IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE COUNTY, FLORIDA

THE JOCKEY CLUB CONDOMINIUM APARTMENTS, INC. and JOCKEY CLUB CONDOMINIUM APARTMENTS, UNIT NO. II, INC., Plaintiffs, vs. APEIRON MIAMI, LLC, and JOCKEY CLUB III ASSOCIATION, INC. Defendants.	Complex Business Litigation Section (40) Case No.: 16-5957 Case No.: 16-13168

ORDER GRANTING MOTION FOR REHEARING AND CONCOMITANT AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS CAUSE having come before the Court on Defendant Apeiron's Motion for Rehearing as to certain portions of the Findings of Fact and Conclusions of Law issued by this Court on May 26, 2017. The Motion is hereby **GRANTED** and the Court issues the following Amended Findings of Fact and Conclusions of Law addressing those matters as well as its entire prior ruling.

THIS MATTER came before the Court on February 27 and 28 and March 1, 2 and 3, 2017 for Non-Jury Trial, the Court having presided over the trial, considered all the testimony, exhibits, relevant legal authority, and having been fully advised by the parties, the Court hereby finds as follows:

Plaintiffs, THE JOCKEY CLUB CONDOMINIUM APARTMENTS, INC. ("Jockey I") and JOCKEY CLUB CONDOMINIUM APARTMENTS UNIT NO. II, INC. ("Jockey II")

(collectively "Plaintiffs" or "Jockey"), seek declaratory and injunctive relief against APEIRON MIAMI, LLC ("Apeiron") the owner of the common areas of the grounds upon which Jockey is located. Jockey contends that certain easements running in favor of them over Apeiron's property prohibit Apeiron from developing its property subject to those easement rights. Plaintiffs also seek declaratory and injunctive relief against Apeiron contending that Apeiron cannot assume maintenance of the Common Areas.

ISSUES TRIED

The Development Action (16-5957) and the Maintenance Action (16-13168) were consolidated for purposes of discovery and trial. Since the beginning of this litigation, two agreements have been the focus: the 1977 Agreement and the 1995 Agreement. Plaintiffs position is that each of these agreements precludes Apeiron from developing anywhere on its approximately 14-acre property.

The Court disposed of the 1977 Agreement in its February 4, 2017 Orders granting Apeiron's summary judgment motions. Those Orders determined that the 1977 Agreement is not binding on Apeiron as it was extinguished by Florida's Marketable Record Title Act. Thus, the 1977 Agreement does not preclude Apeiron from utilizing its Property, and there was nothing relating to that agreement left to be tried.

Only the 1995 Agreement, and its amendment, remained to be addressed, along with the 1995 Pool Easements and the 1990 Parking Easement. Unlike the 1995 Agreement, Plaintiffs did not contend that those pool and parking easements preclude, wholesale, Apeiron's use (development and maintenance) of its Property.[1]

[1] Plaintiffs have also alleged and argued at various times that certain unrecorded 1980 Agreements impact Apeiron's rights to develop or maintain and operate its Property. The 1980 Agreements and all other unrecorded agreements,

The purpose of the declaratory judgment act is to afford relief from insecurity and uncertainty with respect to rights, status, and other equitable or legal relations. *See Kelner v. Woody,* 399 So.2d 35, 37 (Fla. 3d DCA 1981). "The moving party must show he is in doubt as to some right or status and that he is entitled to have such doubt removed." *Abruzzo v. Haller,* 603 So.2d 1338, 1339 (Fla. 1st DCA 1992).

The Court finds that there is a bona fide, actual, present practical need for a declaration regarding the parties' rights pursuant to the 1990 Parking Easement, the 1995 Agreement, the 1995 Amendment and the 1995 Pool Easements and how those rights impact Plaintiffs and Apeiron's ability to develop its property and/or assume control and maintenance of its property.

FINDINGS OF FACT

1. The Jockey Club originally consisted of approximately 22 acres of property located at 11111 Biscayne Blvd. in Miami, Florida (hereinafter the "Jockey Club Property").

2. Of those 22 acres, the original developer, Jockey Club, Inc. ("JCI"), dedicated approximately 8 acres to developing three independent residential condominium buildings. The Jockey Club Condominium Apartments, Inc. ("Jockey I"), Jockey Club Condominium Apartments, Unit No. II, Inc. ("Jockey II"), and Jockey Club III Association, Inc. ("Jockey III" and together with Jockey I and Jockey II, the "Associations"), are the associations for each respective condominium building comprising the eight acres.

