendment of the United States Constitution and is in further violation of the Mississippi Constitution, [§§] 87 and 90, in that [the local bill] is a private and local exception suspending the operation of the general legislative act.

Then the Transcontinental Gas Pipeline Court, in a discussion of Section 87, cites with approval 82 C.J.S. Statutes § 155 (1953) and states:

The purpose of such provisions is to confine the power of the legislature to the enactment of general statutes conducive to the welfare of the states as a whole, to prevent diversity of laws on the same subject, to secure uniformity of law throughout the state as far as possible, and to prevent the granting of special privileges.

Id.

None of the nine (9) cases in this category, which includes all the cases where a local bill suspends a general law for the benefit of a Private Entity, ever refer to the Municipality Exception put forward by the City. Rather, what these cases do is to uniformly enforce a very strict standard that allows no benefit at all to a Private Entity. Judge Campbell, quoted in Yazoo & M.V.R. Co., puts it more eloquently when he discusses whether the Legislature has the authority to enact a local law that falls under the purview of this second prohibition of Section 87. Judge

Campbell says that enacting a local bill that suspends a general law for the benefit of a private entity "[] is placed by § 87 beyond legislative power. Like the tree of knowledge of good and evil, it is forbidden fruit." Yazoo & M.V.R. Co., 36 So. at 78.

There is no Mississippi case where a local bill suspended a general statute and provided any benefit to a private entity and survived a Section 87-challenge. See footnote 5 supra.

CHALLENGED LOCAL BILL
IS HELD A GENERAL LAW

Out of the total thirty-six (36) cases, there are twelve (12) reported cases where the challenged local bill is itself held to be a general law.⁶ Since none of the prohibitions in Section 87 apply to a general law, when in these twelve (12) cases the Section 87-challenged bills were upheld as general laws, they were by definition not subject to any of the three prohibitions set out in Section 87. Logically, bills in this category are tested by the same standards as any general law. Those standards, for testing the constitutionality of general laws, give deference to the

⁶Those cases where the challenged local bill is itself held to be a general law are Secretary of State v. Wiesenberg, 633 So.2d 983 (Miss. 1994); Burrell v. Mississippi State Tax Com'n, 536 So.2d 848 (Miss. 1988); Anderson v. Fred Wagner and Roy Anderson, Jr., Inc., 402 So.2d 320 (Miss. 1981); Jackson Redevelopment Authority v. King, Inc., 364 So.2d 1104 (Miss. 1978); Board of Com'rs Miss. State Bar v. Collins, 214 Miss. 782, 59 So.2d 351 (1952); Clark v. State, 169 Miss. 369, 152 So. 820 (1934); City of Jackson v. Deposit Guaranty Bank & Trust Co., 160 Miss. 752, 133 So. 195 (1931); State ex rel. Jordan v. Gilmer Grocery Co., 156 Miss. 99, 125 So. 710 (1930); Hart v. Backstrom, 148 Miss. 13, 113 So. 898 (1927); Southern Coal Co. v. Yazoo Ice & Coal Co., 118 Miss. 860, 80 So. 334 (1919); Johnston v. Reeves & Co., 112 Miss. 227, 72 So. 925 (1916); Board of Election Com'rs of Rankin County v. Davis, 102 Miss. 297, 59 So. 811 (1912).

Mississippi Legislature. City of Jackson v. Deposit Guaranty Bank & Trust Co., 160 Miss. 752, 133 So. 195 (Miss. 1931).

In City of Jackson, one of the cases where the bill challenged as a local bill was found to be a general law, this Court goes to great lengths to explain why a general bill that suspends a general law is not reviewed with the same strict scrutiny as a local bill which suspends a general law:

The inherent power of the legislature to suspend the operation of a general law is not questioned. That power could not be questioned, for the [second prohibition of § 87] of the Constitution implies the power of suspension and places a limitation upon it, and states the limitation. Granted the power of suspension, then it follows as a necessary consequence that a general law may be suspended by another general law. The question then simply reduces itself to the inquiry whether the act here under review is a general law, which we answer in the affirmative.

