

**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/COUNTER-DEFENDANT

VERSUS

CAUSE NO. CH2:19-515 (2)

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

DEFENDANTS/COUNTER-PLAINTIFFS

HARRISON COUNTY, MISSISSIPPI

**INTERVENOR DEFENDANT/
COUNTER-PLAINTIFF**

FINAL DECLARATORY JUDGMENT

THIS CAUSE having come on to be heard on The City of Biloxi, Harrison County, and RW Development LLC's Motion for Summary Judgment for Declaratory Judgment (Dkt. No. 46) and the Secretary of State/State of Mississippi's Renewed Motion for Summary Judgment for Declaratory Judgment (Dkt. No. 50)¹, and the Court having heard these motions, hereby **DENIES** the Secretary of State/State of Mississippi's Renewed Motion for Summary Judgment (Dkt. No 50), **GRANTS** the City of Biloxi, Harrison County, and RW Development LLC's Motion for Summary Judgment (Dkt. No. 46), makes the following Findings of Fact and Conclusions of Law, and enters this Final Judgment in this action on the various claims raised by the parties, to wit:

1. The parties all agree that the material facts in this action are undisputed, the decision hereon is based upon an interpretation of applicable law, and the Court should therefore proceed to Final Declaratory Judgment.

¹ The City of Biloxi, Harrison County, RW and the Secretary/State of Mississippi acknowledged and agreed at the hearing on their respective motions that the relief sought by the various motions was for declaratory relief pursuant to *Miss. R. Civ. P. 57* as opposed to *Miss. R. Civ. P. 56*.

2. Veterans Avenue is a street located within the borders of the City of Biloxi (“the City”). The City is the owner of the fee simple land comprising the right-of-way of Veterans Avenue which extends south of Highway 90 to the Harrison County Seawall. *See* Dkt. No. 46, Ex. “3”. For many decades prior to this litigation, the Biloxi Port Commission constructed, maintained, and re-constructed a pier immediately south of the Harrison County sand beach at the extension of Veterans Avenue, without having a tidelands lease from the Secretary of State (the “Secretary”). Hurricane Katrina destroyed the pier, and the remnants thereof remain in the water. *See* Dkt. No. 46, Exhibits 4 and 5. The Biloxi Port Commission was dissolved and conveyed its interest in the Veterans Avenue pier, including littoral rights, to the City.

3. Since December 22, 1950, Harrison County (“the County”) assumed perpetual ownership of the beach construction and its administration for public use only² by resolution of the Harrison County Board of Supervisors in Minute Book 50, pgs. 439-50. In 1924, the Mississippi Legislature adopted Chapter 319, Laws 1924, codified in *Miss. Code Ann.* §65-33-1 *et seq.*, that authorized Boards of Supervisors of counties abutting the Mississippi Sound to exercise the right of eminent domain to procure a right-of-way for seawalls, bulkheads, sloping beaches and other road protection structures, and to construct such improvements. In 1948, the Mississippi Legislature adopted Chapter 334, Laws 1948, codified in *Miss. Code Ann.* §65-33-51, approving Federal participation in building a sloping sand beach south of the seawall in Harrison County. Pursuant to this specific Legislative authority, the County entered into a contract for Federal funds in which it agreed to ensure perpetual public use of the beach and its administration by the County for public use.

² Federal Courts have found and held that the County has sole authority over the sand beach authorized by the State and ordered by injunction of the Federal Courts. *See*, pg. 1 of the addendum to the *Final Judgment, U.S.A. v. Harrison County, et al.*, Cause No. 2262 (S.D. Miss. 1970) (Dkt. No. 9-2) and *United States v. Harrison County*, 399 F.2d 485 (5th Cir. 1968).

4. On May 17, 1960, the United States filed suit, *United States v. Harrison County, Mississippi et al.*, Civil Action No. 2262 (S.D. Miss. 1960) putting in issue the ownership, control, and use of the sand beach. During the 1960's and early 70's, the Fifth Circuit rendered opinions on various phases of the litigation on four separate occasions. See *U.S. v. Harrison County*, 399 F.2d 485 (5th Cir. 1968)³; *U.S. v. Harrison County*, 414 F.2d 784 (5th Cir. 1969); *U.S. v. Harrison County*, 445 F.2d 276 (5th Cir. 1971)⁴; and *U.S. v. Harrison County*, 463 F.2d 1328 (5th Cir. 1972). The District Court entered an unpublished *Final Judgment and Addendum to Final Judgment* (Dkt. No. 9-2) setting forth the law pertaining to the sand beach and held that the Harrison County Board of Supervisors was and is charged with the responsibility in all areas of the Sand Beach pursuant to state statutes and the Final Judgment of the United States District Court. The Final Judgment specifically enjoined both the State and Harrison County as its "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).