3. Each condominium building owns only the land on which it is built, a small footprint of land around the building, and its respective parking area. Each condominium

documents, and claims against the Property were, however, expressly extinguished by the 2002 Trustee Deed and corresponding Bankruptcy Order in evidence. (Plf. Ex. 53, pp. 6 – 7 at ¶ 4, 4 n.2; Apeiron's Ex. E).

building was also granted ingress and egress easements across the developer's property by metes and bounds descriptions over the existing roadways.

4. The original developer retained fee simple ownership of the remaining approximately 14 acres of the Jockey Club Property in order to operate a club, hotel, marina, restaurant, tennis courts, pools and other amenities.

5. The Associations do not own, nor do they have record title to, the remaining 14 acres of the developer's property. They have always paid for the right to use the developer's property.

6. Apeiron, a Florida limited liability company formed in 2014, purchased the remaining 14- acres of the developer's property in July 2014 with the intention to develop it.

7. Plaintiffs oppose Apeiron's proposed development and claim that certain alleged restrictions and rights flowing from certain agreements preclude Apeiron from both developing and maintaining its 14-acre Property.

8. As Plaintiffs do not own the Property, nor did they prove any claim to the Property by adverse possession or prescription,[2] their rights, if any, must flow from the challenged easements in a 1995 agreement, an amendment in 1995, and two independently recorded 1995 Pool Easements, together with a 1990 parking lot easement.

9. On January 9, 1995, the original developer and the Associations entered into an agreement which was recorded subsequently in the Public Records of Miami-Dade County,

[2] Plaintiffs originally pled they had easement rights as to Apeiron's Property by virtue of adverse possession and/or prescription. However, when faced with Apeiron's Motion for Judgment on the Pleadings, they amended their complaint withdrawing those claims, but refused to agree to a judgment or order determining they had no such rights. Apeiron then moved for summary judgment on these claims, Plaintiffs failed to produce any summary judgment evidence in opposition, and the Court granted Apeiron's motion for summary judgment on February 7, 2017.

Florida[3]. The particularly relevant Terms and Provisions of the 1995 Agreement provide in pertinent part:

> Recitals:
>
> …
>
> Whereas, the covenants, restrictions, easements, conditions set forth herein shall run with the title to the Common Areas, hereinafter defined, and shall be binding upon the parties and all persons having any right, title or interest in the Common Areas, or in any part thereof….
>
> ARTICLE II – DEFINITIONS
>
> ….
>
> 1. "Common Areas" shall mean and refer to all of the property described in exhibit I as Common Areas, which is a portion of the real property owned by Club east of Biscayne Boulevard less that portion thereof presently constituting the North and South Marinas, the proposed fifty (50) room hotel, the Condominium Units which are operated as the existing hotel, certain parking areas, the Villas, the Lear School Property, and the Jockey Club Clubhouse. Subject to the foregoing, the Common Areas shall include all the areas and facilities which currently exist and constitute the Jockey Club Complex and facilities including *by way of example, and not by way of limitation*, all existing tennis courts, the spa facility, the tennis pro shop its toilets, bath, sauna and locker facilities, the three (3) existing swimming pools, landscape areas, common walkways, etc., together with such other appurtenances and improvements which may be added on the Common Areas from time to time. [E.S.]
> 2. "Common Services" shall mean the services provided by Club pursuant to the 1980 Agreement including, without limitation: utility service for the Common Areas; management and administration of the Common Areas and Common Services (including, without limitation, compensation paid to managers, and other employees); gardening and landscaping of the Common Areas, including decorative planting, tree trimming, lawn maintenance and cutting; water and site irregation [sic] including maintenance of site sprinkler system; maintenance, operation, repair and replacement of equipment serving and appurtenant to the Common Areas including that lighting previously installed thereon by Phase(s) II, lighting for the Common Areas including existing night lighting for all roadways walkways and the Pool Areas; roadway and parking area maintenance and lighting for same; mail service as has been provided under the 1980 Agreement, which shall include pick up of mail from post office, sorting and distribution of mail to Phase(s) I, II and III and mail delivery to post office six (6) days a week excluding national holidays; room service and maid service as has been provided under the 1980 Agreement; pool and pool deck maintenance and repair of pool furniture; repair,

