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LEGAL MEMORANDUM
Regarding Pier B Negotiations and Port Operations

Part I addresses legal rights of the City of Key West concerning the Agreement for cruise ship operations at Pier B.

Part II addresses the requirement that any amendment of the Agreement with Pier B Development Corporation be subject to a referendum of the voters.

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PART I. CURRENT PIER B CRUISE SHIP OPERATIONS ARE NOT AUTHORIZED BY THE TERMS OF THE CITY’S AGREEMENT WITH PIER B DEVELOPMENT CORPORATION.

The City of Key West’s 1994 Agreement with Pier B Development Corporation establishes a property interest of the City in a particular parcel of private property, and authorizes cruise ship operations only within an authorized area at that specific property. This authorized parcel corresponds to the original footprint of the docking structure which was built by the US Navy around the time of World War I (described hereinafter as “Historic Pier B”). However, the cruiseport which is now in operation is a large, modern structure which Pier B Development

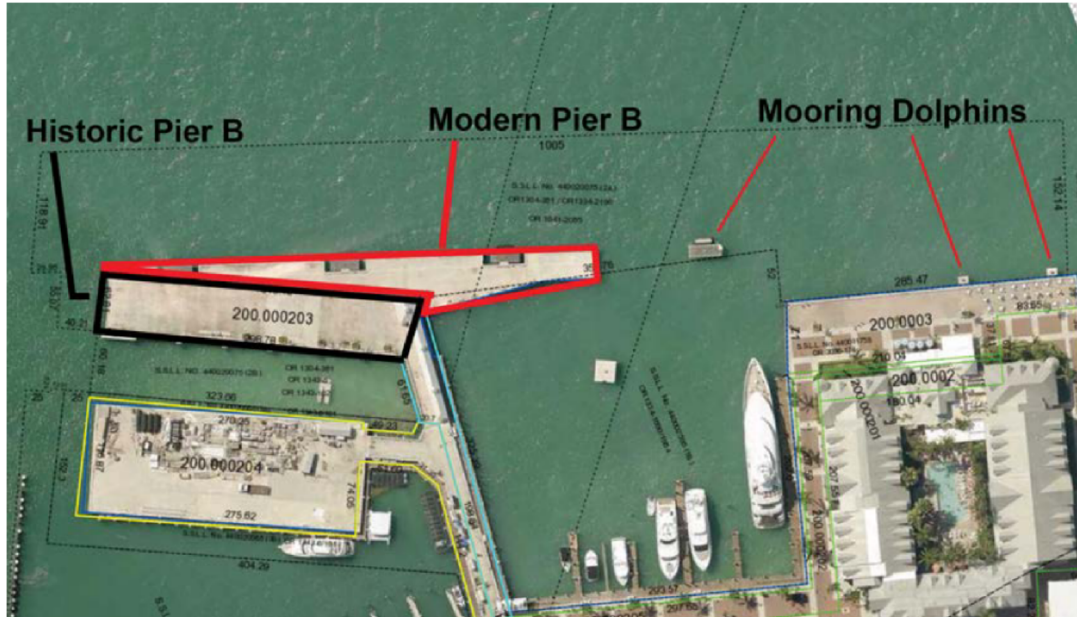
Corporation built on state-owned property in 1999 (hereinafter referred to as “Modern Pier B”). A new Survey attached here as Exhibit 1 clearly illustrates that this Modern Pier B is entirely outside the authorized area of the 1994 Agreement with the City. Thus, the City did not authorize or agree to cruiseport operations at this new site. Given the facts, it would be imprudent and detrimental to the interests of the City of Key West to seek to negotiate or amend the 1994 Agreement with Pier B Development Corporation (hereinafter referred to as “PBDC”) before the legal rights of the City of Key West are fully confirmed.

BACKGROUND

There are three facilities in Key West which have historically supported cruise ship dockings. Two of these cruiseports, Mallory and the Outer Mole, are located on public property and controlled by the City of Key West. The third cruiseport, Pier B, is controlled by Pier B Development Corporation (“PBDC”), subject to its terms of agreement with the City.

The City Commission recently passed Resolution 22-073, establishing capacity and disembarkation limits for cruise ships which dock at the two City-controlled properties. The Resolution specifically excludes Pier B. This Resolution thus accomplishes 2/3 of the relief sought by voters, who enacted uniform cruise limits by referendums later preempted by the State. The City is now engaged in negotiations with PBDC regarding future operations at the third cruiseport, Pier B.