. . .

The evil at which [the second prohibition of § 87] was chiefly directed, was the previous practice of suspending a general law in part in favor of certain individuals or corporation, thereby making them favorites, while the law continued in its operation as to all others not so favored. Here, however, the operation of law is suspended as to all alike, and is general, wherefore there is no constitutional objection that in another respect the present act may apply beneficially to a particular class, since it operates uniformly on all members of that class, upon all who are entitled therein, and the class is germane to the subject of the legislature and is not an arbitrary classification without regard to its just relation to the things to be effected.

Id. at 197 (emphasis added).

In practice, because of the level of deference given to the Legislature, in all twelve (12) of the cases where the Section 87-challenged local bills were held to be a general law, the challenged bills were uniformly held to be constitutional. See footnote 6 supra. Clearly, H.B. 1671 suspends the operation of general laws inside the City of Oxford alone and is therefore not a general law and does not fall into this category of cases. (C.P. Vol. 1 at 50, R.E. at tab 5).

CHALLENGED LOCAL BILL DOES
NOT SUSPEND A GENERAL LAW

Out of the total thirty-six (36) cases, there are fifteen (15) reported cases where the challenged local bill is held not to suspend a general law.⁷ The local bills in this category are generally found to augment - not suspend - an existing general law and not violative of Section 87's second prohibition.

In these fifteen (15) cases, this Court again gives deference to the Mississippi Legislature to determine if the local bill is

⁷Those cases where the challenged local bill is held not to suspend a general law are Bond v. Marion County Bd. of Sup'rs, 807 So.2d 1208 (Miss. 2001); Croke v. Lowndes County Bd. of Sup'rs, 733 So.2d 837 (Miss. 1999); Brandon v. City of Hattiesburg, 493 So.2d 324 (Miss. 1986); In re Validation of \$7,800,000 Combined Util. Sys. Revenue Bond, Gautier Util. Dist., Jackson County, 465 So.2d 1003 (Miss. 1985); Harris v. Harrison County Bd. of Sup'rs, 366 So.2d 651 (Miss. 1979); In re Validation of \$15,000,000 Hospital Revenue Bonds, 361 So.2d 44 (Miss. 1978); Pamertree v. Garrard, 207 Miss. 796, 43 So.2d 381 (1949); City of Greenwood v. Telfair, 207 Miss. 200, 42 So.2d 120 (1949); State v. Roell, 192 Miss. 873, 7 So.2d 867 (1942); Haas v. Hancock County, 184 So. 812, 183 Miss. 365 (1938); State v. Sisters of Mercy, 150 Miss. 449, 115 So. 323 (1928); Tiley v. Grenada Building & Loan Ass'n, 143 Miss. 381, 109 So. 10 (1926); Feemster v. City of Tupelo, 121 Miss. 733, 83 So. 804 (1920); Taylor v. Farmer's Fire Insurance Co., 101 Miss. 480, 58 So. 353 (1912); Henry v. Carter, 88 Miss. 21, 40 So. 995 (1906).

required. The end result is that in all fifteen (15) of these cases where the Section 87-challenged local bills were found not to suspend a general law, the local bills were found to be constitutional. See footnote 7.

The Bond case, upon which the City attempts to premise its Municipality Exception, falls squarely into this category because the local bill challenged in Bond did not suspend any general laws. Bond, 807 So.2d at 1219.

Once the Bond case is firmly placed in the category in which it belongs, cases dealing with local bills that do not suspend a general law, the City's misapplication of Bond becomes obvious.

THE LANGUAGE FROM BOND CONCERNING
MUNICIPALITIES IS MISAPPLIED

Again, the City does not challenge the fact that H.B. 1671 suspends multiple general laws. What the City tries to do instead is to take language from Bond and manufacture an exception which would permit the Legislature to enact a local bill that suspends general laws for the benefit of a private entity as long as a municipality is benefitted (C.P. Vol. 3 at 419).