U.S. v. Harrison County, et al., Cause #2262⁵, U.S. Dist. Ct., S. Dist. Miss., S. Div., Oct. 8, 1970, *Final Judgment*, p. 5, ¶III (unpublished) (Dkt. No. 32-1, adopted by reference).

5. RW Development LLC ("RW") owns and operates tourism businesses on real property adjacent to Veterans Avenue. The area within walking distance of Veterans Avenue includes an amusement park, hotels, and numerous waterfront restaurants. The area also includes

³ The State of Mississippi was represented by 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).

⁴ See 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).

⁵ The State of Mississippi was involved in these proceedings, including the Secretary of State. See 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); 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).

a public east and west boardwalk along the top of the sea wall that intersects with the extension of Veterans Avenue.

6. RW, the City and the County sought to restore the Veterans Avenue Pier and make it a public handicapped-accessible pier bordering the sand beach in Harrison County through a public private partnership and at no cost to the taxpayers.

7. The City passed Resolution No. 438-19 (Dkt. No. 1, Ex. “B” therein, Ex. “A” therein) authorizing the Mayor and City Clerk to enter into an Option Agreement with RW to lease certain areas south of Veterans Avenue from the Harrison County Seawall through the sand beach and out into the waters and submerged land of the Public Trust Tidelands in the area bordered by the extension of the boundaries of Veterans Avenue for RW to construct, maintain and operate a handicapped-accessible public pier at the site of the former City pier. The Secretary⁶ then initiated this action seeking a declaratory judgment that, by virtue of *Miss. Code Ann.* §29-1-107 and *Miss. Code Ann.* §11-11-7, the Secretary is the sole and exclusive authority to lease Public Trust Tidelands, that the City had no authority to lease the subject property⁷ to RW, and that preliminary and permanent injunctive relief should issue against the actions of the City and RW. The County intervened in this action as a party defendant and subsequent to such intervention, the City and County passed Resolutions [Dkt. Nos. 42-1 and 42-3] to enter into a lease with RW. The Secretary filed the State’s original Motion for Summary Judgment (Dkt. No. 21), which this Court denied in its Order entered on May 28, 2021 (Dkt. No. 39), and granted the City, County and RW leave to file counterclaims against the Secretary asserting that, pursuant to the municipal Ports and Harbors statutes discussed *infra* and the statutory authority and Federal Judgment granting authority to the

⁶ At the time this action was filed, Delbert Hosemann was the Secretary. He has since been succeeded by Michael Watson.

⁷ The City/County Lease to RW also includes an option for RW to use air rights and base locations north of the seawall to build a handicapped-accessible pedestrian overpass over Highway 90.

County, the City and County have authority to enter into the Lease with RW in a public private partnership to rebuild the Veterans Avenue pier as a handicapped-accessible pier for the use of the public, and further asserting in the alternative that by virtue of the State's acquiescence, for many decades, in the City's building of piers on tidelands without a State lease, the State is estopped from requiring a lease from the Secretary. Thereafter the City, County, and RW filed their joint Motion for Summary Judgment for Declaratory Judgment (Dkt. No. 46), and the Secretary filed the State's Renewed Motion for Summary Judgment (Dkt. No.50).

8. The following facts are uncontested by the parties:

- a. Veterans Avenue is a street owned in fee simple by the City and located within the City's borders;
- b. For many decades prior to this litigation the Biloxi Port Commission built, operated, and reconstructed a pier at the foot of Veterans Avenue, all without a Tidelands Lease;
- c. The Biloxi Port Commission was dissolved and conveyed the pier and all of the Port Commission's rights to the City;
- d. The pier was destroyed by Hurricane Katrina in 2005, but remnants remain;
- e. Through a public/private partnership, the City, County and RW have entered into a lease whereby RW will construct, at no cost to the taxpayers, a handicapped-accessible public pier at the site of the former Veterans Avenue pier;
- f. The pier will be a public, handicapped-accessible pier constructed, operated, and maintained by RW under the supervision of the City and County;
- g. The pier will serve higher public purposes of the Public Trust for Tidelands by providing public access to the Tidelands, aid to marine navigation and commerce, promotion of tourism and recreation, and promotion of trade in the Port of Biloxi; and
- h. As a handicapped-accessible pier, the Pier would promote the purposes of the American's With Disabilities Act and be in furtherance of the U.S. District Court's Judgment requiring the County to provide access to the public including people with disabilities in accordance with Civil Rights laws of the United States.

