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LEGAL MEMORANDUM

Regarding Pier B Negotiations and Port Operations

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

Part II addresses the proposed “Operating and Settlement Agreement” for cruiseport operations at Pier B.

Part III 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 CURRENT 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

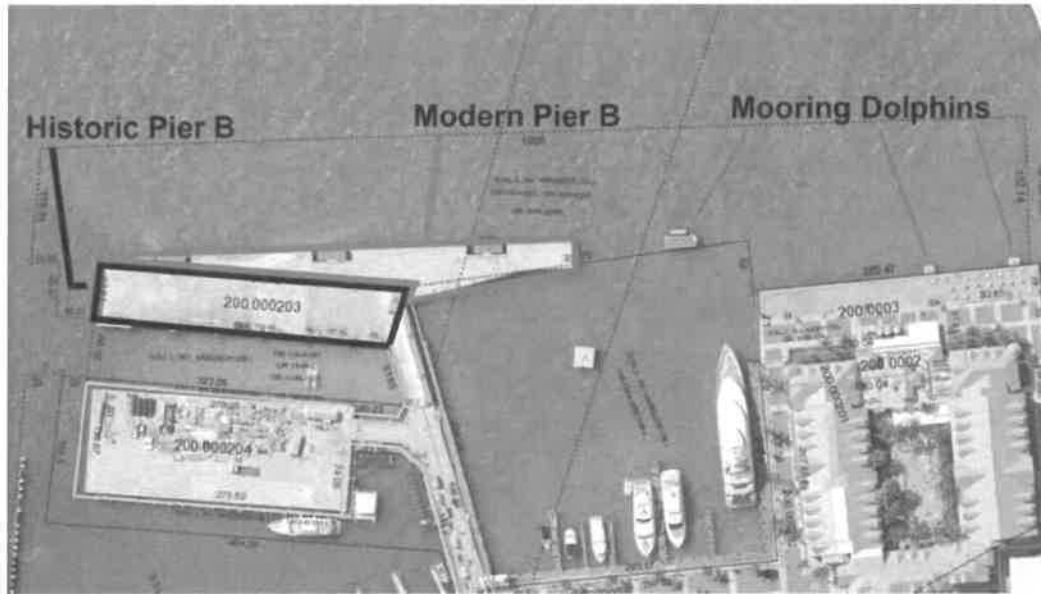
around the time of World War I (described hereinafter as “Historic Pier B”). However, the cruiseport which is now in operation is a large, modern structure which Pier B Development Corporation built on state-owned property in 1999 (hereinafter referred to as “Modern Pier B”). A new Survey attached here 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.<sup>1</sup>

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<sup>1</sup> 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.

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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.)

NOTE: On March 30, 2021, a proposed “Operating and Settlement Agreement” was published by the City. This proposed agreement makes the unsupported claim that separate and additional documents together with the Restrictive Covenant “govern the development and operation of Pier B.” This claim is demonstrably false, as demonstrated in our attached Exhibit 3. The Restrictive Covenant is the sole agreement between the City and PBDC concerning cruiseport operations at Pier B.

#### 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.

#### PART II. THE PROPOSED NEW AGREEMENT GIVES PIER B DEVELOPMENT CORPORATION SUBSTANTIALLY MORE RIGHTS THAN ITS EXISTING ARRANGEMENT WITH THE CITY, AND LEAVES THE CITY WITH FEWER RIGHTS AND FEWER OPTIONS CONCERNING CRUISE SHIP ACTIVITIES IN THE WATERS OF KEY WEST.

In 2019, Pier B hosted approximately 2/3 of all cruise ship visits to the Port of Key West, berthing approximately 250 cruise ships and disembarking approximately 600,000 passengers.

The proposed agreement encourages Pier B’s cruise ship operations to increase to approximately 96% of all potential cruise ship visits (349/365 days), encourages the berthing of

cruise ships on 349 days, and encourages the disembarkation of 1,290,000 passengers per year [3700/day x 349 days].

Conversely, it decreases City's right to cruise ship operations at its 2 public cruise ship piers to a total of 15 days per year.

The proposed agreement entirely eviscerates the City's efforts to limit cruise ship size, traffic, and daily passenger disembarkations so as to protect the environmental and quality-of-life harm created by unfettered mega-cruise ship traffic in the City's harbor and near shore waters.

The proposed agreement ratifies (in-perpetuity) PBDC's right to operate its cruise ship port without compliance of any local laws or ordinances.