The Pier B cruiseport is made up of multiple structures located on two separate parcels of private and state-owned property. The main components of the Pier B cruiseport are (1) the Historic Pier B formerly owned by the US Navy and transferred to private developers as part of the Truman Annex development; (2) the Modern Pier B which PBDC built in 1999 on sovereign submerged lands which it leases from the State of Florida; and (3) a series of three concrete Mooring Dolphins also built by PBDC in 1999 on the property it leases from the State. These structures are indicated in the figure below:



ARGUMENT

Pier B Development Corporation maintains a position that its 1994 Agreement with the City of Key West (Res. 93-405) is legally binding and confers certain rights and obligations for the present-day operations of Pier B. City officials have stated that any potential limitations on cruise ship operations at Pier B must be achieved by way of an amended Agreement with PBDC.

We respectfully submit that the facts and applicable law lead to a different conclusion: There is no legal authorization for present-day cruiseport operations at Pier B.

Pier B Development Corporation's right to operate a cruiseport in Key West is based on a sole written Agreement entered into in 1994 between the City of Key West and Truman Annex Development (PBDC's predecessor in interest). That document is titled "Declaration of Covenants, Conditions and Restrictions for Pier B" (hereinafter referred to as the "Restrictive Covenant") and was adopted by the City in Resolution 93-405. This Restrictive Covenant is nine pages in length, including its three exhibits. It is the only contractual agreement between PBDC and the City of Key West. The Restrictive Covenant is filed in the public records at Official Records Book 1294, Page 0625 et. seq. This document is available for public inspection at any time at our courthouse on Whitehead Street.¹

¹ To avoid any confusion, the Warranty Deed conveying Pier B from Truman Annex to Pier B Development Corp, at Official Records Book 1302, Page 2290, refers to this 1994 Declaration of Covenants (between the City of Key West and Truman Annex) at Condition 5. The Warranty Deed also refers to an additional and separate document titled "Declaration of Covenants," together with its amendment, at Condition 4, but this second document and its amendment are internal corporate documents to which the

Exhibit “A” of that Restrictive Covenant (page 7), contains the legal description of the parcel of real property upon which the City authorized PBDC to operate a cruiseport. The metes and bounds of this property are consistent with the former US Navy docking structure, which lands were included as part of the Truman Annex conveyance. This property is exactly depicted in the attached legal description sketch by Florida Keys Land Surveying, certified and dated 3/21/2022 (hereinafter referred to as the “Survey”). The Survey, using an aerial view of Pier B, confirms the particular footprint on which PBDC is authorized by the City to operate a cruiseport.

As is clear from the Survey, the site on which the City authorized a cruiseport in 1994 is NOT where PBDC operates its cruiseport today. This discrepancy of sites is not the result of scrivener’s error, nor the result of an erroneous survey. It is the result of PBDC constructing a much larger pier in 1999, five years after the Restrictive Covenant was signed and without proper authorization from the City, so that PBDC could attract and accommodate much larger cruise ships. Indeed, the large cruise ship visible in the sketch does not come into physical contact with the authorized cruiseport site at any point. Instead, PBDC operates its cruiseport on a much larger site which is completely separated from and easily identified as seaward of the authorized site for the Pier B cruiseport operations. Thus, operation of the present-day PBDC cruiseport is not legally authorized by the 1994 Restrictive Covenant with the City. (See attached legal brief and supporting case law in Exhibit 2.)

Although PBDC obtained consent from the State of Florida in 1999 to modify and expand the length of its submerged lands lease from 700 feet to 1005 feet to accommodate larger vessels, it never obtained consent from the City of Key West to change the site and footprint for operations of its cruiseport as set out in the 1994 Restrictive Covenant. PBDC thus changed the location of its cruiseport without City consent and in violation of the parties’ 1994 Restrictive Covenant. Such a change of location was never contemplated at the time the parties’ agreement was signed in 1994; and this change in size has enabled much larger and deeper-draft cruise ships, directly contributing to the citizen initiative for referendums to curb the adverse environmental impacts of these larger ships.

City is not a party. (See the 1993 "other" Declaration of Covenants at Official Records Book 1263, Page 1669; and amendment at Official Records Book 1302, Page 1455.)

CONCLUSION TO PART I:

The City authorized cruiseport operations at a particular parcel through an Agreement. Five years later, the operator of the cruiseport moved its operations to a different parcel without City authorization. The original Agreement was not modified, nor did the City grant a new Agreement or otherwise authorize the new cruiseport location.