9. This case is not a boundary dispute. The parties do not contest that the Sand Beach is reclaimed, as specifically authorized by the Legislature, Public Trust Tidelands, nor do they contest that the remnants of the Veterans Avenue pier and the site of the proposed new pier are located within Public Trust Tidelands. They do not contest that title to Public Trust Tidelands is vested in the State of Mississippi.

10. At issue is whether the Legislature's grant of the right of reclamation of Public Trust Tidelands or bottomlands pursuant to *Miss. Code Ann.* §59-15-1 and *Miss. Code Ann.* §59-7-405 to municipalities bordering the Mississippi Gulf Coast is itself an act which vests authority in those municipalities to use, lease, encumber and develop the land reclaimed without an additional lease from the State. In addition to the rights of use, the statutes also contemplate governmental acquisition of private property. The distinction between a vested right of use (through reclamation) by grant of the Mississippi Legislature of public lands versus governmental acquisition of title to private lands is paramount. Both are contemplated by the statute. No entity or person can in fact acquire title to public lands owned by the State of Mississippi. The State may, however, through its Legislature or the Secretary of State grant rights of use of public lands to other governmental political subdivisions and private entities.

11. The Mississippi Supreme Court has recognized the following uses, *inter alia*, as being higher public purposes for the use of Tidelands: (a) navigation and transportation; (b) commerce; (c) fishing; and (d) bathing, swimming, and other recreational activities. *See, Cinque Bambini Partnership v. State*, 491 So. 2d 508, 512 (Miss. 1986)⁸; *Secretary of State v. Wiesenberg*, 633 So.2d 983, 988-89 (Miss. 1994). Similarly, these same higher public purposes are part of the grant of authority to municipalities in the various Ports and Harbors statutes relied upon by the

⁸ "Over the years those purposes have come to include navigation and transportation, *Rouse v. Saucier's Heirs*, 166 Miss. 704, 146 So. 291 (1933); *Martin v. O'Brien*, 34 Miss. 21 (1857); commerce, *Rouse v. Saucier's Heirs*, 166 Miss. 704, 146 So. 291 (1933); fishing, *State ex rel. Rice v. Stewart*, 184 Miss. 202, 231, 184 So. 44, 50 (1938); bathing, swimming and other recreational activities, *Treuting v. Bridge and Park Commission of City of Biloxi*, 199 So.2d 627, 632-33 (Miss.1967); development of mineral resources, *Treuting v. Bridge and Park Commission of City of Biloxi*, 199 So.2d 627, 633 (Miss.1967); environmental protection and preservation, *Miss. Code Ann.*, §§ 49-27-3 and -5(a) (Supp.1985); the enhancement of aquatic, avian and marine life, sea agriculture and no doubt others. *See Marks v. Whitney*, 6 Cal.3d 251, 491 P.2d 374, 98 Cal.Rptr. 790 (1971). Suffice it to say that the purposes of the trust have evolved with the needs and sensitivities of the people -- and the capacity of trust properties through proper stewardship to serve those needs." *Cinque Bambini, supra* at 512.

City and County. *See Miss. Code Ann.* §59-7-405(1)(a) (“in aid of commerce⁹ and navigation”); §59-7-405(5) (“in order to develop and promote tourist and recreational trade in the port”); *Miss. Code Ann.* §21-37-13 (“for public recreation and pleasure purposes”); and *Miss. Code Ann.* §59-15-1 (“for the purpose of establishing, developing, promoting, maintaining and operating harbors for small water crafts and recreational parks connected therewith within its territorial limits”).

12. *Miss. Code Ann.* §59-15-1 specifically provides:

The authorities of any city in this state which has a population of ten thousand or more, according to the last official government census, and the authorities of any municipality bordering on the Mississippi Sound or Gulf of Mexico are hereby given the authority to acquire by purchase, deed, donation, gift, grant, **reclamation**, lease, dedication, or otherwise, land, harbor sites or water frontage for the purpose of establishing, developing, promoting, maintaining, and operating harbors for small water crafts, **and recreational parks connected therewith** within its territorial limits, or both, and **shall have the power to** acquire, purchase, install, rent, **lease**, mortgage, **incumber**¹⁰, construct, own, hold, maintain, equip, use, control and operate recreational parks and harbors for small water craft.