The primary language from Bond that the City seizes upon to support its alleged Municipality Exception comes from page 1219 where this Court was commenting upon language from a prior case dealing with whether or not a municipality could benefit from its own local and private bill. This Court in Bond stated, "We observed that § 87 was inapplicable to public entities such as the City of Hattiesburg." Bond, 807 So.2d 1219. Analyzed in context this

language was only dicta to make it clear that a municipality was a public entity - as opposed to a Private Entity. That language was not somehow making municipalities immune from Section 87. The fact that neither this specific language nor the Bond case as a whole carves out any such Municipality Exception to the unconditional second prohibition of Section 87 is clear for at least two reasons: first a specific reason and second a general reason. First:

BOND SPECIFICALLY HELD THAT IF THE
LOCAL BILL SUSPENDS A
GENERAL LAW, IT IS UNCONSTITUTIONAL

First, the reason Bond cannot serve as the origin of a Municipality Exception, for local bills that suspend general laws for the benefit of a Private Entity, is that Bond itself specifically held, "If the [local] act suspends the general law, it offends § 87." Bond, 807 So.2d 1217-1218. That holding alone makes it clear that this Court in Bond did not use an alleged Municipality Exception to distinguish the local bill challenged in that case. Rather, in Bond this Court logically followed the bright line distinction between local bills that suspend a general law and those that do not. This Court in Bond went on to set out the general test it used, stating:

The Court explained the Legislature may enact upon a given subject matter by both a general law and a local and private law so long as (1) the object and purpose of each act is consistent with the other; and (2) where the differences between them are primarily procedural and minor.

Id. at 1219 (quoting White v. Gautier Utility Dist., 465 So.2d 1003, 1017 (Miss. 1985)). Clearly, if the local bill challenged in

the Bond case had suspended a general law, as H.B. 1671 does, it would not have passed this test and this Court would have found it unconstitutional. Bond, 807 So.2d at 1217-1218.

Second, and more generally:

GENERALLY, BOND IS IN THE WRONG CATEGORY

Bond cannot serve as the origin of a Municipality Exception because the local bill at issue in Bond did not suspend a general law. The Bond Court stated "As discussed previously, § 19-9-17 [the General Law] has not been suspended, but rather has received its full operational effect." Bond, 807 So.2d at 1218.

The opinion in Bond goes to great lengths to make it clear that the Section 87-challenged local bill in that case just supplemented or augmented an existing general law. For that reason the local bill challenged in Bond met the two part test set up in Gautier and applied in Bond, 465 So.2d at 1217, because the local bill in Bond furthered the purposes of the general law and the differences were procedural and minor. Bond, 807 So.2d at 1219. Ergo, the local bill in Bond, just like the local bills in all fifteen (15) cases where a local bill does not suspend a general law, simply did not suspend a general law and was, therefore, not subject to the unconditional requirements imposed by the second prohibition of Section 87. In Bond, the fact that a municipality was involved was not the reason the local bill was found constitutional. Rather, the local bill in Bond avoided the unconditional requirements of Section 87, and ultimately was found constitutional, simply because it did not suspend any general law. Id.

By trying to create a Municipality Exception for local and private bills that suspend general laws for the benefit of a Private Entity, the City is attempting to selectively extract the language it wants to use from a totally inapposite case and premised upon that language ask this Court to completely rewrite part of the Mississippi Constitution. The Constitution plainly states, "Nor shall the operation of any general law be suspended by the Legislature for the benefit of any individual or private corporation or association." Miss. Const. art. 4, § 87. The City misapplies Bond and asks this Court to rewrite the second prohibition in Section 87 to read: "Nor shall the operation of any general law be suspended by the Legislature for the benefit of any individual or private corporation or association - unless a municipality is benefitted." Generally, such a suggested rewrite is directly contra to all the case law that interprets Section 87⁸ and specifically that outcome is directly contra to the plain language in Bond itself.