[3] OR Book 16725 at Pages 1850 (the "1995 Agreement"). (Amd. Jt. Pre-Trial Statement, ¶ 8; Plf. Ex. 5).

replacement and maintenance of tennis court surfaces, nets and wind screening; pest control for the Common Areas; maintenance and capital replacements for the lift-station; security including front gate admission, perimeter security, security personnel a security chief, electric cart for rovers, radios, uniforms, maintenance of gate house and entry gates; maintenance, repair and replacement of the Common Areas; daily staffing for each Pool Area and the Tennis Courts and those additional services usually and customarily provided or required for the Common Areas and those which ae usual and customary for a "club facility" which is operated and maintained in "first class" manner.

3. "Jockey Club Complex" or "Jockey Club" shall mean the Common Areas and the Common Services.
4. "Pool Areas" shall mean the three (3) pool areas located within the Common Areas. There is one Pool Area appurtenant to and adjoining each phase (I, II and III) within the Jockey Club Complex. For purposes of this Agreement and the easements created hereunder and pursuant to this Agreement the term Pool Areas shall include each such pool, its pool deck, pool house, if any; and all appurtenances and appurtenant equipment thereto but not limited to pool circulation, filtering and hearing equipment and interconnecting piping. Attached hereto and marked Exhibit II is a sketch showing the location and limits of the Pool Areas.

ARTICLE III – EASEMENTS OF ACCESS AND ENJOYMENT

Subject to the provisions below, Club hereby grants, conveys, sets-over and establishes for and in favor of Phase(s) I, II and III and to all Unit Owners, and persons and entities who are members of the Club as provided for herein, a non-exclusive right to use and a non-exclusive easement of enjoyment in and to the Common Areas and Common Services, together with an easement of ingress, egress, and access to and from the Common Areas and the improvements located thereon subject to the following:

….

ARTICLE V – CONDOMINIUM COST SHARING

As part of the consideration for Club's providing the Common Services, Phase(s) I, II and III shall collectively pay Club a cost sharing contribution ….

ARTICLE X - ADDITIONAL COVENANTS

1. There is an existing written agreement between Club and Phase II with respect to parking for Phase II, its unit owners, guests and invitees, and an agreement dated February 18, 1987 regarding electrical usage to the Phase II Pool Area. Additionally Club and Phase II entered into an agreement dated August 4, 1977 which was modified by the Club and Phase II in their 1980 Agreement. Except as otherwise modified, the August 4, 1977 Agreement, the February 18, 1987 Agreement, and all existing recorded easements in effect between the Club and Phase II shall remain unaffected by this Agreement and shall remain in full force

and effect and shall to the extent provided by their terms survive any termination or expiration of this Agreement.

2. All existing rights of Phase I, Phase II, Phase III and the Club or any other party with respect to parking, lighting, access, ingress and egress shall remain unaffected by this Agreement and shall remain in full force and effect and shall to the extent provided by their terms survive any termination or expiration of this Agreement.
3. …
4. Further, Club agrees that it will at no time in the future construct any cabanas or other permanent structures which from the Phase I Pool Area deck would obstruct any person's view of the bay.

…

ARTICLE XII – POOL AREAS – COMMON AREA EASEMENT

1. Contemporaneous with the execution hereof, Club has executed and delivered respectively to Phase I, Phase II and Phase III a 99 year easement for the use of the respective Pool Area(s) adjoining Phases I, II and III within the Jockey Club. The form of said easement is attached hereto as Exhibit V. The rights, privileges and obligations of Phase I, Phase II and Phase III and their Unit Owners, and their guests and invitees shall enjoy the easements and privileges provided for herein and in the said Easement but Club shall be fully responsible for all expenses of every kind and nature whatsoever with regard to the Pool Area and all decisions regarding maintenance, repair, operation, expenditure for capital improvements and staffing of the Pool Easement Area. The provision of the easement hereof shall survive any termination of this Agreement.