Astonishingly, the proposed agreement also proposes to convey to PBDC and its tenant cruise lines the right to use a portion of the City's public property at Mallory Pier for expansion of PBDC's cruise ship operations.

Lastly, the proposed agreement could expose the City to costly litigation and monetary damage claims by various parties who are not signatories on this agreement, including but not limited to the Key West Harbor Pilots, the U.S. Navy, U.S. Coast Guard and Federal and State Departments of Transportation.<sup>2</sup>

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

On or about 1986 the Navy, City, and Pritam Singh/Truman Annex Development Co. entered into redevelopment plans conveying a portion of Truman Annex to Pier B's predecessor in interest, reserving to the City the exclusive option to operate a cruise ship pier on the site. The City's exclusive option to operate a cruise ship pier is an "interest" in real property.

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,

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<sup>2</sup> In July 2020 the Key West Harbor Pilots filed a federal lawsuit to prevent the voters' initiatives regarding cruise ship restrictions from appearing on City's November ballot (see Key West Harbor Pilots Association vs. Joyce Griffin, Monroe County Supervisor Elections, et. al., Case No 4:20-cv-10076-JLK). The Harbor Pilots alleged that monetary damages would result if the initiatives resulted in restrictions on cruise ship traffic. The Harbor Pilots also alleged that the City's Comprehensive Plan would be violated by any restrictions on cruise ship traffic. The Harbor Pilots also alleged that: *Operation of the Port of Key West must be coordinated with all entities having jurisdiction, including but not limited to Monroe County, the United States Navy, the United States Coast Guard, and the Federal and Florida Departments of Transportation.*" (see page 13, paragraph 66 of said complaint.)

included a first renewal date of 21 years, and subsequent renewal dates every 10 years thereafter. (That agreement required consent from both parties to make any changes, which effectively makes it a contract-in-perpetuity.)

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 agree that public property at Mallory Square be conveyed to PBDC's tenant cruise lines for 349 days each year in perpetuity, the new Agreement must be approved by voter referendum in compliance with Section 7.03. Moreover, for the City and PBDC to make any amendments, modifications, or renewals of the Restrictive Covenant, or any other Truman Annex Development Agreements, 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.

#### SUMMARY:

1. The only contractual agreement between PBDC and the City of Key West regarding cruiseport operations is the 1994 Restrictive Covenant known as Resolution 93-405 and filed in the public records at Official Records Book 1294, Page 0625 et. seq. This agreement governs a cruiseport which is no longer in use and which was relocated in 1999 to a different parcel without authorization from the City. Present-day cruiseport operations at Modern Pier B are being conducted without prior authorization from the City.
2. The proposed Operating and Settlement Agreement is not in the financial or operational best interests of the City, as it substantially increases the rights and benefits of PBDC, while substantially decreasing the rights and benefits of the City.
3. Any agreement that does not include the consent of — or at the very least prior notice to — other potential “shareholders” related to cruise ship operations in the Port of Key West could open the City of Key West to lawsuits for injunctive or monetary damages relief.
4. Any agreement conveying to PBDC and/or its tenant cruise lines the right to use or operate a portion of its cruise ship activities on the City's real property known as Mallory Square requires approval by voter referendum in compliance with Section 7.03.
5. Any agreement purporting to convey, or to continue to convey in perpetuity to PBDC an interest in the City's exclusive right to operate a cruise ship port at Truman Annex requires approval by voter referendum in compliance with Section 7.03.

6. Because Resolution 22-073 specifically excludes Pier B from its cruise ship restrictions, the City faces no monetary damage claims by Pier B for simply maintaining the status quo and NOT entering into the proposed new “Operating and Settlement Agreement.”
7. The City should postpone entering into any new agreement with Pier B until the full rights and remedies of the City are determined and any new agreement is voter-approved by referendum.