(Emphasis added). The City and County are political subdivisions of the State. *See Miss. Code Ann.* 11-46-1(i). “The city is not acting therefore, solely in its capacity as a municipality, but as an agency of the State create by statutory authorities. *Xidis v. City of Gulfport*, 221 Miss. 79, 72 So.2d 153, 158 (1954). The statute allows the City to “acquire” the right to use Tidelands by “reclamation” without a deed or a lease from the State. “Reclamation” is “[t]he process of bringing economically unusable land to a higher dollar value by physically changing it; e.g., draining a swamp, irrigating desert, replanting a forest.” *Black’s Law Dictionary*, pg. 1271 (6th Ed. 1991). The City is also given the authority to acquire private property through means such as purchase,

⁹ “Commerce” is “intercourse by way of trade and traffic between different peoples or states and the citizens or inhabitants thereof, including not only the purchase, sale, and exchange of commodities, but also the **instrumentalities** and agencies by which it is carried on, and transportation of persons as well as of goods, both by land and sea.” *Black’s Law Dictionary*, pg. 269 (6th Ed. 1991) (emphasis added).

¹⁰ This statute uses the older English spelling of “encumber” with same meaning.

deed, donation, or gift which clearly do not apply to public lands, because title to public lands cannot be transferred.

13. In this case, the Legislature, especially under *Miss. Code Ann.* §59-7-405, has granted to certain municipalities the right to use the tidelands or bottomlands for things like wharves, piers, docks, and other structures without an additional and unnecessarily burdensome State lease. The statutory grant of use is, in effect, the lease. The statute also grants the municipalities the authority to lease the reclaimed parcels to third parties for uses in service to higher public purposes of the Public Trust for Tidelands, and further grants the power to mortgage, encumber, construct, and own things on reclaimed parcels of Tidelands. Likewise, *Miss. Code Ann.* §§65-33-1, *et seq.*, grants to the County authority to construct, use, and absolutely control the Harrison County Sand Beach for public use in service to higher public purposes of the Public Trust for Tidelands. Thus, the City and County will own the pier improvements at Veterans Avenue that will be built and maintained by their lessee. Likewise, the City can own wharves and harbor at other sites without owning fee simple title to the Tidelands on which they are built. It can do all those things on this otherwise unusable land, this bottomland, that it was given the right to use. It only has the right to use the land, but it can own these structures. It does not need to lease from the State over and above the statutory grant of the right of reclamation.

14. The Secretary asserts under §59-15-1, as well as the other city/county statutes granting similar authority, that the City and County must first “acquire” the Tidelands at the foot of Veterans via a lease from the Secretary. The City and County assert, and the Court agrees, the State, as owner and Trustee of the Tidelands, has by statutory authority granted the City and County the right, authority, and power to “acquire” for use the Tidelands portion of the subject property by “reclamation” without any duty to “acquire” further property rights or title from the

State, and that this statute further granted the power and authority to lease, encumber, control, and operate recreational parks and harbors for small watercraft. The reference in §59-15-1 to other methods (purchase, deed, lease, etc.) of acquisition of harbor sites or water frontage is a grant of authority and power to the City to acquire title or lease of private, upland property bordering the Public Trust Tidelands, which obviously would be necessary for the land-side facilities of the harbor (bait shops, restaurants, off-loading wharves, boat-launching equipment, parking, harbor-master and security personnel facilities, utility facilities, etc.) and public access to the seaside facilities of the harbor (piers, boat slips, fuel docks, embarkation docks, etc.) but no State tidelands lease is required.

15. The State cites *Columbia Land Development, LLC v. Secretary of State*, 868 So.2d 1006 (Miss. 2004) in support of its position that the City and County must have a tidelands lease from the State. However, *Columbia Land* is distinguished from this case in that only private interests and that of the State were at issue. *Columbia Land* specifically finds, “**The State of Mississippi is the trustee** of the public trust tidelands. ‘The State, as trustee, may not divest itself of its duties. However, **the state, by statute, may vest in others the authority** to do acts which the trustee cannot practicably be expected to perform.’” (Emphasis added.) *Id.* at ¶20, quoting *Sec. of State v. Wiesenberg*, 633 So.2d 983, 997 (Miss. 1994). The *Columbia Land* case did not involve any political subdivision nor any ports and harbors statutes nor the County’s authority over the sand beach. It involved only a private landowner with no lease from any political subdivision. The Secretary stands in the shoes of the Trustee only in situations where a political subdivision has not already exercised its ports and harbors authority and where it is not practical for the Legislature to act.

