BEFORE THE SUPREME COURT OF THE STATE OF MISSISSIPPI

GWENDOLYN BALL ET AL — APPELLANTS

v. — CAUSE NO: 2006-CA-02126

MAYOR AND BOARD OF ALDERMEN
OF THE CITY OF NATCHEZ, MISSISSIPPI — APPELLEE

APPEAL FROM DECISION OF THE CIRCUIT COURT OF
ADAMS COUNTY, MISSISSIPPI

BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

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ATTORNEYS FOR APPELLANTS

CERTIFICATE OF INTERESTED PERSONS

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 the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

Citizens, Residents & Taxpayers of Natchez, Mississippi	
Gwendolyn E. Ball, J. Neil Varnell and Sarge Preston	Appellants
James A. Bobo	Attorney for Appellants
The City of Natchez, Mississippi	Appellee
Walter Brown and Everett T. Sanders	Attorneys for Appellees
Larry L. Brown Jr., and Edward A. Worley	Developers and Owners of Worley Brown, LLC
Timothy Waycaster	Attorney for Worley Brown, LLC
Mississippi Department of Archives & History	
Phillip C. West	Mayor of Natchez, Mississippi
Bob Pollard, Theodore West, David Massey, Jake Middleton, Joyce Arceneaux-Mathis, And J. "Ricky" Gray	Aldermen of Natchez, Mississippi

James A. Bobo
Attorney for Appellants

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Appellants Gwendolyn E. Ball , J. Neil Varnell and Sarge Preston submit this Brief in support of their Appeal:

I. STATEMENT OF FACTS

Prior to 2005, the officials of the City of Natchez, Mississippi consistently acted to protect and preserve the City's publicly owned lands located at the top of the bluff overlooking the Mississippi River. For example, the City's Code of Ordinances specially provided that "No development, with the exception of limited interpretive and commemorative objects,/signs, shall be permitted on those publicly-owned lands located above the bluff, including those which once constituted the City's original Spanish parade ground." (Record at 49, RE at 121). These public lands were included in the City's "Waterfront Development District" which provided that this zoning district was "intended to preserve the open and undeveloped character of those publicly-owned lands located above the bluff ...." (Record at 46, RE at 120).

This special class of public property included a 2.88 acre bluff top property donated to Natchez in 1995. This bluff top property fronts Broadway Street and had been partially developed with a pecan shelling factory building and related smaller buildings. The property is commonly referred to as the "Old Pecan Factory Site." Beyond the buildings lay an expanse of open area which terminated at the bluff overlooking the Mississippi River.

Appellants J. Neil Varnell and Sarge Preston are long-time residents, taxpayers and landowners within the City of Natchez, Mississippi. (Record at 119, RE at 22). J. Neil Varnell owns property in the neighborhood of the Old Pecan Factory site. Sarge Preston owns real property directly adjacent to the site. (Id.) Appellant Gwendolyn E. Ball is a resident, taxpayer and landowner within the City of Natchez, Mississippi. Mrs. Ball's residence is near the subject

property. (Record at 122, RE at 25). Each of the Appellants has engaged in recreational activities on the site of the subject property, including but not limited to walking and enjoying the scenic vistas.

The Mississippi Department of Archives and History ("MDAH") designated the site as a Mississippi Landmark. See Section 39-7-11. The site is described by MDAH as "very sensitive part[] of the historic fabric of Natchez." (Record at 360, RE at 78). In addition to its historical significance, the site is "quite unique. It offers a beautiful view of the Mississippi River and of Louisiana." (Record at 256, RE at 39).[1]

In the late 1990's the property benefitted from a major bluff stabilization project. (Record at 291, RE at 52) (**See also** House Bill 1932, 1997 Regular Session).

In 2002, the subject property appraised for $1,035,000.00. (Record at 256, RE at 39).[2]

In 2005, Natchez began marketing the Old Pecan Factory Site. Natchez did not publish a notice of intent to sell the subject property as required by Section 21-17-1(2)(a). Nor did the City make the findings required by 21-17-1(2)(a) which would allow the City to transfer the property after having the property appraised by three (3) professional property appraisers under Section 21-17-1(2)(b).

Instead in April, 2005, the City contacted fourteen individuals and solicited proposals concerning the purchase of the property. By June 28, 2005, the Board of Aldermen of the City adopted a resolution "to award and enter into a contract for the proposal made by Ed Worley and

[1] In the opinion of an appraiser hired by Natchez in 2002, the site "is one of the most valuable pieces fo property in Natchez." (Record at 256, RE at 39).

