

**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**

PLAINTIFF

VERSUS

CAUSE NO. 19-515 (2)

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

DEFENDANTS-COUNTER PLAINTIFFS

HARRISON COUNTY, MISSISSIPPI

**INTERVENOR-
COUNTER PLAINTIFF**

VERSUS

**MICHAEL WATSON IN HIS OFFICIAL
CAPACITY AS SECRETARY OF STATE**

COUNTER- DEFENDANTS

**HARRISON COUNTY, MISSISSIPPI'S
AMENDED ANSWER TO COMPLAINT AND COUNTERCLAIM**

COMES NOW, INTERVENOR/COUNTER-PLAINTIFF, HARRISON COUNTY, MISSISSIPPI by and through its Board of Supervisors (hereinafter "Harrison County"), and files its Amended Answer to The Secretary of State's Complaint and Counterclaim, and would respectfully show unto the Court, as follows:

Harrison County incorporates by reference its Answer to Complaint together with Exhibits thereto filed at DKT#17 as if copied herein in full pursuant to *Miss. R. Civ. P.* Rule 10(c).

Harrison County adopts and incorporates by reference the Counterclaims of the Defendants-Counter-Plaintiffs, RW DEVELOPMENT, LLC and THE CITY OF BILOXI, MISSISSIPPI together with Exhibits thereto including the prayers for relief as if copied herein in full pursuant to *Miss. R. Civ. P.* Rule 10(c).

COUNTERCLAIM
PARTIES

1. Intervenor/Counter Plaintiff, Harrison County, Mississippi (hereinafter “Harrison County”) is a political subdivision of the State of Mississippi.

2. Pursuant to specific statutory authority and a Federal Judgment the County has specific authority over and is the owner of the Harrison County Sand Beach which includes a portion of the subject property, more particularly described in the proposed Lease Agreement (Exhibit “1” herein, Exhibit A thereto) between the City of Biloxi and the County, as Lessors, and RW Development LLC as Lessee.

3. Plaintiff/Counter-Defendant, Michael Watson, in his official capacity as Secretary of State of the State of Mississippi (hereinafter “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 Exhibit “1”. Michael Watson may be served with a copy of this Amended Answer to The Secretary of State’s Complaint and Counterclaim by service upon his attorneys of record pursuant to *Miss. R. Civ. P. 5*.

4. The Defendant/Counter-Plaintiff, The City of Biloxi (hereinafter “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 of Biloxi is the owner of a portion of the subject property, more particularly described in the proposed Lease Agreement (Exhibit “1” herein, Exhibit A thereto) between the City of Biloxi and the County, as Lessors, and RW Development LLC as Lessee

5. The Defendant/Counter-Plaintiff, RW Development, LLC, (hereinafter “RW”) is a Mississippi limited liability company and is the proposed Lessee in the proposed Lease (Exhibit “1”, Exhibit A thereto) which includes the subject property.

The County’s Specific Authority under the Law

6. The Mississippi Legislature **specifically** granted the authority to the County, by and through its Board of Supervisors of Harrison County by virtue of *Miss. Code Ann.* §65-33-55(2)(5):

To assume perpetual ownership of any beach construction and its administration for public use only...

7. In addition, thereto, *Miss. Code Ann.*, §49-15-9, Codes 1942, §6047-1024, *Miss. Laws, 1960*, Ch. 173, § 10; *Miss. Laws, 1962*, Ch. 193, § 10; *Miss. Laws, 1991*, Ch. 438, §1; *Miss. Laws, 2020*, Ch. 319, §1, specifically grants the County and the City authority as follows, in part:

All bathhouses, **piers**, wharfs, **docks** and pavilions, or other structures owned by riparian owner **are likewise the private property of such owner**.... The governing authorities of any municipality and **the board of supervisors of any county** are authorized to adopt reasonable rules and regulations to protect riparian owners in the enjoyment of their riparian rights, and for such purposes **may regulate the use of beaches, landings, and riparian areas abutting or fronting on roads, streets, or highways.**

(Emphasis added).

8. These specific statutes, being *Miss. Code Ann.* §65-33-55(2)(5) and §49-15-9 control over general legislation such as the Public Trust Tidelands Act, contrary to the claims of the Secretary of State.