16. *Miss. Code Ann.* §59-7-405(1)(a) provides:

The governing authorities of any municipality in which there is situated and located, in whole or in part, a port or harbor through which commerce flows, and having not less than eight (8) industries engaged in the seafood industry, which maintains a channel and/or harbor to a depth of not less than eight (8) feet, may engage in, either directly or through the commission hereinafter provided and designated, and such other agencies as hereafter may be provided by law, **works of internal improvement**¹¹ or promoting, developing, constructing, maintaining and operating harbors or seaports within the state and its jurisdiction, and either directly or through the commission hereinafter provided for, **with the power and authority to acquire, purchase, install, rent, lease, mortgage and/or otherwise encumber**, to construct, own, hold, maintain, equip, use, control and operate at seaports or harbors, wharves, **piers**, docks, warehouses, cold storage facilities, water and rail terminals, airplane landing fields and strips, and other structures and facilities, **needful for the convenient use of the same in aid of commerce and navigation**¹², and including the dredging of channels and approaches to the facilities, **and being authorized to fill in and reclaim bottomlands** where incidental and necessary to the foregoing development.

(Emphasis added). The City asserts this legislative delegation of authority grants the City the authority to perform “works of internal improvement” “with the power and authority to . . . “lease . . . other structures and facilities, needful for the convenient use of the same in aid of commerce and navigation” and “being authorized to *fill in and reclaim bottomlands*.” (Emphasis added). As set forth *infra*, “reclamation” of bottomlands allows the construction of the pier at Veterans Avenue, and the statute also allows the lease¹³ of the property to RW, without having a lease from the State. Reclamation is a right of use granted by legislative act.

17. *Miss. Code Ann.* §59-7-405(5) reinforces 59-70-405(1)(a): “The municipal authorities or commission may provide, among other harbor facilities, small craft and pleasure

¹¹ “Works of internal improvement” would include a pier at Veterans Avenue.

¹² The phrase “and other structures and facilities, needful for the convenient use of the same in aid of commerce and navigation” would also include a pier outside of the other harbor structures, because such piers, at which marine vessels may embark and disembark passengers to and from other municipal harbor facilities, make the overall port and harbor of the city more convenient to use in “aid of commerce and navigation.” *See also Miss. Code Ann.* §59-7-405(5).

¹³ The lease does not grant exclusive control of anything to RW, but specifically requires the handicapped-accessible pier to be used by the public as required by the Federal Court Judgment in *U.S. v Harrison County, supra*.

craft harbors **and facilities needed therefor**, including park and recreational facilities as an adjunct thereto, **and in order to develop and promote tourist and recreational trade in the port.**” (Emphasis added). The City and County assert this statute allows construction of a pier at Veterans Avenue as a “recreational facility” that is an “adjunct” to the City and County’s ports and harbors “in order to develop and promote tourist and recreational trade in the port.”

18. *Miss. Code Ann.* §21-37-13 is another supplementary authority relied upon by the City and County:

The governing authorities of municipalities shall have the **power and authority** to own, **operate**, and regulate, for public recreation and pleasure purposes, **on any tidewaters** or navigable streams within or on the border of the municipal limits, **piers**, pavilions, bath houses, and other like appropriate structures, either by the use of streets or public landings of the municipality or landings purchased or procured for the purpose

(Emphasis added.) The City and County contend this statute grants the City and County the specific power and authority to construct and operate a pier at the foot of Veterans Avenue, a street within the City. The City and County contend that such pier may be constructed and operated via a lease with RW in a public/private partnership. *See Trueting v. Bridge & Park Comm. of City of Biloxi*, 199 So.2d 627 (Miss. 1967).

