

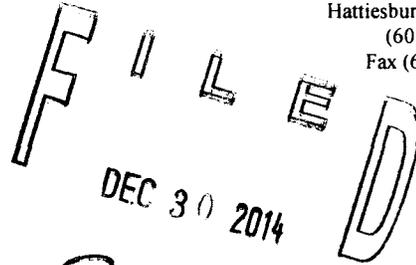
CHANCERY COURT
TENTH CHANCERY COURT DISTRICT OF MISSISSIPPI
(Forrest, Lamar, Marion, Pearl River & Perry Counties)

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December 30, 2014



Jimmy C. Havard
Chancery Clerk

via hand delivery

Hon. Jimmy C. Havard
Forrest County Chancery Clerk
Paul B. Johnson, Jr., Chancery Building
Hattiesburg, MS 39403

Re: Groundworx, LLC vs. City Of Hattiesburg/Thomas A Blanton,
Intervenor And Cross-Plaintiff/Cause Number 2014-0545-GN-DO

Dear Mr. Havard:

Enclosed please find a *Memorandum Opinion And Rulin On Motions To Dismiss* to be filed in the court record in the above-referenced cause.

Pursuant to MRCP 77(d), please mail a filed copy to all Counsel of record for the parties. Please make a docket entry of your filing and mailing of same.

Thank you for your usual kind and prompt attention to this matter.

Very truly yours,

A handwritten signature in black ink, appearing to read "M. Ronald Doleac".

M. Ronald Doleac

MRD/rd
Enclosure

IN THE CHANCERY COURT OF FORREST COUNTY, MISSISSIPPI

GROUNDWORX, LLC

PLAINTIFF

VERSUS

CAUSE NO. 2014-0544-GN-DO

CITY OF HATTIESBURG, MISSISSIPPI

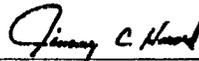
F I L E D
DEC 30 2014

DEFENDANT

AND

THOMAS A. BLANTON

INTERVENOR &
CROSS-PLAINTIFF


Chancery Clerk

MEMORANDUM OPINION AND RULING ON MOTIONS TO DISMISS

THIS CAUSE came on to be heard on December 2, 2014 on *Groundworx's Motion to Dismiss Blanton's Cross-Complaint in Intervention, City of Hattiesburg's Motion to Dismiss Groundworx's Amended Complaint, and Cross-Plaintiff Thomas A. Blanton's Motion to Dismiss Groundworx's Amended Complaint.* This Court, having considered said motions and responses, and supporting briefs, and having heard spirited oral argument on the record from counsel for the parties, and having considered the same, does find and adjudicate as follows:

Background

The contract between Groudworx and the City calls for a new wastewater treatment system for the City of Hattiesburg to be designed, built, owned, maintained, and operated by Groundworx. (Contract Section 2.1.) The contract calls for Groundworx to create a land-based dispersal system that would take treated wastewater and spray it over hundreds of acres as opposed to discharging it into the local Leaf and Bouie Rivers. The Guaranteed Maximum Price (GMP) contract cost is \$137,100,000.00 for land acquisition and system development costs. Financing costs are in addition

to the GMP. (Contract Section 2.2.2.)

Per Section 7.7 (Financing), Groundworx represents that it “has no reason to believe that the financing described in the Proposal will not be available to Groundworx upon the execution of this Agreement.” The agreement/contract was executed by the City on January 21, 2014, and by Groundworx, LLC, a Mississippi limited liability company, on January 27, 2014. In the Amended Complaint, Groundworx alleges that on February 18, 2014, the City council adopted a resolution increasing sewer rates for the purpose of generating a revenue stream to fund the City’s obligations under the contract. (The Ordinance is Exhibit F to the Amended Complaint.) Groundworx further alleges that on February 27, 2014, Mayor Johnny Dupree vetoed the resolution. Groundworx further alleges that on August 5, 2014, the City terminated the contract with Groundworx based on the failure of Groundworx to timely obtain financing for the project by June 2, 2014. (Section 6.21.1.)

On October 13, 2014, the Court ordered the parties to mediation. The parties subsequently filed and noticed their respective Motions To Dismiss, asserting on December 2, 2014 that the predicate legal issues pending, including the Constitutional challenge to the contract, should be ruled upon prior to mediation. The Court agrees.

Blanton’s Motion To Dismiss Groundworx's Amended Complaint

Blanton first filed and noticed his *Motion to Dismiss Groundworx’s Amended Complaint* and this Motion was addressed first on December 2, 2014 following the Court’s denial of Blanton’s *Motion to Relieve Thomas A. Blanton from Responsibility for Mediation Fees and Expenses*.