9. The Secretary of State is not included in nor even mentioned in any of these specific statutory authorities, and the Legislature changed nothing in these specific statutes by

the “general law” dealing with Public Trust Tidelands Legislation of 1989 (Tidelands Act) *Miss. Code Ann.*, §§29-15-1, *et seq.*

10. Both of these *specific* statutes *Miss. Code Ann.* §65-33-55(2)(5)¹ and §49-15-9 specifically grants authority over the sand beach and the use of beaches, landings, and riparian areas abutting or fronting on roads, streets or highways to the Harrison County Board of Supervisors.

The Federal Judgment

11. On or about October 8, 1970 a Federal Judgment was entered in *U.S. v. Harrison County, et al.*, Cause #2262, U.S. Dist. Ct., S. Dist. Miss., S. Div., Oct. 8, 1970, *Final Judgment*, p. 5, ¶III (unpublished) (see DKT#32-1, adopted by reference).

12. The Attorney General for the State of Mississippi² and the Secretary of State³ for the State of Mississippi both participated in said civil action either as representatives and/or parties thereto⁴.

13. The aforesaid Federal Judgment enjoined both the State of the Mississippi and Harrison County as it’s “political subdivision” as follows:

The right to zone, maintain, clean, repair and replenish the sand beach, the right to remove any structures existing in violation of this judgment, and **the right to adopt and enforce reasonable regulations with respect to the use of the beach** by the general public **are all vested in the Board of Supervisors of Harrison County**, subject to the rights of the general public set forth in this judgment....”

(Emphasis added).

¹ Specifically granting to the Harrison Count Board of Supervisors the authority to assume perpetual ownership of any beach construction and its administration for public use only

² Joe T. Patterson, Atty. Gen., Dugas Shands, Asst. Atty. Gen., John A. Welsch, Jr., Jackson, Miss. for appellees. See *U.S. v Harrison County, et al.*, 399 F. 2d at p. 485 (1968).

³ Heber Ladner, Sec. of State, State of Miss., Jackson, Miss....for defendants-appellants; see *U.S. v Harrison County, et al.*, 445 F. 2d at p. 276 (1971).

⁴ *Id.*

14. The *Final Judgment* further held that the sand beach is:

subject to the reasonable exercise of any power vested in the state of Mississippi, or its duly authorized political subdivisions, or municipalities, to create, operate and maintain aids to navigation, including marinas, small craft harbors, docks, **piers**, wharves....

Id., *Final Judgment*, p. 5 ¶IV (DKT#9-2-adopted by reference).

15. Further, the Fifth Circuit Court of Appeals in reviewing aforesaid statute [*Miss. Laws of 1948*, Ch. 334 (now *Miss. Code Ann.*, §65-33-51)] stated:

It would be difficult to conceive of a more positive, complete, thorough, or *unlimited grant of authority* to comply with the requirements of a federal program. This was not only the solemn legislative enactment of a sovereign state *but was, in effect, a grant directly from the property owner of*

U.S. v Harrison County, et al., 399 F. 2d 485, 488-489 (1968).

16. Further, the Federal Judgment specifically provided that:

This judgment is complex in nature and in character, and this court expressly retains and reserves full jurisdiction to issue any process for the necessary protection of the parties, and **the necessary enforcement of any and every provision of this judgment to the end that this court may see to it that its provisions are carefully respected and observed, and complied with in every detail as herein provided.**

Final Judgment, p. 7 ¶IX (DKT#9-2-adopted by reference). (Emphasis added).

17. The State of Mississippi and the Plaintiff, Michael Watson, as Secretary of State of the State of Mississippi, are bound under the principles of *res judicata* and/or judicial estoppel and/or collateral estoppel and/or equitable estoppel by said Final Judgment, which remains in full force and effect, in *U.S. v. Harrison County, et al.*, Cause #2262, U.S. Dist. Ct., S. Dist. Miss., S. Div., Oct. 8, 1970, *Final Judgment*, (DKT#9-2-adopted by reference) and cannot act contrary thereto.

18. Further the Federal Final Judgment, in *U.S. v. Harrison County, et al.*, Cause

#2262, U.S. Dist. Ct., S. Dist. Miss., S. Div., Oct. 8, 1970, *Final Judgment*, (DKT#9-2-adopted by reference) is entitled to the full faith and credit of this Honorable Court.