[2] The appraiser believed that a $66,750.00 deduction should apply to cover demolition and removal of a structure. The result was a net value of $968,250.00. (Id.)

Larry L. Brown, Jr." (Record 151, RE at 43). Thereafter on August 9, 2005, the Board of Aldermen of the City, after an executive session, adopted a resolution to "enter an option development agreement with Worley Brown, LLC for the sale and development of the city-owned Pecan Shelling Factory site on Broadway Street." (Record at 284, RE at 45).

The Resolution recited that the City "has determined that the property is surplus and no longer needed for municipal purposes and that it is in the best interest of the City and of the citizens of this community that the property be sold pursuant to *Miss. Code Ann.* 1972 §57-7-1, revised 2003, for the purposes set forth herein and on the conditions and terms set forth hereinafter." (Record at 285, RE at 46) (Italics in original).

The "Option/Development Agreement" attached to the Resolution provided that the option would expire at 5:00 p.m., on February 9, 2006. (Record at 288, RE at 49). The Option contains no provision for extension of the Option Period beyond February 9, 2006.

¶3.2 of the Option states that the "primary purpose for which Optionee is purchasing and the Optioner is selling the Property is for Optionee to use the Property for the purpose of constructing, establishing, marketing and/or operating and maintaining Condominium Units on the property. (Record at 294, RE at 55). ¶4.2(a) of the Option expressly states the "Purchaser will develop on the subject property Condominium Units consisting of approximately 75 luxury **residential** units, a clubhouse, swimming pool and other related commons area and facilities." (Emphasis added) (Record at 297, RE at 58).

Under the Option, Worley Brown LLC, is granted the right to purchase the subject property during the Option Period for $500,000.00. (Record at 294, RE at 55). This price is

$535,000.00, less than the 2002 Gross Value arrived at by the City's appraiser.[3] The Option provides that the "total proposed investment of the Optionee excluding the land cost shall be approximately $19,300,000." (Record at 297, RE at 58).

The Option committed the City to expend substantial sums in relation to improvements to and around the subject property after the transfer of the property to Worley Brown LLC:

1. The City will provide water and sewer service to the right of way line;
2. The City is to expend up to $50,000.00, for utility relocation;
3. The City is to provide an "improved and lighted walkway" and shall maintain the existing sidewalk;
4. The City is to maintain and control vegetation at the edge of the subject property;
5. The City is to pay for "reasonable engineering services";
6. The City waived its building permit fee;
7. The City will grant "an exemption from any and all municipal ad valorem taxes ... on unsold developer-owned condominium units ... for two (2) years from the date of first occupancy...."
8. The City is to forgo any future Oil & Gas Leases on the subject property; and,
9. The City is to indemnify Worley Brown LCC against certain claims.

The Option further provides that Worley Brown, LLC, shall "disclose to the City ten (10) days prior to a closing ... [t]he approximate budget for development of the Property." (Record at 301, RE at 62).

[3] Suspiciously, the appraiser revised his 2002 appraisal in 2006 to reduce the net value to $714,000.00. The record does not reflect an appraisal current for 2006.

By correspondence dated January 23, 2006, counsel for Worley Brown, LLC, requested the City to grant it a 30 day extension of the Option Period. (Record at 386, RE at 80).

This request was taken up at the "Regular Meeting" of the Board of Aldermen held on January 24, 2006. (Record 387, RE at 81). Mayor Phillip West was absent from the meeting as were two (2) aldermen. Four (4) aldermen were physically present. Mayor West attempted to preside over the meeting "via telephone." During the Meeting an objection was made to the lack of quorum and due to the fact the Mayor was on the telephone and complaining about the quality of the sound. No advance notice of the City's plan to conduct public business through teleconference was given in accordance with Section 25-41-5.

At the January 24, 2006, Meeting the City purportedly adopted a resolution extending the time in which Worley Brown LLC, could exercise the option for 30 days from and after February 9, 2006. (Record at 411, RE at 87).

On February 3, 2006, the Appellants perfected their appeal by filing their Notice of Appeal and Bill of Exceptions concerning the extension of the Option Period beyond February 9, 2006. (Clerk's Docket, RE at 3).

On February 14, 2006, the City purported to exercise jurisdiction over issue of the expiration of the Option Period. (Record at 413, RE at 89). Jurisdiction over the issue of the expiration of the Option Period was again purportedly exercised by the City at its Regular Meeting on February 28, 2006, when the City authorized an extension until March 31, 2006. (Record at 417, RE at 91). On March 28, 2006, the City again attempted to exercise jurisdiction over the extension of the Option Period by purportedly extending the expiration date to April 25, 2006. (Record at 420, RE at 93).