#### 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. Voter approval is now required before finalizing an agreement with PBDC for the cruiseport at its current location under the City Charter Section 7.03 which prohibits the City from conveying any interests in real property without a voter-approved referendum

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 31st day of March 2022,

**Linda Wheeler, Esq.**

**Ralf Brookes, Esq.**

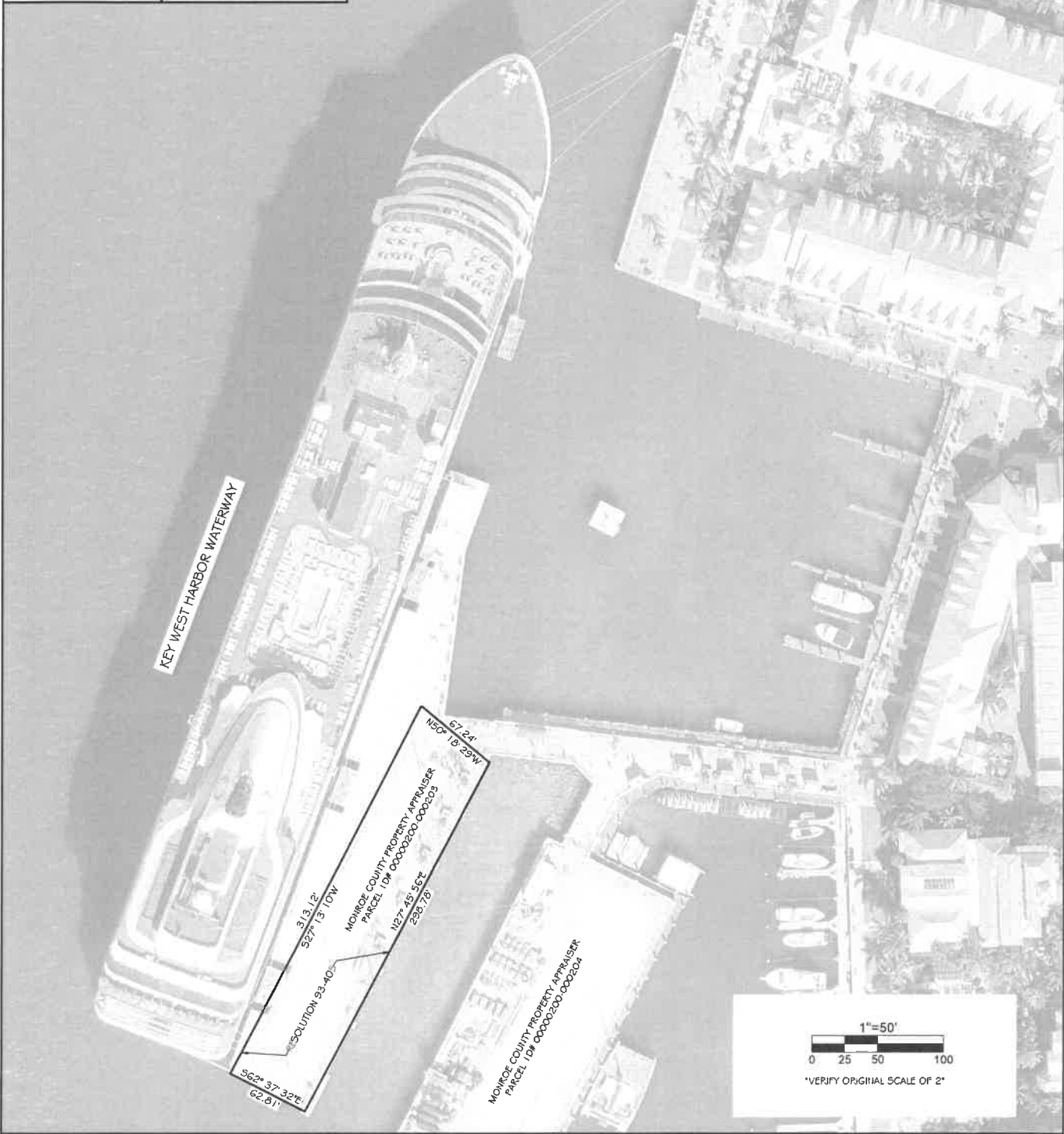




# Exhibit 1b

LOCATION MAP - NTS  
SEC. 06-T689-R25E

## VISUAL REFERENCE SHEET



I HEREBY CERTIFY THAT THIS SURVEY WAS MADE UNDER MY RESPONSIBLE CHARGE AND MEETS THE STANDARDS OF PRACTICE AS SET FORTH BY THE FLORIDA BOARD OF PROFESSIONAL SURVEYORS AND MAPPING IN CHAPTER 51, FLORIDA ADMINISTRATIVE CODE PURSUANT TO SECTION 472.027, FLORIDA STATUTES AND COMPLIES WITH CHAPTER 177, FLORIDA STATUTES.