2. …Accordingly, as additional consideration to Phase(s) I, III and III execution of the Agreement, Club in addition to and not in derogation of any other rights which inure to Phase(s) I, II and III, hereby grants, sets over and establishes in favor of Phase(s) I, II & III jointly and severally a *license and non-exclusive easement* during the term of this Agreement and continuing thereafter to the extent provided in this paragraph *to enter upon the Common Area to enable them to continue to operate, at their expense, either jointly or severally, all of the Common Area, and to provide for themselves all of the Common Services relating to the Common Area excluding room and maid service.* This license and *easement shall apply at any time the Club* either announces its intention to close substantially all of its facilities or ceases site maintenance, or failing such announcement, if the Club *closes all or substantially all of its facilities or ceases* (after written notice to Club and its failure to cure as provided in E. 4 of Article XIII of this Agreement) *to provide the site maintenance and Common Services relating to the Common Area* as required by this Agreement. …In furtherance of the license, easement and grant to Phases I, II & III hereunder, Club hereby grants, assigns and sets over Phase(s) I, II & III all rights reasonably necessary including but not limited to the right to enter upon the Common Area and to utilize (and the obligation to pay for) the Common Area, …. Access to the Common Area provided for herein shall be limited to those portions as reasonably necessary for Phases I, II & III to provide any of the services

> mentioned herein. *Nothing in this paragraph shall affect the Club's ownership rights* or its right to encumber sell or lease its properties, as well as *its right at any time to reopen or to recommence site maintenance.* ….Upon the expiration of the term of this Agreement or any subsequent renewal thereof the liscense [sic], easement, grant and privileges established by this paragraph shall continue unabated and they shall expressly survive the termination hereof for ninety-nine (99) years. After the term hereof or upon expiration of this Agreement for any reason whatsoever, nothing in this paragraph is intended to impose any changes, or financial obligations of any kind or nature whatsoever upon Phases I, II or III, Unit Owners or tenants, have and except the requirement that Phases I, II & III pay and be responsible for all costs incurred in their exercise, jointly or severally of the liscense [sic] easement, grant and privileges established hereby. … [A]nd further that the provisions of this paragraph shall expressly survive any termination of this Agreement. [E.S.]
>
> ARTICLE XIII
>
> 3. Term. The covenants and restrictions of this Agreement and those of the 1980 Agreement which continue herein shall run with and bind the Common Areas, and shall inure to the benefit of and be enforceable by Club, Phase(s) I, II or III, other Unit Owners, their respective legal representatives, successors, heirs and assigns, for a term of ten (10) years from the effective date of this Agreement after which time this Agreement and said covenants conditions, reservation of easements and restrictions, except those which are specifically intended to survive, may only be extended by the further written agreement of Club, Phase I, Phase II and Phase III.[4]

10. Thus the 1995 Agreement provides that the "covenants, restrictions, easements, [and] conditions" run with title to certain defined – but not separately, specifically legally described – "Common Areas" and states that it is binding upon the parties having any right, title, or interest in the Common Areas and their successors. Plaintiffs seek a declaration that the 1995 Agreement is a "covenant running with the land" that is "binding on APEIRON," in both consolidated actions.[5]

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[4] In May 1995, made effective as of January 9, 1995 an Amendment to Agreement was entered into and recorded, which did not affect the provisions at issue in this matter.

[5] Plf. Am. Comp., p. 21, Development Action; Plf. Comp., p. 19, Maintenance Action.

11. There is no provision in the 1995 Agreement that precludes future development of the Common Areas or the Property. The 1995 Agreement expressly contemplates both additional residential and commercial development on the Property (and on an adjacent property known as the "Lear School Parcel.") It is clear from the 1995 Agreement that further development was the impetus for entering into the Agreement.

12. The 1995 Agreement and the covenants, restrictions, and easements granted as to the "Common Areas" were for a 10-year term—except those covenants, conditions, reservation of easements, and restrictions that were "specifically intended to survive"—and could only be extended by further written agreement of owner and the Associations.

13. Article III provides that the developer granted to the Associations "a non-exclusive right to use and a non-exclusive easement of enjoyment in and to the Common Areas and Common Services," together with ingress and egress easements over the "Common Areas." Article III does not contain any language providing that it was "specifically intended to survive" the 10-year term of the 1995 Agreement.

