

**IN THE CHANCERY COURT OF HARRISON COUNTY, MISSISSIPPI  
SECOND JUDICIAL DISTRICT**

**THE STATE OF MISSISSIPPI, BY AND THROUGH  
MICHAEL WATSON IN HIS OFFICIAL CAPACITY  
AS SECRETARY OF STATE<sup>1</sup>**

**PLAINTIFF**

**VERSUS**

**CAUSE NO. 19-515 (2)**

**RW DEVELOPMENT, LLC and  
THE CITY OF BILOXI, MISSISSIPPI**

**DEFENDANTS-COUNTER PLAINTIFFS**

**HARRISON COUNTY, MISSISSIPPI**

**INTERVENOR DEFENDANT-  
COUNTER PLAINTIFF**

**VERSUS**

**MICHAEL WATSON IN HIS OFFICIAL  
CAPACITY AS SECRETARY OF STATE  
AND FOR AND ON BEHALF OF THE  
STATE OF MISSISSIPPI**

**COUNTER- DEFENDANT**

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**THE CITY OF BILOXI'S AMENDED ANSWER TO COMPLAINT AND  
COUNTERCLAIM**

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**COMES NOW**, The City of Biloxi (“Biloxi” or “the City”), and files its Amended Answer to The Secretary of State’s Complaint and Counterclaim, and would respectfully show unto the Court, as follows:

The City incorporates by reference its Answer and Affirmative Defenses filed at DKT#15 to the Complaint (DKT#1) as if copied herein in full.

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<sup>1</sup> The Defendants object to characterization by the Secretary of State (“Secretary”) that he is the “Trustee” of the Tidelands in the heading and style of his *Verified Complaint* (DKT#1, ¶1). The State itself is the Trustee, not the Secretary.

**COUNTERCLAIM**

**PARTIES**

1. The City of Biloxi (“the City”) is a municipal corporation organized and existing under the laws of the State of Mississippi and is a political subdivision of the State of Mississippi. The City is the owner of Veterans Avenue and the littoral rights in the subject property, more particularly described in the proposed Lease Agreement (Ex. “1” herein, Ex. A therein) between the City and Harrison County, as Lessors, and RW Development LLC as Lessee, and the City is authorized, by statutes<sup>2</sup>, to develop and lease the Public Trust Tidelands portion of the property described in Ex. “1”, Ex. A therein. These statutes are specific statutes and control over general legislation such as the Public Trust Tidelands Act. As authorized by statute<sup>3</sup>, the City dissolved the Biloxi Port Commission in 2004, assumed the powers and duties of the Biloxi Port Commission and accepted ownership of its properties. The City owns the remnants of the Veterans Avenue pier and the littoral/riparian rights thereto. *See* Exh. “6” attached hereto and incorporated herein.

2. Michael Watson, in his official capacity as Secretary of State of the State of Mississippi (“Watson” or “Secretary”), claims to be the Trustee of the Public Trust for Tidelands, and under such color of claim, purports to act on behalf of the State of Mississippi in regard to the Public Trust Tidelands’ portion of the property described in Ex. “1”. The Secretary is the statutorily designated agent of the State of Mississippi in all suits involving public lands, and, as such, the State is bound by his actions herein and any relief granted by this Court. Michael Watson may be served with a copy of this Counterclaim by service upon

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<sup>2</sup> *Miss. Code Ann.*, §§ 21-37-13; 49-15-9; 59-1-17 (1); 59-7-401, *et seq.*; and 59-15-1, *et seq.*

<sup>3</sup> *Miss. Code Ann.*, §§ 59-7-405 (1) (b) and 59-7-408 (1).

his attorneys of record pursuant to *Miss. R. Civ. P. 5*.

3. RW Development, LLC, (“RW”) is a Mississippi limited liability company and is the proposed Lessee in the proposed Lease (Ex. “1”, Ex. A therein).