No action was taken at the April 25, 2006, Regular Meeting to further extend the Option Period beyond April 25, 2006. (Record at 424, RE at 95).

Despite the expiration of the Option, the City, on May 9, 2006, again purportedly exercised jurisdiction over the subject matter of the Option and the extension of the Option Period and voted to "extend the time to exercise the option of the Worley-Brown project until the Regular Board Meeting of May 23, 2006. (Record at 427, RE at 97).

By letter dated May 22, 2006, counsel for Worley Brown LLC, purported to give "Notice of Exercise" of the Option. (Record at 434, RE at 98).

On May 30, 2006, the City held a "Special Meeting" which it claimed was "pursuant to notice provided in open session at the May 23, 2006." (Record at 438, RE at 101). However no notice of the Special Meeting was given in accordance with Section 25-41-13 and a copy of any such notice was not made a part of the minutes.

At the May 30, 2006, "Special Meeting," the Mayor and Board of Alderman were presented with documents which included the Affidavit of Gwendolyn E. Ball which set forth the following:

> There is no order entered on the minutes of the Governing Authority of the City of Natchez, Mississippi, authorizing the execution of a deed of conveyance to that property commonly known as the Pecan Factory Property, located in Natchez, Adams County, Mississippi.
>
> The Governing Authority of the City of Natchez, Mississippi has failed to publish at least once each week for three (3) consecutive weeks, in a public newspaper of the municipality in which the Pecan Factory Property is located, notice of the intention to sell the subject property and to accept competitive bids.
>
> The Governing Authority of the City of Natchez, Mississippi has failed to accept sealed competitive bids for the sale of the Pecan Factory Property.

> The Governing Authority of the City of Natchez, Mississippi, has not accepted bids for the sale of the subject property and has not awarded the sale of the subject property to the highest bidder in the manner provided by law.
>
> The Governing Authority of the City of Natchez, Mississippi has not, by resolution duly and lawfully adopted and spread upon its minutes determined that the Pecan Factory Property is no longer needed for municipal or related purposes and is not to be used in the operation of the municipality; that the sale of such property in the manner otherwise provided by law is not necessary or desirable for the financial welfare of the municipality; and that the use of such property for the purpose for which it is to be sold, conveyed or leased will promote and foster the development and improvement of the community in which it is located and the civic, social, educational, cultural, moral, economic or industrial welfare thereof.
>
> The Governing Authority of the City of Natchez, Mississippi, has not had the requisite number of appraisals of the Pecan Factory Property performed by professional property appraisers in conformity with State Law.
>
> The decision under consideration is arbitrary, capricious, discriminatory, illegal, or not supported by substantial evidence.
>
> The proposed action violates the State Constitution and constitutes a prohibited gift or donation to the option holder. The value of the Pecan Factory Property far exceeds the purchase price under the option. The terms of the transaction are such that the City would spend as much as the purchase price on improvements to the property after the sale.

(Record at 443-444, RE at 104-105).

It was brought to the attention of the City that it no longer had jurisdiction over the matter; that it had failed to comply with Sections 21-17-1 et seq.; that the proposed property use was residential; that the decision under consideration was arbitrary, capricious, discriminatory, illegal, and not supported by substantial evidence; and moreover that the action violates the Mississippi Constitution and constitutes a prohibited gift or donation. (Record at 439, Re At 102).

Notwithstanding the issues raised at the Meeting the City proceeded with the execution and delivery of the "proposed deed of conveyance." (Record at 448, RE at 106). The record does

not establish that the City was provided with any of the information required by the Option, including, but not limited to, the "approximate budget for the development." (Record at 301, RE at 62).

On June 8, 2006, the Appellants perfected their appeal of the actions taken by the Mayor and board of Aldermen of the City of Natchez, on May 30, 2006. (Record at 110, RE at 13).

The two appeals were consolidated and oral arguments were presented to the Honorable Forrest Al Johnson on July 31, 2006. These appeals were subsequently submitted to the Court by a "Final Amended and Consolidated Bill of Exceptions."

On November 17, 2006, the Circuit Court issued its ruling denying the relief sought by the Appellants. (Record at 505-507, RE at 5-7). The Circuit Court determined that:

1. The Court had jurisdiction to hear the appeal.
2. The Appellants had standing to pursue the consolidated appeal.
3. The City's actions were authorized by Section 57-7-1
4. That the development in question was commercial within the meaning of Section 57-7-1
5. The option extensions were "reasonable and necessary" and within the authority of the City to grant and "did not violate any statutory or constitutional rights."
6. That "all of meetings in question were legal and conformed to existing practice and procedures as set out by law."
7. That the "price for the property was reasonable, given all the factors considered and within the authority of the Mayor and Board to accept."