Based on the above facts and applicable law, the City is well within its rights to declare PBDC's present-day cruiseport operations in material breach of its contractual obligations pursuant to the 1994 Restrictive Covenant. Given that PBDC is operating a cruiseport in violation of its agreement with the City, remedies in law available to the city include (1) termination entirely of PBDC's right to operate a cruiseport; (2) enforcement of the terms of the 1994 Agreement, requiring PBDC to return its cruiseport to the metes and bounds boundary of Historic Pier B; or (3) enter into a modification or amendment of the 1994 Agreement which would approve the PBDC cruiseport at its current location, subject to mutually agreed terms.

Should PBDC seek to deny or otherwise challenge the City's rights of contractual enforcement, a suit for declaratory judgment would settle the issue. And because the City can choose not to limit or curtail PBDC's activities at its cruiseport until a court of competent jurisdiction decides the matter, the city would face no claim from PBDC for monetary damages in the interim.

PART II. VOTER REFERENDUM REQUIRED FOR ANY AMENDMENT OR MODIFICATION OF AGREEMENT.

In 1994, the City and PBDC entered into their Restrictive Covenant. That Agreement, conveying to Pier B the City's exclusive right to operate a cruiseport at the Truman Annex site, included a first renewal date of 21 years, and subsequent renewal dates every 10 years thereafter.

In 1996, City Ordinance 7.03 was enacted which prohibits the City from conveying any interests in real property without a voter-approved referendum. By the passage of time and the operation of law, the Restrictive Covenant expired on February 18, 2015 (the first renewal date after enactment of Section 7.03).

For the City and PBDC to modify, amend, or renew the Restrictive Covenant (for the purpose of ratifying the PBDC cruiseport at its current location), a new Agreement must be approved by voter referendum in compliance with Section 7.03.

IN CLOSING

Understandably, the citizens and the Commission are experiencing “cruise ship fatigue.” This topic has brought our community together and consumed our attention and passions as few topics ever have. However, we respectfully submit that now is not the moment to acquiesce to Pier B Development Corporation’s unsupported claim of superior contractual rights in the face of obvious legal deficiencies in the Agreement and the demonstrated public preference to limit cruise operations at Pier B. Before entering into an agreement which appears to require voter approval under Section 7.03, we respectfully suggest that the City seek confirmation and clarification of its rights under the 1994 Agreement by a competent judicial authority.

The City Commission has given its unanimous and continued support for the reasonable cruise ship limitations sought by the voters at two of Key West’s three cruiseports. At this time, PBDC’s cruiseport facility at Pier B is operating as normal, despite the fact that it has not been authorized by the City. Neither the City nor PBDC will suffer financial harm by simply pausing negotiations until there is a judicial decision regarding the rights of the parties, after which the City and PBDC can resume negotiations based on the certainty of their rights.