Blanton contends that the contract is void ab initio because it violates Article VII, Section 183 of the Mississippi Constitution which prohibits government from lending its credit in aid of a private business. He also asserts that the funding mechanism of the contract violates the due process

clause of the 14th Amendment of the United States Constitution. Initially, Blanton asserted that the funding mechanism of the contract violates due process rights because the City is being required to finance the construction of a system to be established and owned by Groundworx prior to the implementation of service by Groundworx and with no assurance that the system will be operational. After the filing of Groundworx's Amended Complaint, seeking only a money judgment for damages under the contract and/or course of conduct and dealing, Blanton now asserts that due process rights are offended by the notion that the City and its taxpayers are now requested to pay in excess of \$6 million to Groundworx and receive, in essence, nothing in return.

Blanton posits the contract is violative of Section 183 and the 14th Amendment under contract section 4.1.1 urging that the City is both financing and lending its credit to Groundworx. Blanton asserts the City's payments to Groundworx are tied directly into the interest portion of Groundworx's Debt Services Plan under the contract.

4.1.1 City unconditionally and irrevocably covenants and agrees to pay to Groundworx: (i) beginning on the Effective Date, the interest portion of Groundworx's Debt Service payments, with the same to be billed and paid in a manner to ensure that Groundworx receives the payments at least fifteen (15) days prior to the due date for the Debt Service payment; (ii) beginning on the date the work required by Exhibit 2.2.4.2 is complete and subject to Section 2.2.7, and continuing until the payments provided for by the following sentence commence, the amount set forth in Exhibit 4.1.1 which may be adjusted based upon changed requirements of the City, and additional requirements which may be imposed by the Commission or the EPA and Groundworx's Debt Service payments, with the same to be billed and paid in a manner to ensure that Groundworx receives the payments at least fifteen (15) days prior to the due date for the Debt Service payment; and (iii) during each Fiscal Year or part thereof during the Term from any monies legally available for such purpose to the City, at the time and in the manner hereinafter provided, commencing with the Accounting Effective Date of this Agreement, the Total Annual Requirement for such Fiscal Year.

It is undisputed that Groundworx is a private legal entity, being an LLC.

Blanton complains that Section 2.3 of the contract provides that Groundworx is the sole

owner of the system to be constructed including all real property used or to be used in the operation of the system. Under the contract (and affirmed at oral argument) the City waives any and all rights of ownership and claims of ownership to the system. The City has only an option to purchase the system from Groundworx per Section 2.3 of the agreement.

Section 2.3 The Parties hereto acknowledge that Groundworx shall be the sole owner of the System, including all real property used in operation of the System, some of which will be owned by Groundworx in fee simple and some of which will be leased by Groundworx, and that all Wastewater collection, transportation, storage, disposal and/or treatment facilities owned by City shall remain the property of, and sole responsibility of, the City. City hereby waives any and all rights, title and/or claims of ownership to System, any real property or personal property included as part of the System and any and all Wastewater facilities constructed, or to be constructed, or included as part of the System, except for any rights granted to City as provided in the Option.

In this regard, Blanton relies heavily on the proposition that the contract does not grant the City any element of management or control over construction or operation of the system to be constructed for a public purpose and also runs afoul of the holding in *Brister v. LeFlore County*, 156 Miss. 240, 125 So. 816 (1930). The Court acknowledges that Section 2.3 of the Contract provides that the City remains the Owner of the existing wastewater collection, transportation, storage, and/or treatment facilities owned by the City, and the City has sole responsibility therefor. However, as stated above, Section 2.1 clearly designates Groundworx as responsible for designing, building, owning, maintaining, and operating the wastewater system contracted for.

Blanton further complains that Section 2.1 of the contract allows sole determination by Groundworx and MDEQ of the plans and specifications for the System to be constructed, operated, owned, and maintained by Groundworx. The City is only afforded an opportunity to make recommendations to Groundworx with no obligation on the part of Groundworx to adopt any such

recommendations for construction and operation.

Blanton asserts each payment under the contract as sued for by Groundworx in its Amended Complaint is an unconstitutional appropriation per *Brister* in interpreting Section 183. Blanton also cites *Swetman, et al v. Harrison County*, 207 Miss. 831, 42 So.2d 801 (1949), holding that a municipality cannot donate real property. He asserts that holding is applicable because it bears on the acquisition structure of the contract whereby the City finances Groundworx's property purchases and/or leasehold interest acquisitions for construction of the System.

Groundworx complains that the breach of contract count it sues upon is based on the City's failure to raise sewer rates or to identify a revenue stream to fund construction of the System.