14. Article XII, Paragraph 2 of the 1995 Agreement provides that it grants Plaintiffs a license and non-exclusive easement during the term of the Agreement and continuing thereafter to the extent provided in that paragraph, the right to enter upon the Common Area to enable them to continue to operate, at their expense; either jointly or severally, all of the Common Area, and to provide for themselves all of the Common Services relating to the Common Area excluding room and maid services. The reason for this non-exclusive easement, expressed in the language of the 1995 Agreement, was so the Plaintiffs could step in and maintain the Common Areas themselves, at their expense, in the event the developer stopped maintaining the property.

15. Notwithstanding the 1995 Agreement's use of the phrase "Common Areas" throughout, and in Article III and XII in particular, Apeiron is the fee simple owner of the Property, including the areas defined in the 1995 Agreement as "Common Areas".

16. Of equal import to the rights set forth in the paragraph for Jockey I, II and III, is the the sentence contained therein which states:

> "Nothing in this paragraph shall affect the Club's ownership rights or its right to encumber sell or lease its properties, **as well as its right at any time to reopen or to recommence site maintenance**." [E.A.]

17. Although there is a detailed definition of the "Common Areas" in Article II of the 1995 Agreement that purports to describe what parts of Apeiron's Property are included and not included, there is no separate, specific legal description or survey of the "Common Areas".

18. Article XII, Paragraph 2 places an express limitation on the easement in recognition of the developer's paramount property rights. The last sentence of Article XII, Paragraph 2, originally and as amended, specifies that the provisions of that paragraph, not just the license and non-exclusive easement to maintain described therein, "expressly survive[d] any termination of this [1995] Agreement."

19. The parties stipulated that the Clubhouse building identified in the 1995 Agreement was demolished sometime in 2009.

20. Article III, relating to Plaintiffs' easement of use and enjoyment of the "Common Areas" contains no language indicating it was specifically intended to survive the expiration or termination of the agreement.

21. Apeiron was aware of the 1995 Agreement prior to its purchase of the Property in 2014. After conducting its due diligence, Apeiron determined that the agreement did not present an impediment to developing the Property.

22. Apeiron formally announced its intent to recommence site maintenance of the Property in a May 2016 letter to the Associations. Nothing in the 1995 Agreement, in particular Article XII Paragraph 2, requires the owner of the Property to pay the Associations for their maintenance of the "Common Areas."

23. Prior to and after Apeiron's purchase of the Property, no one on behalf of the Associations or JCMA ever asked Apeiron to resume maintenance of the Property. Nor did the Agreement contain such a requirement. Indeed, Plaintiffs filed the Maintenance Action, seeking to preclude Apeiron from assuming maintenance once it sought to do so.

24. Apeiron was not sued for reimbursement of the amounts paid by the Plaintiffs for their maintenance of the Property from the time Apeiron obtained ownership through the time it notified Plaintiffs it was resuming maintenance. Plaintiffs, however, now ask for this alternative monetary relief in the Maintenance Action for the time period Apeiron owned the Property but was not maintaining it, despite their claim seeking to enjoin Apeiron from assuming maintenance of its Property.

25. Apeiron's representative, Muayad Abbas, testified regarding Apeiron's positions and contentions with respect to the 1995 Agreement, in particular Article XII, Paragraph 2 and Article III. Apeiron's position is that the first sentence in Article XII, Paragraph 2 reserves the Property owner's ownership rights and its right, at any time, to resume site maintenance, and that it was not limited to the 10-year term of the 1995 Agreement or by any other term.

26. No testimony was received from the Boards of Jockey I or Jockey II at the trial. No representative of Jockey I testified at the trial. The only representative of Jockey II that testified at trial was Jerome Cohen.

27. Mr. Cohen's testimony frequently diverged from the positions Jockey II (and Jockey I) have put forth in the Development and Maintenance Actions regarding the meaning and effect of Article XII, Paragraph 2's alleged non-exclusive easement to maintain. He testified that Apeiron may resume maintenance of its Property anytime it wants as long as the Associations do not have to pay Apeiron for maintenance of Apeiron's Property; that Apeiron can't expect the associations to make contributions towards it; that Apeiron has property the easements don't cover and that Apeiron has plenty of property they can develop.

28. Mr. Cohen also testified that the area where the demolished clubhouse building once stood is not covered by the easements in the 1995 Agreement, and Apeiron can certainly develop on that property, "build a restaurant, build a hotel building or whatever can be built on what he owns there . . ."