ERIC A. ISAKS, PLS, 45705, PROFESSIONAL SURVEYOR AND MAPPER, LSW 7847

NOT VALID WITHOUT THE SIGNATURE AND THE RAISED SEAL OF A FLORIDA SURVEYOR AND MAPPER



**FLORIDA KEYS  
LAND SURVEYING**  
21460 OVERSEAS HIGHWAY, SUITE 4  
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### 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"=50'
ORDER NO.: 22-571	CHECKED BY:	SHEET 2 OF 2

# 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).

## Exhibit 3

### BRIEFING ON THE “BUILT-OUT AGREEMENT” AND FALSE CLAIMS MADE IN THE “OPERATING AND SETTLEMENT AGREEMENT”

The proposed “Operating and Settlement Agreement” conflates three separate and distinct Agreements and makes the unsupported claim that these documents together “govern the development and operation of Pier B and are binding upon and effective as to the Parties.” This claim is grossly exaggerated and demonstrably false. Two of these agreements deal with “development” which clearly does not include the Pier B cruiseport; nor do these development agreements in any way govern the operation of Pier B. The third Agreement (with which we are primarily concerned in the body of our memorandum) deals solely with the “operation” of Historic Pier B and does not concern development in any way.

The agreements referenced are: the 1986 Truman Annex Development Agreement and subsequent DRI Development Order (the “Truman Annex DRI”), together with its many amendments; the 1994 Declaration of Covenants, Conditions and Restrictions (the “Declaration”); and the 2000 Agreement for the Built-Out Truman Annex DRI (the “Built-Out Agreement”).

The 1986 Truman Annex DRI permitted a large number of “development uses,” but these permitted “development uses” did not include a cruiseport or cruise ship operations of any kind, neither at Pier B nor at any other site. The DRI’s sole reference to a cruiseport is as one of several “conditions, terms, restrictions, and other requirements,” wherein the City was given the option to require the developer to construct a cruiseport and keep the disembarkation tax (referred to hereafter as “the cruiseport option”). This cruiseport option ensured that the City retained the right to require the developer to perform services for the City, at City expense, and for the benefit of the City and its citizens. As the option to build a cruiseport was a right granted exclusively to the City, the DRI did not grant the developer any development rights to a cruiseport. Cruise ship operations are not otherwise mentioned in this agreement.

By its own terms, the 2000 Built-Out Agreement only authorizes development which was previously authorized by the 12<sup>th</sup> Amendment to the DRI. As noted above, the “cruiseport option” in the 1986 DRI was not a permitted “development use” but one of several “conditions, terms, restrictions, and other requirements.” Nor was it made a “development use” through any of the subsequent amendments. Moreover, the “cruiseport option” was expressly and completely deleted from the DRI in 1995, five years prior to the Built-Out Agreement’s execution. The Built-Out Agreement defines “the Owners” as several Walsh-controlled corporations including Pier B Development Corporation and restricts the sites on which development is authorized to lands where the Owners “hold legal and equitable title.” Thus, any lands rented or leased by the Owners, including the entirety of the Modern Pier B structure, are excluded from any development rights granted by the Built-Out Agreement. The only reference to the property or properties known as Pier B within the Built-Out Agreement is in Paragraph 1.B.: “On the mainland, the Owners shall be entitled to complete the Pier B expansion that is now in progress.” For the reasons given above, the reference to “the Pier B expansion that is now in progress” “on

the mainland” clearly cannot refer to the cruiseport at Pier B: the cruiseport and cruise operations were never permitted development uses under the DRI; the cruiseport option was deleted from the DRI; and the cruiseport occupies a leased parcel which is expressly excluded from any development rights. Instead, the reference to “the Pier B expansion” “on the mainland” clearly refers to the parcel, identified within the Pier B Deed as the “5’ Upland Pier B,” to which PBDC held legal and equitable title, and upon which the 12<sup>th</sup> Amendment had previously authorized a “Harbor Walk ... and ... waterfront parks encompassing parts of the mainland ... Pier B.” To state otherwise, or to imply by conflation that the Built-Out Agreement refers to the Pier B cruiseport or cruise operations in any way requires either ignorance of the document or willful misrepresentation of its clear terms.

As we have stated in the main body of our memorandum, the sole agreement between the City and PBDC concerning cruiseport operations at Pier B is the 1994 Restrictive Covenant (Res. 93-405). The apparent dispute over this simple fact calls for a suit for declaratory judgment to settle the issue before advancing any further in negotiations with PBDC.