To 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. Against that applicable measuring stick, the correct standard, the H.B. 1671 is unquestionably unconstitutional. Yazoo & M.V.R. Co., 36 So. at 78-79.

⁸Every local bill passed for a municipality presumably benefits the municipality. Therefore, as a practical matter, the proposed Municipal Exception would exempt all local bills from Article 4, Section 87 coverage. There is no such Municipality Exception.

LEXSTAT MISS CODE ANN 1-3-77

MISSISSIPPI CODE of 1972 ANNOTATED
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*** CURRENT THROUGH THE 2007 1st EXTRAORDINARY SESSION ***
*** STATE COURT ANNOTATIONS CURRENT THROUGH June 7, 2007 ***

TITLE 1. LAWS AND STATUTES
CHAPTER 3. CONSTRUCTION OF STATUTES

GO TO MISSISSIPPI CODE OF 1972 ARCHIVE DIRECTORY

Miss. Code Ann. § 1-3-77 (2007)

§ 1-3-77. General severability provision

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.

RESEARCH REFERENCES

CJS. C.J.S. Statutes §§ 82-84.

B. Issue No. 2: **WHETHER H.B. 1671 UNCONSTITUTIONALLY
VACATES PUBLIC PROPERTY IN VIOLATION OF ARTICLE 4, SECTION 90
OF THE MISSISSIPPI CONSTITUTION.**

Article 4, Section 90 of the Mississippi Constitution states:

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

House Bill 1671 vacates public grounds in the form of the air rights above publically owned real estate. House Bill 1671 authorizes the City to sell or trade the air rights above any real estate the City designates as a public parking facility for any amount the City so chooses. That authority is given in Section 3 where the City has given the authority to sell or trade the air rights "under such terms and conditions and for such periods of time as the governing authorities deem proper." (C.P. Vol. 1 at 50, R.E. at tab 5). Further, in Section 6, the City is given the authority to trade the air rights "in exchange for the construction of such enlarged or improved parking facility" by a Private Entity with no requirement that the enlarged or improved parking facility have a value equal to the conveyed air rights (C.P. Vol. 1 at 50, R.E. at tab 5). Therefore, pursuant to the provisions of H.B. 1671, the City is authorized to "vacate" public grounds.

Therefore, H.B. 1671 is also unconstitutional under Article 4, Section 90.

V. CONCLUSION

In all thirty-six (36) prior cases where a local and private bill is challenged under Article 4 Section 87 of the Mississippi Constitution, this Court has drawn a clear roadmap of the routes a public entity can take to try to improve governmental efficiency via a local bill. That map clearly puts off limits any route using a local bill to suspend a general law for the benefit of a Private Entity.

The City argues that municipalities enjoy an exception to the Section 87 prohibition against local and private bills suspending general laws for the benefit of a Private Entity and the City can be trusted to treat all its citizens fairly without the inconvenience of the legal safeguards, contained in those suspended general laws, that protect all the other citizens of this State. Without casting any aspersions and without dwelling on the implications of the fact that the developer, Craigsides, paid to have H.B. 1671 drafted and paid for the lobbyist who got it passed, Oxford Asset Partners will simply borrow a quote from the Myers Court when they said "If men were angels, no government would be necessary." Myers, 943 So.2d at 1 (quoting The Federalist No. 51, at 349 (James Madison) (Jacob E. Cooke ed. 1961)).

The perceived efficiencies that the City hopes to gain by implementing H.B. 1671 do not even come close to justifying the nullification of the multiple statutory public safeguards lost with

the passage of H.B. 1671. Therefore, Article 4, Section 87 and Section 90 dictate that H.B. 1671 be found unconstitutional. Regardless of how efficient the City might become in building parking garages, the end does not justify the means.

DATED: February 6th, 2007.

Respectfully submitted,

OXFORD ASSET PARTNERS, LLC

By its attorneys

MOCKBEE HALL & DRAKE, P.A.

BY:  

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VI. 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 Brief of the Appellant, Oxford Asset Partners, LLC, to the following:

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This the 6th day of February, 2007.



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