Assuming bond financing, Blanton complains the City is lending its credit in aid of the private LLC entity, Groundworx. As noted above, Blanton also posits that the Amended Complaint still presents a substantive Due Process and Constitutional violation.

Both Groundworx and the City assert that the Contract is one for services and thus no property right exists that is subject to the constraints of the Due Process Clause or of the Mississippi Constitution Section 183 prohibitions. Groundworx argues that its Amended Complaint for damages is based on the City's failure to raise sewer rates or to identify a revenue stream to fund construction of the system. See Paragraph 33 of the Amended Complaint wherein Groundworx alleges that "The City was aware that Groundworx would be unable to obtain financing without the City's cooperation and was, therefore, knowingly in complete control of whether Groundworx would be able to meet its obligations under the Contract." Again, Blanton complains that the City is lending its credit in aid of the private LLC entity Groundworx.

Groundworx pleads that the City should have expected Groundworx to rely on the City's

promise to raise rates or otherwise identify a revenue stream to pay Groundworx's obligation. Blanton says Groundworx's damages sued for under the Amended Complaint requests payments by the City which Section 183 prohibits. Blanton asserts that legally requiring the City to retroactively finance or pay any expenses or costs incurred by Groundworx to purchase property options as the sole property of Groundworx is a clear Constitutional violation of both Section 183 and the 14th Amendment. The same position, as a matter of law, is asserted by Blanton regarding the \$876,088.33 attorney fees alleged to have been incurred for legal work for development of Groundworx's System.

Groundworx responds and says Blanton's Cross-Complaint is untimely and this Court has no jurisdiction and cites Section 11-51-75 of the Miss. Code Ann. and asserts that Blanton cannot show specific harm not suffered by the general public thereby failing to meet his legal burden for standing citing *Burgess v. City of Gulfport*, 814 So.2d 149, 153 (Miss. 2002).

Groundworx further positions that the work performed and the costs incurred would have allowed the City to comply with the MDEQ *Amended Agreed Order*, which is for a public purpose, arguing that payments that should have been made are payments for services to improve the City's wastewater treatment and do not constitute the City lending its credit in aid of or to Groundworx. House Bill 1529 is cited by Groundworx as specific legislative authority for the particular project on the City's part. House Bill 1529 states,

"The city [of Hattiesburg] shall have, in addition to any other powers granted under any other provisions of law, the following powers: (a) To enter into contracts with any person for a term not to exceed thirty (30) years, and upon such other terms and conditions as may be deemed desirable, for the collection, storage, transportation, treatment and/or disposal of wastewater; (b) To enter into operating agreements with any person, for a term not to exceed thirty (30) years, and upon such other terms and conditions as may be deemed desirable, for the operation of all or any portions of the city's wastewater collection, storage, transportation, treatment or other systems; and (c) To lease to or from any person, for a term not to exceed thirty (30) years, and upon such other terms and conditions as may be deemed desirable, all or any portions of the city's wastewater collection, storage, transportation, treatment or other systems."

MCA Sections 21-27-17 and 21-27-11(b) are also cited by Groundworx.

The Court notes and finds that the System to be constructed under the Contract would remain the property of and under the control of Groundworx unless the City exercised its option to purchase assuming the System was built. Groundworx now sues for breach of contract and for damages and promissory estoppels following the City's cancellation of the agreement.

Analysis

The parties throughout have agreed that the contract is integrated. (See Section 6.1.) Contract law is well-settled in Mississippi. An instructive analysis and review of contractual intent, ambiguity, and application of the canons of contract law, is found in the holding in the case of *Martindale vs. Hortman Harlow Bassi Robinson And McDaniel, PLLC*, 119 So.3d 338 (Miss. Ct. App. 2012), rehearing denied April 9, 2013, certiorari denied August 1, 2013, wherein Judge Maxwell writes for the Court that a court must accept the plain meaning of a contract as the intent of the parties if the contract is not ambiguous.

Article VII, Section 183 of the Mississippi Constitution of 1890 reads in relevant part:

"No county, city, town, or other municipal corporation shall hereafter become a subscriber to the Capital stock of any railroad or other corporation or association, or make appropriation, or loan its credit in aid of such corporation or association."

The Due Process Clause of the 14th Amendment to the Constitution of the United States reads as follows:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property,

without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

The Due Process Clause of the Mississippi Constitution, found at Article III, Section 14, reads as follows:

“No person shall be deprived of life, liberty, or property except by due process of law.”