19. Other specific authorities relied upon by the County include *Miss. Code Ann.* §65-33-1:

When any public road, street or highway shall extend along the beach or shore of any body of tidewater, and such road, street, or highway, or any part thereof shall be exposed or subject to, or in danger of, damage by water driven against the shore by storms, the boards of supervisors shall have the power, and it is hereby made their duty, to erect and maintain all necessary **or other necessary structures or improvements connecting the beach or shore of any such bodies of water with islands or other land areas located offshore or connecting therewith, pumped-in sand** or earth fills, **sloping beaches**, topping, road surfacing, road protection pavements, aprons, or other necessary devices to protect and preserve such roads, streets, and highways, or to increase the strength or stability of any existing

road protection structures by hard surface aprons or other road protection devices or structures, and for that purpose or for the purpose of constructing or improving such highway, may issue the bonds of the county therefor.

(Emphasis added). As the County explained at the September 20, 2021 hearing, a handicapped-accessible pier will require such pier to begin on the sand beach as opposed to beginning at the shoreline. This pier will connect pedestrians from the seawall, across the sand beach, and onto the pier over the waters and submerged bottomlands of the Public Trust Tidelands.

20. As instructed by the Fifth Circuit in its 1969 opinion, the District Court entered an unpublished *Final Judgment* and *Addendum to Final Judgment*, Oct. 8, 1970, in *United States v. Harrison County, Mississippi, et al.*, Cause No. 2262 (Dkt. No. 9-2 herein) which essentially set forth the law pertaining to the sand beach and held that the Harrison County Board of Supervisors is charged with the responsibility *in all areas* of the Sand Beach pursuant to state statutes and the *Final Judgment* (*Id.*, Dkt. No. 9-2) of the U.S. Dist. Court for the Southern District of Mississippi. (Emphasis added.) The State of Mississippi, through its Attorney General, and the then Secretary of State of the State of Mississippi himself appeared in said actions. See footnotes 3, 4 and 5, *supra*.

21. The Fifth Circuit recited the specific statutory authority of the Board of Supervisors of Harrison County, Mississippi as granted to it by the Mississippi legislature in *Miss. Laws of 1948*, Ch. 334 (now *Miss. Code Ann.*, §65-33-51) and found:

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 owner of the property....**

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

22. The Secretary disputes this grant of authority, asserting *United States v. Harrison*

County is limited to a mandate that “Harrison County uphold its end of the contract and provide **unfettered** access to the sand beach during the Civil Rights Era.” Dkt. No. 51, pg. 18 (emphasis added). As pointed out by the City and County, this is to be a handicapped-accessible pier. 42 U.S.C.A. §12101(a)(1)-(4) states:

The Congress finds that —

- (1) physical or mental disabilities in no way diminish a person’s right to fully participate in all aspects of society, yet many people with physical or mental disabilities have been precluded from doing so because of discrimination; others who have a record of a disability or are regarded as having a disability also have been subjected to discrimination;
 - (2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;
 - (3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, **recreation**, institutionalization, health services, voting and access to public services;
 - (4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;
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(Emphasis added). Under the laws of the United States, “No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, **facilities**, privileges, advantages, or **accommodations** of any place of public accommodation by any person who owns, leases (or leases to) or operates a place of public accommodation.” 42 U.S.C.A. §12182(a) (emphasis added). The County is seeking to provide unfettered access at Veterans Ave.

23. The Secretary contends that the construction and lease of the subject property would be in violation of *Miss. Const. Art. 4, §95*, that states, “Lands belonging to, or under the control of the State, shall never be **donated directly or indirectly to private corporations or individuals**, or to railroad companies.” (Emphasis added). It is true that the State holds title of

Public Trust Tidelands “as trustee for the people of the State.” *Parks v. Simpson*, 137 So.2d 136, 139 (Miss. 1962) (Emphasis added). However, neither statement of the law has any application herein.

24. The State is not transferring title of any Tidelands to the City and County. The City and County are not transferring title of any Tidelands to RW. Through the municipal Ports and Harbors statutes, the act of building and leasing a pier is an act of reclamation for admittedly public use authorized by the owner (the State, as Trustee). The Ports and Harbors statutes explicitly grant the City the right to reclaim, use, and lease the subject property for higher public purposes without acquiring title or obtaining a lease from the State.