8. That Worley Brown LLC's purported right to "secure the sidewalk, with gating or otherwise, after normal daylight hours" was not reasonable; not supported by the evidence and contrary to the authority of the City under the statute in question." In addition the right was contrary to the proposal submitted to the City.

9. "All remaining issues not specifically addressed ... are resolved against the appellants...."

(Record at 506-507, RE at 5-7).

The Appellants timely perfected their appeal to this Honorable Court.

II. SUMMARY OF THE ISSUES

1. Should the Taxpayers, Landowners and Residents of a Mississippi municipality be denied access to judicial review of the failure of municipal officials to conduct public meetings in conformity with State Law and the municipality's charter and to review actions taken by municipal officials to transfer valuable municipal property in a manner not authorized by State Law?

2. Can the officials of a Mississippi municipality ignore State Law and the municipality's charter and conduct public business during meetings with no quorum physically present?

3. Should the cases of **South Cent. Turf, Inc. v. City of Jackson**, 526 So.2d 558 (Miss. 1988) and **Gatlin v. Cook**, 380 So.2d 236 (Miss. 1980) be over turned and abandoned and the authority and jurisdiction of Circuit Courts and Appellate Courts made subordinate and inferior to the jurisdiction of municipalities following an appeal perfected pursuant to

Section 11-51-75 of the Mississippi Code of 1972, as amended?[4]

4. Does Section 57-7-1 allow a Mississippi municipality to sell municipal real estate without first improving the property for industrial and commercial purposes?

6. Does Section 57-7-1 allow a Mississippi municipality to sell municipal real estate for residential purposes?

7. Does Section 57-7-1 allow a Mississippi municipality to sell municipal real estate with no idea as to the present value of the subject property or the anticipated cost of improvements which the municipality obligates itself to make in relation to the transfer of the subject property?

8. May a Mississippi municipality by waiver of fees, taxes and its commitment to infrastructure improvements, in effect, donate municipal real property and funds to private individuals in exchange for those individuals' nebulous proposal to invest millions of dollars in a residential development on the subject real property?

9. Should a Court charged with reviewing a Mississippi municipality's sale of municipal property be left to guess the present value of the real property involved or the anticipated cost of improvements to which the municipality obligated itself to make in relation to the transfer of the subject property?

10. Were the actions of the Governing Authorities of the City of Natchez, Mississippi, otherwise arbitrary, capricious, discriminatory, illegal, not supported by substantial evidence or an unlawful donation of real property and funds?

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[4] Unless indicated all statutory citations are to provisions of the Mississippi Code of 1972, as amended.

III. SUMMARY OF THE ARGUMENT

The lower court committed reversible error by failing to declare the City's Meeting of January 24, 2006, and the actions purportedly taken during the meeting, to be void due to the failure of the municipal authorities to have a quorum. A proper ruling on this point establishes that the Option Agreement entered into by the City expired by its own terms.

Due to the timely appeal of the actions taken at the January 24, 2006, meeting, i.e., improper meeting and improper obligation of the City under the Option to a time beyond February 9, 2006, the City had no jurisdiction to reconsider or further extend the Option Period.

Furthermore, the lower court committed reversible error by failing to declare that the sale of the Old Pecan Factory site was arbitrary, capricious, illegal, unsupported by substantial evidence and an improper donation of public lands and funds to a private company. First the City attempted to proceed under a statute which covers surplus airport property. Second that statute (§57-7-1) clearly required that the surplus land be "**set aside and improved**" and "**thereafter**" sold for "**commercial and industrial**" purposes. None of these conditions were met. The City did not improve the Old Pecan Factory and just sold it for residential, not industrial or commercial purposes.

Moreover the City used a four (4) year old appraisal to arrive at a value for the property and then made concessions without any indication of the cost of the concession and the net effect of the sale of the property. The minutes of the City are devoid of sufficient information necessary for a reviewing court to engage in any meaningful analysis consistent with the judiciary's role as a separate branch of government, i.e, to act as a check and balance. The bottom line is that the City did not have sufficient information to know whether the deal into which it had entered was

an improper donation or otherwise just the arbitrary and capricious disposal of some of the most valuable and historic land in Natchez.

The lower court and the City should be reversed and a judgment rendered for the Appellants.