4. Harrison County, Mississippi, (“County”), a political subdivision of the State of Mississippi, is entrusted by statute<sup>4</sup>, as confirmed by Federal Court orders<sup>5</sup>, with the total authority and control of the Sand Beach property at issue in this action.

### **FACTUAL BACKGROUND**

5. The City is the owner in fee simple of the part of the Subject Property upland (north) of the seawall and is the owner of the littoral rights appurtenant to its ownership of the upland north of the seawall. (Ex. “2”). The City is also owner of the Veterans Avenue pier and the littoral/riparian rights therein.

6. The City, by and through its authority delegated to it by the State under municipal ports and harbors specific statutes,<sup>6</sup> has, for many decades, built, and maintained, many piers, docks, wharves, and harbors without having a tidelands lease issued by the Secretary. These statutes extend beyond the physical port or harbor and allow municipalities to develop piers and other infrastructure as an adjunct to developing ports and harbors, the tourist industry along the Gulf Coast, and to promote access to the Public Trust for Tidelands.

7. For many years prior to the Secretary’s Complaint, the City has built, maintained, and rebuilt a municipal pier at the extension of Veterans Avenue without the State

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<sup>4</sup> *Miss. Code Ann.* §65-33-1, *et seq.*

<sup>5</sup> *See, U.S.A. v. Harrison County, et al.*, 399 F.2d 485 (1968); 414 F.2d 784 (1969); 445 F.2d 276 (1971); 463 F.2d 1328 (1972); and unpublished *Final Judgment and addendum to Final Judgment*, in *United States v. Harrison County, Mississippi, et al.*, Cause No. 2262, U.S. Dist. Ct., S. Dist. Miss., S. Div. (Oct. 8, 1970.) (DKT#9-2 incorporated herein).

<sup>6</sup> *Miss. Code Ann.*, §§ 21-37-13; 49-15-9; 59-1-17 (1); 59-7-401, *et seq.*; and 59-15-1, *et seq.*

requiring the City to obtain a Public Trust Tidelands Lease to build, use and possess the City's municipal piers at the extension of Veterans Avenue.

8. For over 100 years the custom, practice, and acquiescence of the State has been to permit the City, pursuant to its statutory authority<sup>7</sup> pertaining to municipal ports, docks wharves, and harbors, to build and lease numerous piers, wharves, docks and harbors, without a lease from the State. Such acquiescence is because the State has authorized such development by the City via statutes.

9. The City is the owner of littoral rights in the part of the Subject Property in the Public Trust Tidelands south of the seawall in the area of the extension of Veterans Avenue, subject to the County's interests in the sand beach.

10. For over 100 years, the custom, practice, and acquiescence of the State has been to permit upland owners of littoral rights to build piers without a lease from the State. However, the Secretary of State has and continues to interfere with the City and County's rights in the Subject Property.

11. RW owns, in fee simple, real property bordering the east side of the Subject Property and bounded on the west by Veterans Avenue and on the south by the toe of the seawall, and RW owns the littoral rights that are appurtenant to its fee simple upland property.

12. The historic Buena Vista Hotel owned, used and possessed a pier and pavilions in the area of its littoral rights for many decades, without the State requiring it to obtain a Public Trust Tidelands Lease.

13. The historic Biloxi Hotel owned, used and possessed a pier in the area of its

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<sup>7</sup> *Ibid.*

littoral rights for many decades, without the State requiring it to obtain a Public Trust Tidelands Lease.

14. The historic Edgewater Hotel owned, used and possessed a pier in the area of its littoral rights for many decades, without the State requiring it to obtain a Public Trust Tidelands Lease.

15. The historic Tivoli Hotel owned, used and possessed a pier in the area of its littoral rights for many decades, without the State requiring it to obtain a Public Trust Tidelands Lease.

16. From, and after, 1900, many owners of upland parcels of residential property bordering the Mississippi Sound south of Highway 90 (formerly Front Street) built, owned, used and possessed piers and wharves in the areas of their littoral rights without the State ever requiring them to have a Public Trust Tidelands Lease. Specifically, the City, through its former Port Commission, constructed, maintained, and repaired the pier south of Veterans Avenue as an adjunct to its ports and harbors. Such improvements and littoral rights were transferred to the City upon the dissolution of the Biloxi Port Commission.

