

CITY OF BILOXI
AGENDA ITEM
FACT SHEET

Item No.: 4D

Council Meeting Date: June 02, 2015

ITEM TITLE: RESOLUTION

INTRODUCED BY: Mayor Andrew "FoFo" Gilich

CONTACT PERSON: David Nichols, CAO

SUMMARY EXPLANATION: Resolution authorizing second amendment to Stadium Sublease and Use Agreement with Biloxi Baseball, LLC. regarding beneficial occupancy and reduction of liquidated damages.

Resolution Ordinance Public Hearing Routine Agenda

Exhibits for Review

Contract Minutes Plans/Maps Deed Lease

Other (Specify): Exhibit "A" and "B"

Submittal Authorization: Council President Mayor

STAFF RECOMMENDATION:

Staff recommends approval

COUNCIL ACTION: Motion By: _____ Second By: _____

Vote: Councilmember	Yes	No	Other	Councilmember	Yes	No	Other
Lawrence	___	___	___	Tisdale	___	___	___
Gines	___	___	___	Glavan	___	___	___
Newman	___	___	___	Fayard	___	___	___
Deming	___	___	___				

ACTION TAKEN:

GB/mw 060215hleg

Resolution No.

RESOLUTION AUTHORIZING SECOND AMENDMENT TO STADIUM
SUBLEASE AND USE AGREEMENT WITH BILOXI BASEBALL, LLC. REGARDING
BENEFICIAL OCCUPANCY AND REDUCTION OF LIQUIDATED DAMAGES

WHEREAS, in order to expedite the opening of the MGM Park Baseball Stadium it is necessary to modify some of the terms of the February 11, 2014, Stadium Sub-Lease and Use Agreement (the "Stadium Lease") between the City, Biloxi Baseball, LLC, Beau Rivage Resorts, Inc., and Overtime Sports Management, Biloxi, LLC, which has been previously amended; and,

WHEREAS, to facilitate the opening, the City of Biloxi is amending the construction contract with W. G. Yates & Sons Construction, Inc., ("Yates"), which will result in additional work to be performed and add additional costs; and,

WHEREAS, in consideration for entering into the Yates amendment expediting the opening date and resulting in an increase in the contract amount by \$200,000.00, Biloxi Baseball, LLC, has agreed to limit the liquidated damages referenced under Section 8(b) of the Stadium Lease to a total amount of \$100,000.00; and,

WHEREAS, to begin the baseball season with the June 6, 2015 home game Biloxi Baseball, LLC, will accept the facility for beneficial occupancy as that term is utilized in the Stadium Lease even though construction will continue to completion while the baseball season continues, and the date of that beneficial occupancy will begin when the stadium is made available by Yates to Biloxi Baseball, LLC, for its preparation for the first home game; and,

WHEREAS, the City of Biloxi avers that the tasks or requirements listed on the document attached hereto as Exhibit "B" have been completed, and Biloxi Baseball, LLC, agrees to execute a letter to the Mayor of Biloxi in substantially the form of Exhibit "B" confirming that those requirements or tasks listed therein have been completed; and

WHEREAS, certain notice provisions in Section 31 of the Stadium Lease should be amended to refer to the new City Administration;

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF BILOXI, MISSISSIPPI, AS FOLLOWS:

Section 1: The Mayor and Municipal Clerk are hereby authorized to execute a Second Amendment to Stadium Sublease and Use Agreement with the necessary parties thereto in substantially the form as the document attached hereto as Exhibit "A", and to do all things necessary and proper to carry out the terms of that amendment and the intent of this resolution.

Section 2: This resolution shall be in full force and effect from and after the date of its adoption.

EXHIBIT "A"
SECOND AMENDMENT TO STADIUM SUB-LEASE AND USE AGREEMENT

WHEREAS, on February 11, 2014, the City of Biloxi, Mississippi ("City") entered into a Stadium Sub-Lease and Use Agreement (the "Stadium Lease") with Biloxi Baseball, LLC ("Biloxi Baseball"), Beau Rivage Resorts, Inc., and Overtime Sports Management, Biloxi, LLC ("Overtime"), regarding the baseball stadium being constructed; and

WHEREAS, in March of 2015 those same parties executed a First Amendment to the Stadium Lease; and

WHEREAS, in order to facilitate the opening the Baseball Stadium contemplated by the Stadium Lease, the City and Biloxi Baseball, LLC, are now amending certain additional terms of that agreement;

NOW, THEREFORE, FOR AND IN CONSIDERATION OF the City entering into an amendment to the General Works contract with W. G. Yates & Sons Construction, Inc., increasing the Contract Sum to be paid by the City by \$200,000.00, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, including the mutual covenants and promises contained herein, Biloxi Baseball, LLC, and the City of Biloxi, Mississippi, hereby amend their February 11, 2014 Stadium Sublease and Use Agreement as follows:

SECTION ONE. Section 8(b) is hereby amended to read as follows:

(b) Biloxi Baseball Remedies. The City acknowledges that its covenant to have the Stadium available for Beneficial Occupancy on or before April 18, 2015, is of great importance to Biloxi Baseball, and that in the event the Stadium is not available for Beneficial Occupancy on or before April 18, 2015, Biloxi Baseball will suffer damages, the actual amount of which would be impractical or extremely difficult to determine, that the liquidated damages amounts set forth below are reasonable pre-estimates of what Biloxi Baseball's monetary damages would be in the event the Stadium is not available for Beneficial Occupancy on or before April 18, 2015, and it is the parties intention that the City provide Biloxi Baseball with liquidated damages to compensate Biloxi Baseball if the Stadium is not available for Beneficial Occupancy on or before April 18, 2015, rather than penalties to deter the City from breaching this Agreement and/or to punish the City. Therefore, in the event the Stadium is not available for Beneficial Occupancy on or before April 18, 2015, plus additional time for performance attributable to *force majeure*, as defined herein, then Biloxi Baseball will have the following available remedy:

Biloxi Baseball may suspend their performance of the Agreement until the Stadium is available for Beneficial Occupancy, and the City agrees to pay to Biloxi Baseball as liquidated damages an amount of \$10,000.00 per Club Home Game for each Club Home Game for which the Stadium is not available for Beneficial Occupancy after April 18, 2015, plus additional time for performance attributable to *force majeure*, as defined herein. The number of games to which this liquidated damages provision shall apply shall be determined according to the game schedule established by Biloxi Baseball in the

ordinary course of operations; however, the City shall not be held responsible for payment of the liquidated damages of \$10,000.00 per Club Home Game beyond a cap or maximum of ten (10) such Club Home Games—in other words, the liquidated damages shall not exceed \$100,000.00. Furthermore, if Biloxi Baseball and/or Overtime fail to carry out their respective obligations to obtain a Temporary Certificate of Occupancy and to obtain all approvals or waivers they may need from Major League Baseball, Minor League Baseball, and the Southern League of Minor League Baseball to begin Minor League Baseball play by the Biloxi Shuckers on June 6, 2015 at the Stadium in Biloxi, then the City shall not be obligated to pay any liquidated damages.

Biloxi Baseball and Overtime acknowledge and agree that the remedies set forth in this amended Section 8(b) shall be Biloxi Baseball's sole and exclusive remedies with respect to a breach of Section 8(a) by the City.

SECTION TWO. The parties agree that the Beneficial Occupancy Date, as that term is utilized in the Stadium Lease as amended, including but not limited to Section 8(a) and Section 1(h), shall be the date upon which the Stadium is made available by W. G. Yates & Sons Construction, Inc., and the City to Biloxi Baseball, LLC, for the team's preparation for the first home game, which shall be held on June 6, 2015; further Biloxi Baseball, LLC agrees to execute and deliver the attached letter (Exhibit "B") to the Mayor of Biloxi as soon as the contractor completes the listed items, but not later than the time of the first pitch of the first Club Home Game on June 6, 2015.

SECTION THREE. The parties acknowledge and confirm that it is the obligation of Biloxi Baseball, LLC, to communicate with Major League Baseball, Minor League Baseball, and the Southern League of Minor League Baseball to obtain all approvals or waivers they may need to begin Minor League Baseball play on June 6, 2015.

SECTION FOUR. Section 31 (b) [notice provision] is hereby amended to read as follows:

If to the City: Mayor Andrew "FoFo" Gilich
P.O. Box 429
Biloxi, MS 39533-0429

With a copy to: Gerald Blessey, City Attorney
P.O. Box 429
Biloxi, MS 39533-0429

SECTION FIVE. All other terms and conditions of the Stadium Lease, as amended, not specifically modified by this Amendment shall remain in full force and effect.

EXECUTED BY THE UNDERSIGNED WITH AN EFFECTIVE DATE of June 2, 2015.

PRIMARY SIGNATORIES:

CITY OF BILOXI, MISSISSIPPI

BILOXI BASEBALL, LLC

BY: _____
Mayor Andrew "FoFo" Gilich

BY: _____
Ken Young, Managing Partner

Municipal Clerk

NECESSARY CONSENTING SIGNATORIES PER STADIUM LEASE:

BEAU RIVAGE RESORTS, INC.

OVERTIME SPORTS
MANAGEMENT, BILOXI, LLC

BY: _____
George P. Corchis, Jr.

BY: _____

EXHIBIT "B"

Mayor Andrew "FoFo" Gilich
City of Biloxi, Mississippi
140 Lameuse Street
Biloxi, MS 39530

Dear Mayor Gilich:

This letter confirms that the following items the team has deemed necessary to begin Minor League Baseball games at MGM Park have been completed by the Contractor (Yates) to the satisfaction of Biloxi Baseball, LLC:

- * Playing field
- * Seats
- * Clubhouses and Umpires room, including Trainer and weight rooms
- * Batting Screens, field screens, batters eye, pitching warm up area, batting cages, pitching mounds
- * Dugouts, including bat/helmet racks
- * Concourse bathrooms
- * Food Service areas which have been turned over to Ovations
- * Scoreboard
- * Press box and radio rooms
- * North side box office
- * Outfield fence, padded, and padded dugout rails, foul poles, crowd protective netting, field and bullpen tarps
- * Service road behind first base side of stadium
- * I-110 netting

Witness my signature this ___ day of June 2015.

Biloxi Baseball, LLC

By: _____
Ken Young