19. Harrison County, Mississippi, (“County”), a political subdivision of the State of Mississippi, is entrusted by specific statutes as adopted by the Mississippi Legislature as confirmed by said Federal Court Judgment above⁵, with the total authority and control of the Sand Beach property at issue in this action.

FACTUAL BACKGROUND

20. The County adopts by reference the allegations set forth hereinabove.

21. The City of Biloxi 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. (Exhibit “2”).

22. “Harrison County”, by and through its authority delegated to it by the Mississippi Legislature under the specific statutes and by the Federal Final Judgment set forth above has, for many decades, built, maintained, and administered the sand beach for public use without having a tidelands lease issued by the Secretary, and the Secretary has contributed nothing thereto.

23. For decades the custom, practice, and acquiescence of the State has been to permit “Harrison County”, pursuant to its statutory authority set forth above pertaining to sand beach the right to administer for public use, zone, maintain, clean, repair and replenish the sand

⁵ 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).

beach, the right to place and/or remove any structures existing in violation of the judgment, and the right to adopt and enforce reasonable regulations with respect to the use of the beach by the general public without a lease from the State. Such acquiescence is because the Mississippi Legislature has specifically authorized via specific statutory authority and Federal Court Judgment controls under the principles of *res judicata* and/or judicial estoppel and/or collateral estoppel and/or equitable estoppel.

24. Harrison County is the “perpetual” “owner” of the sand beach south of the seawall in the area of the extension of Veterans Avenue, subject to the City’s interests as an upland owner of littoral rights.

25. 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.

26. 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.

27. In the Secretary’s Complaint (DKT#1), the Secretary has taken a position requiring Harrison County to obtain a Public Trust Tidelands Lease, 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 The County.

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

29. The County is entrusted by statutes set forth hereinabove and confirmed by Federal Court Final Judgment with the total and perpetual 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 (Exhibit "3" attached hereto and incorporated herein as if copied in full) authorizing the County to enter, with the City, the proposed Lease (Exhibit "1" herein, Exhibit A thereto; and Exhibit "3", Exhibit A thereto) to grant to RW, a non-exclusive leasehold of the County's interests in the subject property for the sole purpose of constructing and maintaining a handicap-accessible pier for general public use and non-exclusive private use.

COUNT ONE

30. Harrison County incorporates by reference and re-alleges the allegations of paragraphs 1 through 29 of its Counterclaim as if copied herein in full.

31. Pursuant to various statutes set forth herein, the Legislature of the State of Mississippi has delegated to the City and Harrison County specific authority to enter into leases such as the Lease set forth in Exhibit "1" without the necessity of first entering into a Public

Trust Tidelands Lease with the Secretary of State and the State of Mississippi.

32. Pursuant to *Miss. R. Civ. P. 57* Harrison County 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 Exhibit “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 as Lease, such as the Lease attached hereto in Exhibit “1”, Exhibit A thereto, 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 Exhibit “1”, Exhibit A thereto, 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 Exhibit “1”, Exhibit A thereto, RW may construct and maintain, at its expense, for public use and non-exclusive private use the improvements described in the attached Exhibit “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 Exhibit “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 Harrison County to lease the Tidelands portion of the subject property described in the attached Exhibit “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 authorized to enter into the Lease (Exhibit “1”, Exhibit A thereto) set forth within the attached Exhibit “1” without Harrison County, RW or Harrison County entering into a Tidelands Lease with the Secretary of State and/or the State of Mississippi;
 - h. The Federal Court Final Judgment is entitled to the full faith and credit of this Honorable Court;
 - i. The Federal Court Final Judgment is *res judicata* to the claims of the Counter-Defendant, The State of Mississippi by and through the Secretary of State that Secretary of State not Harrison County has authority over the sand beach;
 - j. The Counter-Defendant, The State of Mississippi by and through the Secretary of State is judicially estopped to assert he has authority over the sand beach by the Federal Court Final Judgment;
 - k. The Counter-Defendant, The State of Mississippi by and through the Secretary of State is collaterally estopped to assert he has authority over the sand beach by the Federal Court Final Judgment;
 - l. The Counter-Defendant, The State of Mississippi by and through the Secretary of State should be equitably estopped to assert he has authority over the sand beach by the

Federal Court Final Judgment.

COUNT TWO

33. Harrison County incorporates by reference the allegations of paragraphs 1 through 32 of its Counterclaim as if copied herein in full.