25. The Secretary further contends that the City and County’s statutorily delegated authority must yield to *Miss. Code Ann.* §29-1-107 and §7-11-11. Both of these statutes are general statutes. See *Secretary of State v. Wiesenberg*, 633 So.2d 983, 995 (Miss. 1994) (the present legislation being challenged is general law) and *Attorney General Opinion*, 2003 WL 21962279 (2003). The Ports and Harbors statutes along with the Seawall Act, *supra*, are specific legislation granting specific powers to the City and County. It has been a longstanding rule of statutory construction that the terms of a specific statute control the terms of a general statute. As the Mississippi Supreme Court stated in *Townsend v. Estate of Gilbert*, 616 So.2d 333 (Miss. 1993):

This Court has recognized that a specific statute will control over a general one. *Benoit v. United Companies Mortg. of Miss.*, 504 So. 2d 196 (Miss. 1987). In *Benoit* [504 So. 2d at 198], this Court stated:

Moreover, we have recognized as a principle of statutory construction that, in the event of apparent conflicts, statutes dealing specifically with a matter are to be preferred over those of a more general nature. In *Lincoln County v. Entrican*, 230 So. 2d 801 (Miss. 1970) we stated:

The rule is well established that where a special and particular statute deals with a special and particular subject its particular terms as to that special subject control over general statutes

dealing with the subject generally.

230 So. 2d at 8004; *McCaffrey's Food Market, Inc., v. Mississippi Milk Commission*, 227 So. 2d 459 (Miss. 1969).

26. Indeed, §29-1-107(1) is limited by the phrase “except as otherwise provided by law.” This limitation, along with 29-1-107(c)(i)’s provision recognizing that public trust tidelands leases may be “from the state **or any of its political subdivisions**” (emphasis added) indicates legislative acknowledgment of the statutory grant of authority for political subdivisions¹⁴ to act as lessor of tidelands under the Ports and Harbors statutes. §29-1-107 does not repeal the other relevant statutes.

27. Reclamation is a right that can be conferred by statutes, as it was by §59-15-1. For additional context, this Court has looked to historic acts¹⁵ throughout the years in the United States that involve the concept of reclamation to protect or enhance the public’s interests in real property by bringing “economically unusable land to a higher...value by physically changing it” (*Black’s Law Dictionary, supra*), albeit in other fact situations. For example, *see Save Our Wetlands v. Orleans Levee Board*, 368 So.2d 1210 (La. Ct. App. 1979) wherein the Louisiana appellate court held that the Orleans Levee Board, a state agency, had the authority to reclaim certain Louisiana tidelands for a public use without taking title to the property, because the state already owned the tidelands and had by *LA Rev Stat* §38:307 delegated to the Levee Board the authority to use the tidelands for public use. “The operation of an airport for the benefit of the public is clearly public use. Further, it is clear that the State’s actions [through its delegated agency] do not constitute alienation but rather reclamation.” *Save Our Wetlands v. Orleans Levee Board*, 368 So.2d at 1213.

¹⁴ The City and County are political subdivisions of the State. *See Miss. Code Ann.* §11-46-1(i).

¹⁵ *See, Cinque Bambini, supra*, at 517 and its *fn* 6, citing Justice Holmes in *Common Law* (1881), p.1, (“The life of the law has not been logic; it has been experience.”) and J. Holmes in *New York Trust Co. v. Eisner*, 256 U.S. 345, 349, 41 S. Ct. 506-507, 65 L. Ed. 963, 983 (1921) (“...[A] page of history is worth a volume of logic.”)

For another example, see 30 *U.S. Code* §1237, regarding the reclamation of land which has been adversely affected by past coal mining practices. In that context, 30 *U.S. Code* §1237 authorizes the U.S. Government along with “states, political subdivisions, [and] their agents...to do all things necessary or expedient to restore, reclaim, abate, control, or prevent the adverse effects” of past coal mining practices on property, without first having to acquire the property. The governments were granted the right of reclamation to go in and try to repair and restore these lands that became unusable because of coal mining. Also, they were granted the right, after the reclamation or when it was deemed necessary, especially to prevent any further adverse effects, to acquire the land from the private owners through condemnation, purchase, gift, donation. This federal example, albeit regarding actions to reverse an adverse use of real property without owning it, illustrates the concept of delegating to political subdivisions the authority, on behalf of the state, to reclaim certain property to establish a positive, valuable use in the public interest without actually owning title to the property.