IV. ARGUMENT

A. Standing[5]

J. Neil Varnell and Sarge Preston are long-time residents, taxpayers and landowners within the City of Natchez, Mississippi. (Record at 119, RE at 22). J. Neil Varnell owns property in the neighborhood of the Pecan Factory site. Sarge Preston owns real property directly adjacent to the site. (Id.) Gwendolyn E. Ball is a resident, taxpayer and landowner within the City of Natchez, Mississippi. Mrs. Ball's residence is near the subject property. (Record at 122, RE at 28). These parties claim that the actions being appealed will adversely impact their properties by adverse impact on values and aesthetics; that each of these parties has engaged in recreational activities on the site of the subject property, including but not limited to walking and enjoying the scenic vistas; that these activities are not engaged in by the general public and that the actions being appealed will adversely impact their continued pursuit of those activities. (Id.) They further

[5] In the proceedings below, the City did not argue that the Appellants did not have standing to raise issues concerning the "illegality" of the City's actions. (Hearing Transcript at 33, RE at). Instead the City argued that the Appellants did not have standing to contest the "legislative decision ... as to what kind of deal to make." Hearing Transcript at 34, RE at). That is, whether the sales price was sufficient given the alleged benefits and concession made by the City. The City should be procedurally barred from rasing any issues concerning standing other than its claim that Taxpayers, Residents and Landowners can not seek judicial review of the terms and conditions of a municipality's sale of property which is claimed to be surplus. See **Dedeaux Utility Co., Inc. v. City of Gulfport**, 938 So.2d 838, 846 (Miss. 2006).

claim that the impact of the proposed development on the stability of the Bluff subjects each of them to physical danger and also threatens the above referenced real properties. (Id.)[6]

These consolidated appeals were perfected pursuant to Section 11-51-75. In applying this section this Court has repeatedly noted that "any act is appealable." **Benedict v. City of Hattiesburg**, 693 So.2d 377, 380 (Miss. 1997). Moreover, "'Mississippi's standing requirements are quite liberal.'" **City of Picayune v. Southern Regional Corp.**, 916 So.2d 510, 525 (Miss. 2005) (citations omitted). "The public property of a municipal corporation, real and personal, or in other words such property as is held in trust for the public generally, is subject to the control of the legislature." **Board of Mayor and Aldermen of Yazoo City v. Wilson**, 232 Miss. 435, 99 So.2d 674, 677 (1958). Beneficiaries of a trust in public lands have standing to pursue claims concerning the disposition of those land. **Holmes v. Jones**, 318 So.2d 865, 869 (Miss. 1975). Taxpayers have been recognized to have standing to contest the matters almost identical to the matters raised by these appeals. **See Bond v. Marion County Bd. of Sup'rs**, 807 So.2d 1208, 1214 (Miss. 2001) (Taxpayer had "a due process right to be heard in a judicial forum regarding his allegations that ... the Board ... acted outside the authorities conferred by the legislature....") and **Jackson County Historical Soc. v. Board of Sup'rs of Jackson County,** 214 Miss. 156, 58 So.2d 379, 381 (1952) (taxpayers had standing to challenge validity of sale of public land). In addition nearby landowners have standing to contest government actions which

[6] "A party's assertion of an interest or effect goes a long way toward establishing that it has an interest in or will likely be affected...." **Harrison County v. City of Gulfport**, 557 So.2d 780, 783 (Miss. 1990).

might adversely impact the value of their property. **Luter v. Oakhurst Associates, Ltd.**, 529 So.2d 889, 892 (Miss. 1988).

"In Mississippi, parties have standing to sue when they assert a colorable interest in the subject matter of the litigation or experience an adverse affect from the defendant's conduct." **Mississippi Manufactured Housing Ass'n v. Board of Aldermen of City of Canton**, 870 So.2d 1189, 1192 (Miss. 2004). Here the Appellants are landowners, residents and taxpayers who seek judicial review of the act of the municipal authorities of Natchez in conducting a public meeting without a quorum present and otherwise in violation of state law and its Charter; and, who seek judicial review of the act of selling municipally owned real property in a manner not allowed by law and on terms and conditions rendering the transaction arbitrary, capricious, without a substantial basis and an illegal donation of property and funds. As landowners, residents and taxpayers, the Appellants have an interest in the City's disposal of allegedly surplus property and in the City conducting proper public meetings. **See Simpson v. City of Gulfport**, 121 So.2d 409, 414 (Miss. 1960) (taxpayers maintained action to prevent transfer of property and to invalidate government action based upon the lack of quorum).