The MCRP 12(b)(6) standard applicable to Blanton's attack on the Amended Complaint is whether or not the Amended Complaint states a cause of action upon which relief can be granted if all allegations therein are taken as true for motion argument purposes. Subsumed in that standard is the presumption that the legal theories pled are not barred as a matter of law. Such is the position of the City in its effort to have the Amended Complaint dismissed. Blanton's position is that the contract is unconstitutional. The pleading consideration under the MCRP 12(b)(6) standard necessarily includes consideration by the Court of the pleading allegations in and exhibits to the Amended Complaint, i.e., the Contract itself, among other attached exhibits.

Blanton, in his reply brief, notes that Groundworx cannot rely on House Bill 1529 to withstand a Constitutional challenge, because House Bill 1529 did not (and cannot) authorize a contract in violation of Section 183. Any contract terms must comply with constitutional mandates or be deemed void ab initio. That is the law, and, rightfully so. See also *Carothers v. Town of Booneville*, 169 Miss. 511, 153 So. 670 (1934).

Instructive is the holding in the case of *J. Love Co. v. Town Of Carthage*, 218 Miss. 11, 65 So.2d 568 (1953) addressing the authority set forth in what is now MCA Section 21-27-33, holding any acts conducted outside of the authority of the statute are ultra vires.

Section 21-27-33 of the Mississippi Code Annotated provides:

All municipalities of the state are hereby empowered and authorized, if they so desire, to sell, lease, or otherwise dispose of any or all electric, water, gas or other municipally-owned public utility systems or properties on such terms and conditions, and with such safeguards as will best promote and protect the public interest. Said municipal corporations are empowered and authorized to transfer title to said public utility properties by warranty deed, bill of sale, contract, or lease, in the manner provided by law. However, notice of intention to make such sale, lease, or disposition of any such system, setting out the price and other general terms and conditions of such proposed sale, lease, or disposition shall be given by publication, once a week for three consecutive weeks in a legal newspaper published in such municipality, and if no such newspaper be published in said municipality, then in some newspaper having a general circulation in such municipality. After ten days from the last publication of such notice, the system may be disposed of, unless within ten days after the last publication of such notice a petition signed by not less than twenty per centum of the qualified voters of such municipality be filed, objecting to and protesting against such sale, lease, or disposition, in which event the same shall not be made unless submitted to a special election ordered for the purpose of determining whether a majority of those voting in such election shall vote for or against such sale, lease, or other disposition. Such election shall be ordered to be held not less than forty days after the date of the last notice of the proposed sale, lease or disposition. Notice of such election, stating the purpose of election, shall be published once each week for three consecutive weeks next preceding the time set for holding said election in such newspaper as herein provided. The laws governing special municipal elections shall govern the ordering and conduct of said election.

The ballots provided shall have plainly written or printed thereon the words "shall the waterworks, electric, or gas (as the case may be) system be sold, leased, or disposed of (as the case may be)" and below said words shall be suitably placed on separate lines, the words "yes" and "no," so that the voter may indicate the way he desires to vote on the question submitted.

If a majority of those voting in said election shall vote in favor of such sale, lease, or disposition, then the proper officer of the municipality may proceed to sell, lease or dispose of such system in accordance with the terms and conditions set out in the notice of proposed intention to sell, lease or dispose of such system, as herein provided. If such election is determined against such sale, lease or disposition of such system, then such system shall not be sold, leased or disposed of, but shall remain the property of the municipality.

Blanton argues that the City's noncompliance with US and State of Mississippi environmental laws and regulations does not justify a contract violative of the Section 183 prohibition and due process. Blanton says the City could maintain a measure of control in the contract for the System and not rely solely on the private entity being fully in charge as the contract provides. That brings into play for consideration by the Court the criteria requirements of the *Brister* holding that management and control are necessary on the part of the governmental body where a public purpose is involved. The Court reads *Brister* to hold that a public purpose cannot survive without an element of management and control by the City. Under the contract now before the Court, the City has no control over the system and services contracted for a public purpose.

At argument, the City and Groundworx asserted that the Contract is one for services. The City suggested the agreement is a cost-plus contract. Is the contract one for services? If so, does a contract for services bear the same or different scrutiny under the law? The Court sees no distinction between construction and services in the instant case. The contract calls for construction by Groundworx of a wastewater system for the City of Hattiesburg. The services contracted for cannot be rendered prior to construction of a system over which Groundworx has full and complete control for planning, specifications, construction, ownership, and operation to be paid for by the City.

The contract recognizes the authority of MDEQ to deal with Groundworx in these areas. However, the contract specifically denies by agreement any control or management by the City over planning, specifications, construction and operation of the System called for. The Court interprets the public purpose control and management addressed in *Brister* to mean control and management by the contracting governmental entity and not just any governmental entity such as MDEQ in this case. The law does not allow the City to abdicate its responsibility of control and management, even by agreement and even to another governmental entity.