28. In Mississippi, the concept of reclamation of Tidelands by political subdivisions is not just the act of filling in submerged land, although filling may be part of the action—it is primarily the act of converting to use, with or without filling in, a parcel of Tidelands that has been rendered unusable or that is not being used to its highest and best use in the public interest, which is why *Miss. Code Ann.* §59-15-1 and §59-7-405 (1) (a) refer separately to filling in bottomlands and reclamation. A right of reclamation by a governmental body, like the City or County, is not a property ownership interest in the title to the property—it is a right of use of the property granted by the owner (the State, which is the Trustee of the Tidelands) to serve the owner’s interests, like a lease or an easement. In effect, Mississippi’s statutory grant of reclamation of Tidelands to the City is similar to a lease, but it carries the added duty of reclaiming specific Tidelands for specific

uses, on behalf of the State (the Trustee), to serve higher public purposes of the Public Trust for Tidelands to benefit the beneficiaries of the Trust: the general public. It is similar to a lease—a right to use something. A lessee does not have an ownership interest—it has a right to use the property, and unless restricted otherwise, a right to sublease it to another who may stand in the sub-lessor’s shoes. The lessee and sublessee are in privity with the ownership but have not acquired an ownership interest in or title to the property. Reclamation is the same concept. A political subdivision does not need to acquire title to Tidelands nor even acquire a lease of Tidelands. The Court finds it is not necessary for the City and/or the County to have a separate lease from the State in light of the already existing statutory grant of reclamation to the public bodies. The political subdivisions are acting in the public’s interest on behalf of the owner and under the statutory direction of the owner. Use or leasehold rights to occupy and acquisition of title are two separate actions, just like in *Save Our Wetlands, supra*, and 30 U.S.C. §1237, *supra*. The Court finds it is not necessary for the City and/or the County to acquire title or even acquire a leasehold interest in order to use the land in light of the statutory grant of the right of reclamation.

29. The Court further finds that municipal piers and harbors have been constructed within the City for many decades without the requirement of a tidelands lease from the Secretary. Pursuant to specific statutory grants, cited herein, of the right to reclaim and use Tidelands, these piers and harbors have been constructed in furtherance of the higher public purposes of the Public Trust for Tidelands. The State has acquiesced for many decades in the use of these Tidelands for these higher public purposes without having or requiring a tidelands lease from the Secretary, and, accordingly, the State is estopped from asserting that a tidelands lease is now necessary to act in furtherance of the higher public purposes of the Trust. *See Bayview Land Ltd. v. State*, 950 So.2d 966 (Miss. 2007). This does not necessarily apply to private entities or individuals who *on their*

own do not possess a statutory grant of reclamation like the City and County do here. The Defendant RW Development, in the present case however, is acting at the behest of the City and the County and in conjunction therewith. The City and County have the statutory right to lease reclaimed Tidelands. The City and County have entered into a lease with RW Development for the building and operation of the pier. This action is precisely the authority granted via statute to the City and County for the use and development of reclaimed tidelands.

30. Based upon **the reasons set forth hereinabove** the Court does hereby find, declare, and adjudge pursuant to *Miss. R. Civ. P. 57* that The City of Biloxi, Harrison County, Mississippi and RW Development LLC's Motion for Summary Judgment for Declaratory Judgment (Dkt. No. 46) should be, and hereby is, **GRANTED**, as a matter of law as follows:

- a. The construction and lease of a pier at the foot of Veterans Avenue is in furtherance of the higher public purposes set forth in the Ports and Harbors statutes to act in aid of commerce, navigation, and recreation and to promote tourism and trade in the ports, along with the authority granted to the County under the Seawall Act and *United States v. Harrison County, supra*;
- b. The City and County have the specific statutory authority under the Ports and Harbors statutes and Seawall Act to reclaim, use, and lease the subject property to RW Development for public use. Such a lease is not in violation of Art. 4, §95 of the Mississippi Constitution, as title is not changing and the pier and lease are for a higher public purpose for public use of the same;
- c. *Miss. Code Ann. §29-1-107* and *§11-11-7* are general statutes that must yield to the specific authority granted to the City and County. Accordingly, no tidelands lease is required from the Secretary in order for the City and County to cause the pier to be constructed via a public/private partnership with RW and grant a non-exclusive lease of the subject property to RW;
- d. The Secretary of State's Renewed Motion for Summary Judgment is therefore **DENIED for the reasons set forth hereinabove**; and
- e. The Clerk of the Court is directed to forthwith enter this Declaratory Judgment as a Final Judgment, there being no just cause for delay.

SO ORDERED, ADJUDGED AND DECREED this the 4th day of October 2021.


HONORABLE JENNIFER SCHLOEGEL
CHANCERY COURT JUDGE

Modified by the Court and prepared by:

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