17. From, and after, 1900, many owners of upland parcels of commercial property, including, but not limited to, commercial seafood factories and tourism recreational facilities, bordering the Mississippi Sound south of Highway 90 (formerly Front Street) built, owned, used and possessed piers and wharves in the areas of their littoral rights without the State ever requiring them to have a Public Trust Tidelands Lease.

18. In the Secretary's Complaint (DKT#1), the Secretary has taken a position requiring the City to obtain a Public Trust Tidelands Lease to build and lease a municipal pier, but the Secretary's position is inconsistent with the State's historic laws, custom, practice, and

acquiescence of allowing littoral owners and municipal and county governments to build piers, docks, wharves, and harbors in Public Trust Tidelands without obtaining a lease from the State, and is inconsistent with the custom, practice and acquiescence of the Office of the Secretary of State in recent decades of allowing some private littoral owners and municipal governments to build piers, docks, wharves and harbors in Public Trust Tidelands without a lease from the Secretary of State. Further, the Secretary's position is contrary to specific statutory grant of authority to the City and County.

19. On April 7, 2021, the City of Biloxi passed Resolution No. 218-21 (Ex. "1") to lease the subject property (as more particularly described in Ex. "1" herein, Ex. A therein) to RW Development LLC ("RW") so that RW, at its expense, may construct and maintain a municipal pier thereon for general public use and non-exclusive private use.

20. Harrison County is entrusted by statutes<sup>8</sup> and confirmed by Federal Court orders<sup>9</sup> with the total authority and control of the Sand Beach, and has intervened in the Secretary's action against the City and RW. On April 5, 2021, the Harrison County Board of Supervisors adopted a resolution (Ex. "3" attached hereto and incorporated herein as if copied in full) authorizing the County to enter, with the City, the proposed Lease (Ex. "1" herein, Ex. A therein; and Ex. "3", Ex. A therein) to grant to RW, a non-exclusive leasehold of the County's interests in the subject property.

### **COUNT ONE**

21. The City incorporates by reference and re-alleges the allegations of paragraphs 1 through 20 of its Counterclaim as if copied herein in full.

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<sup>8</sup> *Miss. Code Ann.* §65-33-1, *et seq.*

<sup>9</sup> See, fn4, *supra*.

22. Pursuant to various statutes<sup>10</sup> regarding Ports and Harbors, including, without limitation, those set forth in Ex. “1” attached hereto, the Legislature of the State of Mississippi has delegated authority to the City and Harrison County to enter into the Lease set forth in Ex. “1” without the necessity of first entering into a Public Trust Tidelands Lease with the Secretary of State and the State of Mississippi.

23. Pursuant to *Miss. R. Civ. P. 57* the City seeks a Declaratory Judgment that:

- a. The City is the owner of Veterans Avenue and the upland portion of the Subject Property described in the attached Ex. “1”, along with the Veterans Avenue pier and the littoral/riparian rights thereto;
- b. The State delegated, by statutes, *Miss. Code Ann.*, §§ 21-37-13; 49-15-9; 59-1-17 (1); 59-7-401, *et seq.*; and 59-15-1, *et seq.*, to the City, certain authority over the Public Trust Tidelands portion of the subject property and empowered the City to enter into the Lease attached hereto in Ex. “1”, Ex. A therein, without obtaining a Public Trust Tidelands Lease from the Secretary of State;
- c. The State delegated, by statute, *Miss. Code Ann.* §65-33-1, *et seq.*, to Harrison County, the sole and exclusive authority over the Sand Beach, and, as such, authorized the County to enter into the Lease attached hereto in Ex. “1”, Ex. A therein, without obtaining a Public Trust Tidelands Lease from the Secretary of State;
- d. The City may lease its upland interest in the Subject Property, along with