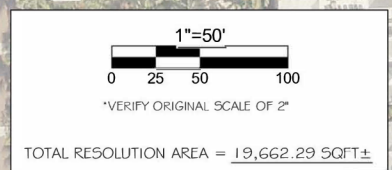
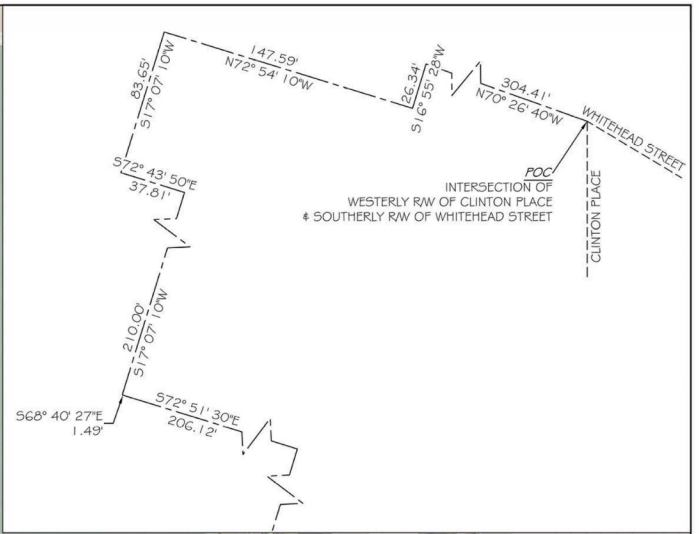
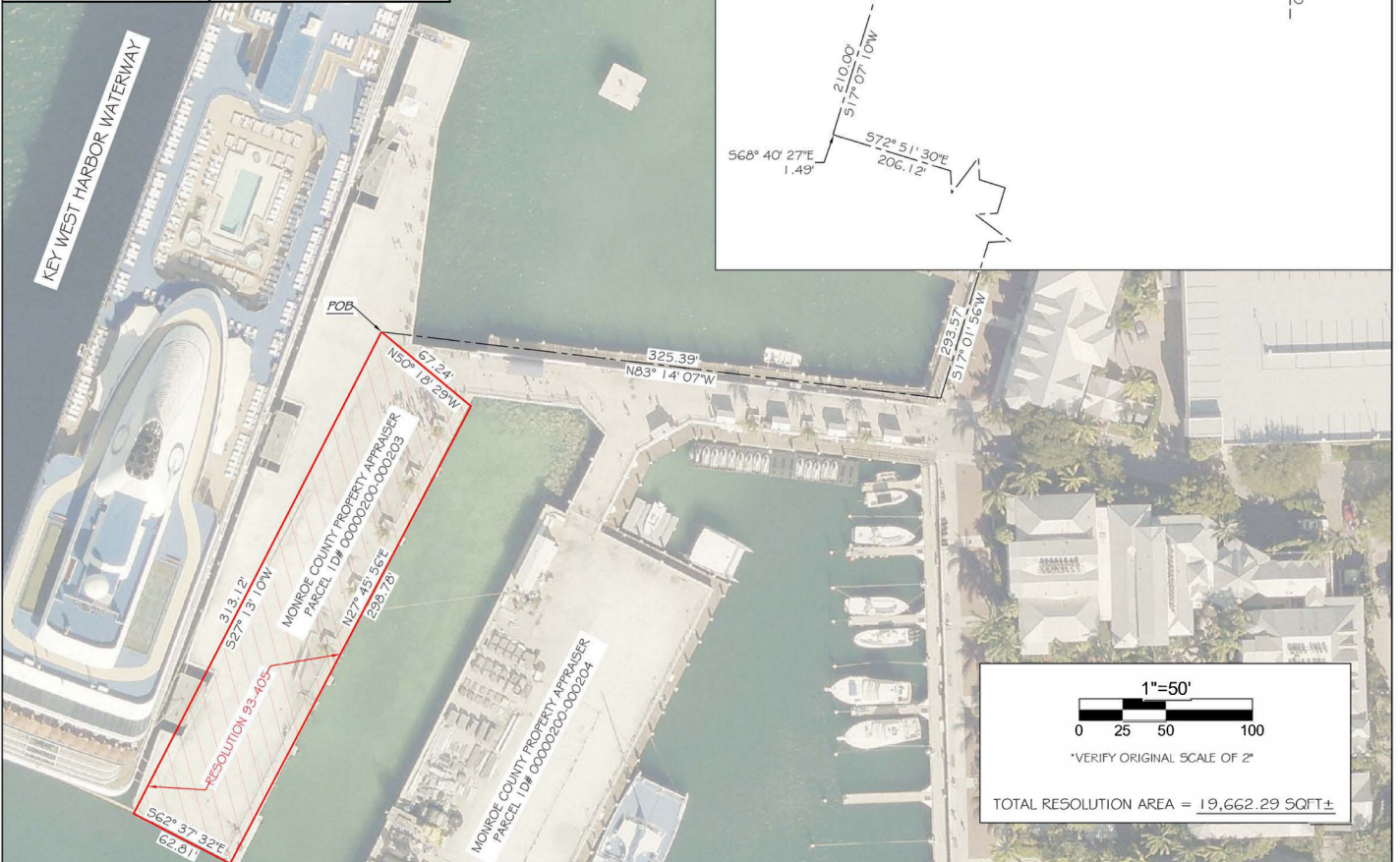
We remain available at all times to discuss these matters with you further. Thank you for your consideration.

Respectfully submitted this 30 day of March 2022,

Linda Wheeler, Esq.

Ralf Brookes, Esq.

Exhibit 1a



SURVEYOR NOTES

- THIS IS NOT A BOUNDARY SURVEY. ANY BOUNDARY OR RIGHT OF WAY LINES SHOWN HEREON ARE FOR REFERENCE PURPOSES ONLY.
- BEARINGS SHOWN ARE REFERENCED TO THE RECORD DESCRIPTION OF RESOLUTION AREA SHOWN HEREON.
- ADDITIONS OR DELETIONS TO SURVEY MAP OR REPORT BY OTHERS THAN THE SIGNING PARTY IS PROHIBITED WITHOUT THE WRITTEN CONSENT OF THE SIGNING PARTY.
- STREET ADDRESS: 271 FRONT STREET, KEY WEST, FL 33040.
- ALL UNITS ARE SHOWN IN U.S. SURVEY FEET.
- BACKGROUND IMAGE IS A 2015 GEO-REFERENCED AERIAL IMAGE OBTAINED FROM THE FLORIDA DEPARTMENT OF TRANSPORTATION AND IS SHOWN FOR VISUAL REFERENCE ONLY.