Again, the Court acknowledges that Section 2.3 of the Contract provides that the City remains the owner of the existing wastewater collection, transportation, storage, and/or treatment facilities owned by the City, and the City has sole responsibility therefor. However, as stated above, Section 2.1 clearly designates Groundworx as responsible for designing, building, owning, maintaining, and operating the wastewater system contracted for.

Groundworx cites *Albritton v. City of Winona*, 178 So. 799 (Miss.1938), wherein the Court held that a statute enacted by the legislature and taxes to be levied under it were for a legitimate public purpose, and that the only statutes that could be struck down under Section 183 were those

“strictly in aid of a private corporation.” *Id.* at 809. In *Albritton*, however, the City retained control of the operation in question whereas in this case, the contract by agreement affords the City no control or management, which is similar to the holding in *Carothers v. Town of Booneville*, *supra*, in which the proposed bond measure violated Section 183. “[T]hat the municipality was not authorized to operate a manufacturing enterprise itself, but only authorized to issue bonds for the purpose of erecting a factory and to purchase a lot for such purpose. The act is one strictly in aid of a private corporation, and it is well settled in this state that taxes cannot be levied for private purposes.” *Carothers*, *id.* at 671.

The Court in *Brister* held:

"The object and purpose of relator is a public purpose in the sense that it is being conducted for the public benefit, but it is not a public purpose within the meaning of our taxing laws, unless it is managed and controlled by the public." *Brister*, 125 So. at 818.

The Court notes that the *Burgess* case does not appear to be instructive here as it deals with standing of a resident as to action taken to specific property as opposed to standing of a taxpayer and property owner as to action that affects all taxpayers and property owners.

It is apparent to the Court from the pleadings, briefs, and argument of counsel that Groundworx could not secure financing for the Contract project without the aid of the City, which dissolved upon the Mayor’s veto of the rate increase ordinance passed by the City Council. Such an entanglement and conflict between the City and Groundworx is likely such a scenario as was contemplated in the drafting of Article VII, Section 183 of the Mississippi Constitution and the prohibitions contained therein, and the due process considerations that necessarily attach thereto.

CONCLUSION

The Court FINDS, ADJUDICATES AND ORDERS as follows:

The Court finds that the Contract between the City of Hattiesburg and Groundworx, styled "Agreement for the Treatment of Wastewater" and executed by the City of Hattiesburg, Mississippi on January 21, 2014 and by Groundworx, LLC on January 27, 2014, is not ambiguous and is integrated, and is tantamount to the City lending its credit or otherwise aiding Groundworx, a private company, in funding a public purpose project, over which the City contractually agreed it had no management or control for the public purpose to be served, contrary to the holding in *Brister, id.* Accordingly, the Court finds the Contract violates Article VII, Section 183 of the Mississippi Constitution and the due process clauses of the Mississippi Constitution (Article III, Section 14) and the United States Constitution (14th Amendment). The Court makes no such ruling as to House Bill 1529. Thus, the Agreement is hereby deemed void ab initio.

As such, the Constitutional issue is dispositive and no further issues need be addressed. Blanton's *Motion to Dismiss Groundworx's Amended Complaint* is GRANTED. Groundworx's *Amended Complaint* is hereby DISMISSED with prejudice.

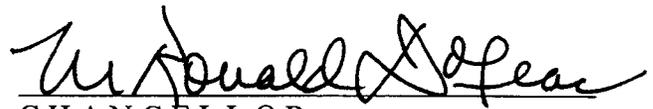
Further, the *City's Motion to Dismiss Groundworx's Amended Complaint* is deemed by the Court to be moot and is dismissed without prejudice. *Groundworx's Motion to Dismiss Blanton's Cross-Complaint in Intervention* is likewise deemed moot and dismissed without prejudice. Each party shall bear its own costs and fees.

Counsel for Blanton, Hon. Michael Adelman, is directed to prepare a Final Judgment per M.R.C.P. 54 consistent with the Court's findings and ruling herein and to submit same to counsel for

the City and to counsel for Groundworx for approval as to form only within 14 days of entry of this Memorandum Opinion and Ruling.

Notice of the filing of this Memorandum Opinion and Ruling, together with a filed copy thereof, shall be sent by the Clerk of the Court to counsel of record for the parties pursuant to MRCP 77(d).

SO ORDERED and ADJUDGED, this the 30th day of December, 2014.


CHANCELLOR