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<sup>10</sup> *Miss. Code Ann.*, §§ 21-37-13; 49-15-9; 59-1-17 (1); 59-7-401, *et seq.*; and 59-15-1, *et seq.*

its littoral rights, to RW without a Public Trust Tidelands Lease from the Secretary of State or the State of Mississippi;

e. By virtue of entering the Lease described in Ex. “1”, Ex. A therein, RW may construct and maintain, at its expense, the improvements described in the attached Ex. “1” without obtaining a Public Trust Tidelands Lease from the Secretary of State or the State of Mississippi;

f. By virtue of *Miss. Code Ann.*, §§21-37-13; 49-15-9; 59-1-17 (1); 59-7-401, *et seq.*; 59-15-1, *et seq.*, 65-33-1, *et seq.*, and the various statutes cited in Ex. “1”, the Mississippi Legislature, acting on behalf of the Trustee, has delegated to the City and Harrison County, certain authority over Public Trust Tidelands authorizing the City and County to lease the Tidelands portion of the subject property described in the attached Ex. “1”, without obtaining a Public Trust Tidelands Lease from the Secretary of State or the State of Mississippi; and

g. The City and Harrison County may enter into the Lease (Ex. “1”, Ex. A therein) set forth within the attached Ex. “1” without the City, RW or Harrison County entering into a Tidelands Lease with the Secretary of State and/or the State of Mississippi.

## **COUNT TWO**

24. The City incorporates by reference the allegations of paragraphs 1 through 23 of its Counterclaim as if copied herein in full.

25. Based upon the Secretary of State and the State of Mississippi’s custom, practice, usage and acquiescence for over a century in allowing piers to be constructed by

political subdivisions and private entities along the Mississippi Sound and the Gulf of Mexico, and in particular, allowing the City to build and rebuild the municipal pier at Veterans Avenue on the subject property, without requiring the political subdivisions or the upland owners of littoral rights to enter a tidelands lease from the Secretary of State or the State of Mississippi, as is more fully described in the Affidavit of Mayor A. M. Gilich (Ex. “4” herein) and in the Affidavit of Jane Shambra (Ex. “5” herein), the State and the Secretary of State are equitably estopped from requiring a Public Trust Tidelands Lease be entered into prior to the City and Harrison County leasing the property described in the attached Ex. “1”.

26. Pursuant to *Miss. R. Civ. P. 57* the City seeks a Declaratory Judgment that:

a. The State and the Secretary of State are equitably estopped from requiring the City, County and RW, or RW individually, to enter into a Public Trust Tidelands Lease from the State or Secretary of State prior to, or subsequent to, the City and Harrison County leasing to RW the property described in the attached Ex. “1”;

b. By virtue of entering the Lease described in Ex. “1”, Ex. A therein, RW may construct and maintain, at its expense, the improvements described in the attached Ex. “1” without obtaining a Public Trust Tidelands Lease from the Secretary of State or the State of Mississippi;

c. The City and Harrison County may enter into the Lease (Ex. “1”, Ex. A therein) set forth within the attached Ex. “1” without the City, RW or Harrison County entering into a Tidelands Lease with the Secretary and/or the State of Mississippi; and

d. The City is the owner of the Veterans Avenue pier, along with the

littoral/riparian rights thereto.

**PRAYER FOR RELIEF**

27. The City incorporates by reference the allegations of paragraphs 1 through 26 of the Counterclaim as if copied herein in full.