B. The Option Expired on February 9, 2006

The City of Natchez has six (6) aldermen. The Charter of the City of Natchez, specifically provides that a "majority of said council shall constitute a quorum...." Charter Section 19 (Record at 474, RE at 115). The Charter also provides that the council "may elect one of their number as mayor pro tempore who shall be invested with all of the powers and rights and shall perform all of the duties of the mayor ... whenever the mayor shall be absent from the city...." Charter Section 5A (Record at 472, RE at 114). Similarly §21-3-19 requires the "Mayor and

Board" to hold regular meetings and provides that in "all cases it shall require a majority of all aldermen to constitute a quorum for the transaction of business."

Section 21-3-15 provides that the Mayor "**shall** preside at all meetings of the board of aldermen" and Section 21-3-13 provides that the "board of aldermen **shall** elect from among its members a mayor pro tempore, who **shall serve** in the place of the mayor in cases of temporary absence or disability of the mayor." (Emphasis added). The issue of "temporary absence" under Section 21-3-13 was first considered by the Mississippi Supreme Court in the case of **Scott v. Stater**, 707 So.2d 182 (Miss. 1997). In **Scott** the Court adopted a "physical absence" test and determined that because a Mayor was not "physically absent from the jurisdiction" at the time of a meeting then the obligation of the Aldermen to elect a Mayor Pro Tempore did not arise. 707 So.2d at 186.

On January 24, 2006, Mayor Phillip West was "physically absent from the jurisdiction." In addition two (2) aldermen were also absent. Four (4) aldermen were physically present. Mayor West attempted to preside over the meeting "via telephone." During the Meeting an objection was made to the lack of quorum and due to the fact the Mayor was on the telephone and complaining about the quality of the sound. No advance notice of the City's plan to conduct public business through teleconference was given in accordance with Section 25-41-5.[7]

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[7] Municipalities "are but creatures of the state and they possess only such power as conferred upon them by statute." **City of Starkville v. 4-County Elec. Power Ass'n**, 909 So.2d 1094, 1111 (Miss. 2005). Section 25-41-5 does not allow the Mayor to preside over a meeting through teleconference. Section 25-41-5 provides that if a quorum is present then "additional members of the public body" may participate through teleconference provided at least thirty (30) days advance notice has been given. The Mayor is not a member of the Board of Aldermen. Moreover, no notice was given as required by the statute.

In the present case the City could not proceed under Section 25-41-5 and with Mayor West absent, Section 21-3-13 **demanded and required**[8] that the Aldermen elect a Mayor Pro Tem and that the Mayor Pro Tem serve in place of the absent Mayor. The law is clear that once an Alderman passes into the role of Mayor Pro Tem then he or she is no longer in the role of Alderman. See **Scott**, 707 So.2d at 186. Given the clear demands of the law, there were only three (3) persons serving in the role of Alderman on January 24, 2006, and no lawful meeting occurred and therefore the Worley Brown Option expired on February 9, 2006.[9]

C. The Cases of **South Cent. Turf, Inc. v. City of Jackson** and **Gatlin v. Cook**, Should Not Be Overturned And Abandoned

Following the January 24, 2006, Meeting, the Appellants Varnell and Preston timely perfected there appeal, pursuant to Section 11-51-75, of the irregularities of the meeting and the vote to obligate the City under the Option beyond February 9, 2006. The Notice of Appeal and Bill of Exceptions were filed on February 3, 2006.

"It is well settled that where a case has been removed to an appellate court by appeal the lower tribunal is divested of any jurisdiction to subsequently modify its order or entertain a

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[8] In **Poindexter v. Southern United Fire Ins. Co.,** 838 So.2d 964, 971 (Miss. 2003), the Mississippi Supreme Court once again made clear that "'shall' means 'shall,' not 'shall sometimes.'"

[9] The wisdom of this legislative requirement that the presiding officer be physically present was abundantly apparent to everyone in attendance at the January 24, 2006 meeting. It was clear that the physically present city attorney acted as the presiding officer. The disembodied and static-marred voice of the Mayor over an improvised speaker phone represented more of an eavesdropper than a presiding officer. It was readily apparent that the Mayor could not hear everything which was occurring at the meeting. Exhibits were submitted during the meeting. The Mayor was not present to review and receive these exhibits. These functions were usurped by others.

petition for rehearing... (Citations omitted). The rule applies with equal force when an appeal is taken from a judgment or decision of municipal authorities." **Gatlin v. Cook**, 380 So.2d 236, 237-238 (Miss. 1980). See also **South Cent. Turf, Inc. v. City of Jackson**, 526 So.2d 558, 562 (Miss. 1988) ("As in **Gatlin v. Cook**, the City of Jackson was without authority to reconsider the matter....")..

As the result of the appeal, the City did not have jurisdiction to take up the issue of further extending the obligations of the City under the Option past February 9, 2006.