NOTE: FOUNDATIONS BENEATH THE SURFACE ARE NOT SHOWN. MEASURED DIMENSIONS EQUAL PLATTED OR DESCRIBED DIMENSIONS UNLESS INDICATED OTHERWISE.

THE FOLLOWING IS A LIST OF ABBREVIATIONS THAT MAY BE FOUND ON THIS SHEET:

BBF = BULKHEAD FENDER	CB = CONCRETE CURB	CC = CONCRETE CURB	CCF = CONCRETE CURB FENDER	CCF = CONCRETE CURB FENDER	CCF = CONCRETE CURB FENDER
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- LEGAL DESCRIPTION -

RESOLUTION 93-405
 A PARCEL OF SUBMERGED LAND CONNECTED TO FILLED SUBMERGED LANDS LYING WESTERLY OF BLOCK 17 (UNNUMBERED) ON THE ISLAND OF KEY WEST, MONROE COUNTY, FLORIDA, AS SHOWN ON THE UNRECORDED 'MAP OF THE TOWN OF KEY WEST, TOGETHER WITH THE ISLAND' AS SURVEYED AND DELINEATED FEBRUARY 1829 BY W.A. WHITEHEAD AND BEING MORE PARTICULARLY DESCRIBED AS FOLLOWS:

COMMENCE AT A P.K. NAIL AND BRASS WASHER STAMPED #2749 SAID POINT BEING THE INTERSECTION OF THE WESTERLY RIGHT OF WAY LINE OF CLINTON PLACE AND THE SOUTHERLY RIGHT OF WAY LINE OF WHITEHEAD STREET; THENCE RUN ALONG THE SOUTHERLY RIGHT OF WAY LINE OF WHITEHEAD STREET AND THE PROLONGATION THEREOF; N 70°26'40\"/>

- 1). S 27°13'10\"/>

THENCE LEAVING SAID LINE N 50°18'29\"/>

CERTIFIED TO - SAFER CLEANER SHIPS;	SYMBOL LEGEND:	
	<ul style="list-style-type: none"> ○ SANITARY MANHOLE □ IRRIGATION CONTROL BOX □ ELECTRIC BOX ○ WOOD UTILITY POLE ○ WATER METER ○ LIGHT POLE ○ GUY WIRE ○ IRRIGATION CONTROL VALVE 	<ul style="list-style-type: none"> ○ SANITARY CLEANOUT ○ WATER VALVE ○ METAL UTILITY POLE ○ CATCH BASIN ○ DRAINAGE MANHOLE ○ CONCRETE UTILITY POLE ○ YARD DRAIN GRATE ○ FIRE HYDRANT

LEGAL DESCRIPTION SKETCH

PIER - B - CITY COMMISSION RESOLUTION 93-405
 KEY WEST, MONROE COUNTY, STATE OF FLORIDA

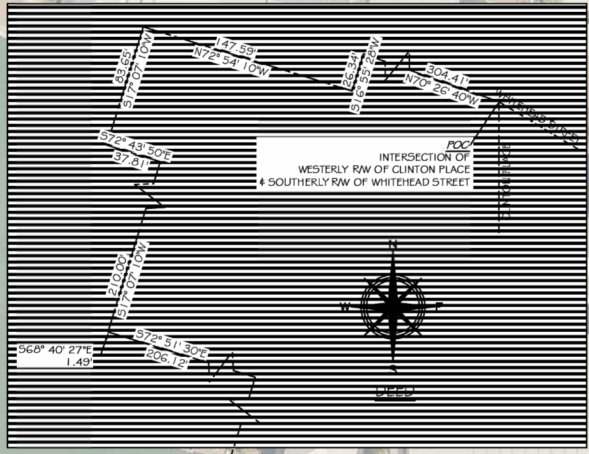
DATE: 03/21/2022	SURVEY BY: EAI	PROJECT: PIER-B_RES
REVISION DATE: XX/XX/XXXX	DRAWN BY: MPB	H. SCALE: 1\"/>
ORDER NO.: 22-571	CHECKED BY:	SHEET 1 OF 1