34. 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 (Exhibit "4" herein) and in the Affidavit of Jane Shambra (Exhibit "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 Exhibit "1".

35. Pursuant to *Miss. R. Civ. P. 57* Harrison County 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 Exhibit "1";
- b. By virtue of entering the Lease described in Exhibit "1", Exhibit A thereto, RW may construct and maintain, at its expense, the improvements described in the attached Exhibit "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 (Exhibit “1”, Exhibit A thereto) set forth within the attached Exhibit “1” without “The City”, RW or Harrison County entering into a Tidelands Lease with the Secretary and/or the State of Mississippi.

PRAYER FOR RELIEF

36. Harrison County incorporates by reference the allegations of paragraphs 1 through 35 of the Counterclaim as if copied herein in full.

WHEREFORE, Harrison County respectfully requests that the Court enter a Declaratory Judgment pursuant to *Miss. R. Civ. P. 57* as hereinabove set forth finding and declaring that:

- a. The City is the owner of Veterans Avenue and the upland portion of the Subject Property described in the attached Exhibit “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 Exhibit “1”, Exhibit A thereto, 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 The County, the sole and exclusive authority over the Sand Beach, and, as such, authorized the County to enter into the Lease attached hereto in Exhibit “1”, Exhibit A thereto, without obtaining a Public Trust Tidelands Lease from the Secretary of State;
- d. Harrison County may lease in the Subject Property to RW to construct and

maintain, at its expense and at no cost to the taxpayers of Harrison County, a handicap accessible municipal pier thereon for general public use and non-exclusive private use 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 Exhibit “1”, Exhibit A thereto, RW may construct and maintain, at its expense, the improvements described in the attached Exhibit “1” for general public use and non-exclusive private use 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 Exhibit “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 Exhibit “1”, for general public use and non-exclusive private use 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 or reclamation of Public Trust Tidelands; and

g. The City and Harrison County have authority to enter into the Lease (Exhibit “1”, Exhibit A thereto) set forth within the attached Exhibit “1” for general public use and non-exclusive private use without the City”, RW or Harrison County entering into a Tidelands Lease with the Secretary and/or the State of Mississippi;

h. The Federal Court Final Judgment is entitled to the full faith and credit of this

Honorable Court;

i. The Federal Court Final Judgment is *res judicata* to the claims of the Counter-Defendant, The State of Mississippi by and through the Secretary of State to any authority over the sand beach;

j. The Counter-Defendant, The State of Mississippi by and through the Secretary of State is judicially estopped to assert any authority over the sand beach by the Federal Court Final Judgment;

k. The Counter-Defendant, The State of Mississippi by and through the Secretary of State is collaterally estopped to assert any authority over the sand beach by the Federal Court Final Judgment;

l. The Counter-Defendant, The State of Mississippi by and through the Secretary of State should be equitably estopped to assert any authority over the sand beach by the Federal Court Final Judgment.

IN ADDITION TO, OR IN THE ALTERNATIVE TO, the foregoing prayer for declaratory judgment, t the County respectfully requests that the Court enter a Declaratory Judgment pursuant to *Miss. R. Civ. P. 57* as hereinabove set forth finding and declaring that:

m. The State and the Secretary of State are equitably estopped from requiring the City, The 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 Exhibit “1”;

n. By virtue of entering the Lease described in Exhibit “1”, Exhibit A thereto, RW may construct and maintain, at its expense, the improvements described in the attached Exhibit “1” for general public use and non-exclusive private use without obtaining a Public Trust Tidelands

Lease from the Secretary of State or the State of Mississippi;

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

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

Respectfully submitted this the 7th day of June, 2021.

Respectfully submitted,
HARRISON COUNTY, MISSISSIPPI by and
through Its Board of Supervisors,
INTERVENOR/COUNTER-PLAINTIFF

BY AND THROUGH ITS COUNSEL OF
RECORD

BOYCE HOLLEMAN AND ASSOCIATES

By: s/ Tim C. Holleman

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CERTIFICATE OF SERVICE

I, Tim C. Holleman, do hereby certify that I have this day filed the foregoing with the Clerk of the Court using the MEC system which sent notification and a copy to all counsel of record.

This the 7th day of June 2021.

/s/ Tim C. Holleman

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