D. The City Failed To Comply With Section 57-7-1

The Mississippi Legislature has enacted legislation which allows surplus lands to be "set aside and improved for industrial and commercial purpose and ... **thereafter** ... sold upon such terms and conditions as a municipality ... shall prescribe." Miss. Code Ann. §57-7-1. (Emphasis added).[10] The City invited the lower court to step through the looking glass into a realm where property does not have to be "set aside and improved;" "thereafter" means "before;" and where "residential" means "industrial and commercial." The lower court erroneously accepted this invitation.

In **City of Natchez, Miss. v. Sullivan**, 612 So.2d 1087 (Miss. 1992), the Mississippi Supreme Court rejected an attempt of the City to rewrite State Statutes to suit the ends of the City. In **Sullivan**, the Court stated:

> In considering a statute passed by the legislature,... the first question a court should decide is whether the statute is ambiguous. If it is not ambiguous, the court should simply apply the statute according to its plain meaning and should not use principles of statutory construction. (Citations omitted).

[10] A basic question exists on whether a statute governing airport property can be used to transfer non-airport property. Taking §21-17-1 and §57-7-1 together it seems clear the Legislature did not intend for the latter statute to be used to create a loop hole for the avoidance of a competitive bid process and the use of three (3) appraisals.

Sullivan, 612 So.2d at 1089.[11]

1. Set Aside and Improve

The City has not "set aside and improved" the subject property. In fact the City has merely attempted to transferred the property "as is." Section 57-7-1 is not ambiguous. The City would have the Court rewrite this Statute to provide "set aside or improve[]." The Mississippi Supreme Court has long recognized that it is generally not the providence of Courts to change the Legislature's "ands" to "ors" or "ors" to "ands." **See Banks v. City of Greenwood, By and Through City Council,** 404 So.2d 1038, 1039 (Miss. 1981).

Importantly, improvements performed by the city, prior to sale, would have to comply with the applicable bid laws so that public scrutiny and accountability would be insured. See Miss. Code Ann. §31-7-13. This is certainly consistent with the Legislature's desire that public property not be squandered or be the subject of turnkey arrangements which enrich private individuals at the expense of the public.

2. The Great Thereafter

In addition it is clear from Section 57-7-1 that the property must be "improved" before it is leased or sold. The Merriam-Webster Online Dictionary defines "thereafter" as meaning "after that."[12] The clear import of the language used by the Legislature is that if a city desires to use this

[11] "This Court generally looks to the 'plain meaning' of a statute.... (citation omitted). 'Popular words in statutes must be accepted in their popular sense and we must attempt to glean from the statutes the legislative intent.' ... (citations omitted)." **Leuer v. City of Flowood**, 744 So.2d 266, 270 (Miss. 1999).

[12] http://www.merriamwebster.com/dictionary/thereafter

method to dispose of surplus property that it must first "set aside and improve" the property **and after** that it can lease or sell the property upon such terms as it shall prescribe.

4. Residential Is Not Commercial

Remarkably the lower court held that the planned residential condominiums were a "commercial use" under the statute.

Paragraph 4.2 of the Option expressly states the "Purchaser will develop on the subject property Condominium Units consisting of approximately 75 luxury **residential** units, a clubhouse, swimming pool and other related commons areas and facilities." (Emphasis added). Residential use is of course different from commercial use. **See e.g.**, §89-8-1 et seq., of the Mississippi Code of 1972, as amended, (Residential Landlord and Tenant Act).

The desire of the City to sell highly valuable and irreplaceable bluff property without engaging in an open bid process or through multiple publically disclosed appraisals cannot be the tail which wags the Mississippi Legislature. It is the Legislature which defines and limits the actions of the City. **See e.g.**, Article 1, Section 1 of the Mississippi Constitution of 1890. Long ago in **Gully v. Williams Bros., Inc.**, 182 Miss. 119, 180 So. 400, 405-06 (1938), the Mississippi Supreme Court stated:

> Municipal corporations are now, as they have always been in this state, purely creatures of legislative will; governed, and the extent of their powers limited, by express grants; invested, for purposes of public convenience, with certain expressed delegations of governmental power; their granted powers subject at all times to be enlarged or diminished; ... their powers, their rights, their corporate existence, dependent entirely upon legislative discretion, ... Unless expressly limited by constitutional provision, the legislative department has absolute power over municipalities.