FLORIDA KEYS LAND SURVEYING
 21460 OVERSEAS HIGHWAY, SUITE 4
 CUDJOE KEY, FL 33042
 PHONE: (305) 394-3690
 EMAIL: FKLSEmail@gmail.com

I HEREBY CERTIFY THAT THE SURVEY WAS MADE UNDER MY RESPONSIBLE CHARGE AND MEETS THE STANDARDS OF PRACTICE AS SET FORTH BY THE FLORIDA BOARD OF PROFESSIONAL SURVEYORS AND MAPPERS IN CHAPTER 531.7, FLORIDA ADMINISTRATIVE CODE, PURSUANT TO SECTION 472.027, FLORIDA STATUTES AND COMPLIES WITH CHAPTER 177, FLORIDA STATUTES.

SIGNED: ERIC A. ADAMS, C.S.M. #6703, P.S.
 SURVEYOR AND MAPPER, LDB #7047

Exhibit 1b



SURVEYOR NOTES

- THIS IS NOT A BOUNDARY SURVEY, ANY BOUNDARY OR RIGHT OF WAY LINES SHOWN HEREON ARE FOR REFERENCE PURPOSES ONLY.
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- 1). S 27°13'10" W - 313.12 FEET
- 2). S 62°37'32" E - 62.81 FEET
- 3). N 27°45'56" E - 298.78 FEET

THENCE LEAVING SAID LINE N 50°18'29" W - 67.24 FEET TO THE POINT OF BEGINNING, CONTAINING 0.4514 ACRES, MORE OR LESS.

 <p>FLORIDA LAND SURVEYING 1700 UNIVERSITY BLVD, SUITE 101 MIAMI, FL 33136 (305) 371-2222 www.floridasurveyors.com</p>	<p>LEGAL DESCRIPTION SKETCH PIER - B - CITY COMMISSION RESOLUTION 93-405 KEY WEST, MONROE COUNTY, STATE OF FLORIDA</p>
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Exhibit 2

“RESTRICTIVE COVENANTS”

LEGAL BRIEF AND SUPPORTING CASE LAW

Restrictive covenants are sometimes referred to as “Covenants, Conditions, and Restrictions.” A covenant is language within a conveyance or other contract evidencing an agreement to do or refrain from doing a particular act. A restriction is simply a limitation on the use of the land. Restrictive Covenants are expressly written in deeds, leases, conveyances and other real property instruments. The land that is limited in a particular way is the “burdened parcel” and the boundaries of the burdened parcel are specifically described in a legal description (i.e. see Exhibit A of the 1994 Restrictive Covenant) that may also contain a survey of the real property showing the location of the legal description metes and bounds or lots. Since a Restrictive Covenant involves an interest in land, it falls under the Statute of Frauds and generally must be in writing to be enforceable and the language used, including the legal description of the real property that is encumbered, clearly evidences the nature and location of the limitations, burdens and benefits that the parties intend to create (Florida Statutes § 725.01). When enforcing a Restrictive Covenant the courts will look to the legal description to determine the land that is encumbered, i.e., the boundaries of the real property that is encumbered by the instrument, agreement, or covenant. Case law has also placed additional requirements on agreements involving real property that are longer than one (1) year in duration, requiring the agreement to be specific as to the parties involved, the subject matter, the parties’ obligations and the consideration or it is unenforceable. See, *Minsky’s Follies of Fla., Inc. v. Sennes*, 206 F.2d 1, 3 (5th Cir. 1953), in which the court explained: “In order that there be a contract, the parties must have a definite and distinct understanding, common to both, and without doubt of difference.” *Id.* Deed restrictions or restrictive covenants on real property can be specifically enforced under the same general principles that govern the enforcement of contractual undertakings. See *Frumkes v. Boyer*, 101 So. 2d 378 (Fla. 1958), where Restrictive Covenants are defined (1) as an agreement between landowners that their property will be used only for specified purposes in a specified manner, or (2) as a provision in a deed limiting the use of the property and prohibiting certain uses. *Hill v. Palm Beach Polo, Inc.*, 717 So. 2d 1080 (Fla. 4th DCA 1998). The use of a Restrictive Covenant to specifically authorize terms for use of Pier B as a cruiseport by the City in 1994 is entirely consistent with Florida law, as Restrictive Covenants are typically used to specifically control the use of property. *Marco Island Civic Ass’n, Inc. v. Mazzini*, 881 So. 2d 99 (Fla. 2d DCA 2004).