**WHEREFORE**, the City of Biloxi respectfully requests that the Court enter a Declaratory Judgment pursuant to *Miss. R. Civ. P. 57* finding and declaring that:

a. The City is the owner of Veterans Avenue, the Veterans Avenue pier, the littoral/riparian rights thereto, and the upland portion of the Subject Property described in the attached Ex. “1”;

b. The State delegated, by statutes, *Miss. Code Ann.*, §§ 21-37-13; 49-15-9; 59-1-17 (1); 59-7-401, *et seq.*; and 59-15-1, *et seq.*, to the City, certain authority over the Public Trust Tidelands portion of the Subject Property and empowered the City to enter into the Lease attached hereto in Ex. “1”, Ex. A therein, without obtaining a Public Trust Tidelands Lease from the Secretary of State;

c. The State delegated, by statute, *Miss. Code Ann.* §65-33-1, *et seq.*, to Harrison County, the sole and exclusive authority over the Sand Beach, and, as such, authorized the County to enter into the Lease attached hereto in Ex. “1”, Ex. A therein, without obtaining a Public Trust Tidelands Lease from the Secretary of State;

d. The City may lease its upland interest in the Subject Property, along with its littoral rights, to RW without a Public Trust Tidelands Lease from the Secretary of State or the State of Mississippi;

e. By virtue of entering the Lease described in Ex. “1”, Ex. A therein, RW may construct and maintain, at its expense, the improvements described in the attached Ex. “1”

without obtaining a Public Trust Tidelands Lease from the Secretary of State or the State of Mississippi;

f. By virtue of *Miss. Code Ann.*, §§21-37-13; 49-15-9; 59-1-17 (1); 59-7-401, *et seq.*; 59-15-1, *et seq.*, 65-33-1, *et seq.*, and the various statutes cited in Ex. “1”, the Mississippi Legislature, acting on behalf of the Trustee, has delegated to the City and Harrison County, certain authority over Public Trust Tidelands authorizing the City and County to lease the Tidelands portion of the subject property described in the attached Ex. “1”, without obtaining a Public Trust Tidelands Lease from the Secretary of State or the State of Mississippi. Such specific statutes take precedence over the general Public Trust Tidelands Act, and the activities are not limited to activities solely within a port or harbor but extend to piers and other improvements made as an adjunct to such ports and harbors and in furtherance of development of such ports and harbors, the tourist industry, and access to the Public Trust Tidelands; and

g. The City and Harrison County may enter into the Lease (Ex. “1”, Ex. A therein) set forth within the attached Ex. “1” without the City, RW or Harrison County entering into a Tidelands Lease with the Secretary and/or the State of Mississippi.

**IN ADDITION TO, OR IN THE ALTERNATIVE TO**, the foregoing prayer for declaratory judgment, the City of Biloxi respectfully requests that the Court enter a Declaratory Judgment pursuant to *Miss. R. Civ. P. 57* finding and declaring that:

h. The State and the Secretary of State are equitably estopped from requiring the City, County and RW, or RW individually, to enter into a Public Trust Tidelands Lease from the State or Secretary of State prior to, or subsequent to, the City and Harrison County leasing to RW the property described in the attached Ex. “1”;

i. By virtue of entering the Lease described in Ex. “1”, Ex. A therein, RW may

construct and maintain, at its expense, the improvements described in the attached Ex. “1” without obtaining a Public Trust Tidelands Lease from the Secretary of State or the State of Mississippi;

j. The City and Harrison County may enter into the Lease (Ex. “1”, Ex. A therein) set forth within the attached Ex. “1” without the City, RW or Harrison County entering into a Tidelands Lease with the Secretary and/or the State of Mississippi; and

k. The City is the owner of the Veterans Avenue pier and the littoral/riparian rights thereto.

And the City prays for any other relief to which the City may be entitled at law, or in equity, as the Court may deem proper.

This the 7<sup>th</sup> day of June, 2021.

Respectfully submitted,

***THE CITY OF BILOXI, MISSISSIPPI***

BY: */s/ Michael E. Whitehead*  
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*And*

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**CERTIFICATE OF SERVICE**

I, Michael E. Whitehead, of the law firm of Page, Mannino, Peresich & McDermott, PLLC, hereby certify that I have electronically filed the foregoing with the Clerk of the Court by using the MEC system, which sent notification to all parties who have appeared in this case

This, the 7<sup>th</sup> day of June, 2021.

**/s/ Michael E. Whitehead**

**MICHAEL E. WHITEHEAD, MSB #8891**

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