180 So. At 405-06. Here the Legislature has limited the authority of the City to situations where the resulting land use is commercial or industrial. This Court should not sanction or join in the modification of the Legislature's limiting language of "industrial and commercial" in Section 57-7-1 to broadly read "residential, industrial or commercial." There can be little doubt that the Legislature knows and appreciates the difference between residential property uses, industrial property uses and commercial property uses. **See** Miss. Code Ann. §29-3-31 (directing board of education to classify certain 16th Section lands) and §29-3-151 (authorizing the lease of certain 16th Section lands for "commercial, industrial, and/or recreational use"). Giving credit to the Legislature, one must conclude that if it wanted cities to be able to avoid the restrictions of Section 21-17-1 in relation to residential property uses then it would have so stated in Section 57-7-1. Otherwise the exception devours the Rule. To paraphrase the case law, the City, like the Courts:

> ha[s] no right to add anything to or take anything from a statute, where the language is plain and unambiguous. To do so would be intrenching upon the power of the legislature. Neither have the courts [and cities] authority to write into the statute something which the legislature did not itself write therein, nor can they ingraft upon it any exception not done by the lawmaking department of the government.

Hamner v. Lumber Co., 100 Miss. 349, 417, 56 So. 466, 490 (1911).

E. The Transaction Is Arbitrary, Capricious, Illegal, Not Supported By Substantial Evidence or Is An Unlawful Donation Of Real Property And Funds

"The minutes ... are the sole and exclusive evidence of what the board did." **Smith v. Board of Sup'rs of Tallahatchie County**, 86 So. 707, 709, 124 Miss. 36,, (Miss. 1921). In this case the minutes reflect that the City used a four (4) year old appraisal to arrive at the value of the subject property and further that the City agreed to take on many expensive responsibilities and obligations without any indication of the cost of such responsibilities and obligations. Moreover, the City

agreed to waive the collection of fees and taxes without any indication of the amount of money involved. The minutes do not reflect that the City was ever provided with a realistic budget for the project as required by the Option and therefore only had before it the nebulous representation that investment in the project would be appropriately $19 Million. Lastly, while the minutes make is impossible to arrive at an actual net purchase price for the subject property the indications which are there point to Worley Brown LCC obtaining the property for free or even at a profit.

It is not reasonable for the City to use a four (4) year old appraisal when trying to arrive at the value of this unique and historic parcel of real property. **See e.g., Williamson v. Lowndes County**, 723 So.2d 1231, 1233 (Miss. Ct App. 1998) (rejecting use of 2 year old appraisal) (citing **Pearl River Valley Water Supply Dist. v. Wood**, 252 Miss. 580, 595, 172 So.2d 196, 203 (1965) (rejecting use of 3 year old appraisal).

These is no evidence in the record to support the City's decision that it was prudent to take on substantial and costly improvements and to waive the collection of fees and taxes. Therefore there is no way for a Court to effectively review the City's conduct. Given the absence of a disclosed rational basis the Court must concluded that the actions of the City were arbitrary and capricious. **Mississippi Power Co. v. Fairchild**, 791 So. 2d 262 (Miss. Ct. App. 2001) ("the Board gave no indication of what factors were considered in reaching its determination, thus giving no assistance to this Court to find anything but that the decision was arbitrary and capricious.").

In addition Section 95 of Article 4 of the Mississippi Constitution of 1890, specifically prohibits the donation, direct or indirect, of public lands to private corporations or individuals. Public lands can only be disposed of for adequate consideration. In the present case public lands and

funds have been, in effect, donated to Worley-Brown LLC, without adequate consideration being paid.

V. CONCLUSION

The City of Natchez, Mississippi has conducted illegal meetings, exceeded it jurisdiction and arbitrarily and capriciously donated value public land and substantial funds to a private company. The decisions of the municipal authorities should be reversed and a decision rendered for the Appellants.

Respectfully submitted, this the 5th day of June, 2007.

Gwendolyn Ball, J. Neil Varnell
and Sarge Preston

By: _____
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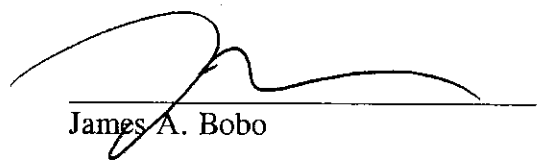
CERTIFICATE OF SERVICE

I, James A. Bobo, one of the attorneys for Appellants, do hereby certify that I have this day, mailed via United States mail, postage prepaid, a true and correct copy of the above and foregoing document to Walter Brown, City of Natchez Attorney, Post Office Box 963, Natchez, Mississippi 39121-00963 and Everette Sanders, City of Natchez Attorney, Post Office Box 1185, Natchez, Mississippi 39121-1185.

This the 5th day of June, 2007.



James A. Bobo