29. Mr. Cohen also testified that Apeiron is not permitted to resume maintenance of the Common Areas because the non-exclusive maintenance easement became exclusive after the 1995 Agreement terminated, and that Apeiron cannot develop its Property over the "Common Areas" because of the Plaintiffs' maintenance easement.

30. Mr. Cohen's testimony as to the effect of the 1995 Agreement was not relevant in light of the plain language of the 1995 Agreement. His testimony does not support the Plaintiffs' contention that the circumstances surrounding the 1995 Agreement evidences that the intention of the parties was to preclude further development on, and to permanently preclude the developer or its successors from resuming maintenance of, the "Common Areas."

31. As to future development matters, Apeiron's corporate representative, Muayad Abbas, testified that after Apeiron purchased the Property in 2014, he approached the Boards of Directors for both Jockey I and Jockey II, in an attempt to collaborate with them on Apeiron's proposed development and to devise a plan that could be supported by them and that would be mutually beneficial for all parties.

32. There was no evidence adduced that Apeiron negotiated in bad faith with either or both Jockey I and Jockey II over the approximately year and a half period between the date Apeiron purchased its Property and the date Plaintiffs filed suit, in an attempt to adapt and modify Apeiron's proposed development to meet their concerns.

33. Plaintiffs did not establish any evidence that Apeiron operated in bad faith in its negotiations with Jockey I or Jockey II, or that Apeiron treated Jockey I or Jockey II any differently than it treated Jockey III, with whom Apeiron ultimately reached an agreement to support its proposed development.

Dispute over Location and Boundaries of the Common Areas

34. Both the non-exclusive maintenance easement in Article XII, Paragraph 2 and the non-exclusive use and enjoyment easement in Article III relate exclusively to the portion of the Property that the 1995 Agreement defines as the "Common Areas".

35. The Agreement attaches a complete legal description and site plan. There is no separate, specific legal description of these defined "Common Areas," nor does it include a survey of the "Common Areas," over which the non-exclusive maintenance easement was granted. The legal description describes the entire property as a whole and the Agreement's "lessed-out" areas are not separately described.

36. According to Apeiron's expert, site plans are not generally used for identifying easements.

37. No separate legal description of the "Common Areas," as defined in Article II was offered in evidence. Nor did Plaintiffs introduce a survey of the "Common Areas" that excludes the significant portions of Property lessed-out by the "Common Areas" definition in Article II.

38. Moreover, Plaintiffs' expert did not evaluate the portions of the Property lessed-out of the definition of "Common Areas" in order to survey or plot the "Common Areas" as they are defined in the 1995 Agreement. Plaintiffs' expert focused only on the first part of the "Common Areas" definition that refers to "all of the property described in Exhibit I [the Site Plan] as Common Areas," without considering the less-outs in the "Common Areas" definition. Plaintiffs' expert thus testified that the legal description that he plotted was substantially all of Apeiron's Property without reference to the less-outs in the definition of the "Common Areas."

39. Apeiron's expert testified that he could not sufficiently identify the location and boundaries of the "Common Areas" as defined in the 1995 Agreement so as to be able to plot them on a survey because the 1995 Agreement does not include any legal descriptions for areas lessed-out of the "Common Areas" definition.

40. The Court found neither of the experts' testimony as helpful as they should have been in reaching the ultimate answers sought by their respective clients.

The 1990 Parking Easement

41. On April 20, 1990, an Easement Agreement was entered into between Jockey Club, Inc. and Jockey II, which was subsequently recorded in the Public Records of Miami-Dade

County, Florida.[6] Pursuant to the 1990 Parking Easement, Jockey II was granted a perpetual exclusive easement to use certain parking areas contained on the Common Area Property on the West side of its building, and physically integrated into the parking area owned by Jockey II as shown on Exhibit C to the 1990 Parking Easement. Exhibit "C" to the 1990 Parking Easement on page 808 of the recorded instrument clearly shows the areas that were intended to be covered by the easement in the form of a graphic depiction.

42. Pursuant to the 1990 Parking Easement, Apeiron cannot relocate the easement without Jockey II's consent, which cannot be unreasonably withheld.

43. The Court finds that the 1990 Parking Easement is valid and binding on Apeiron. As such, Apeiron can only relocate or build on top of the easement area governed by the 1990 Parking Easement with the consent and approval of Jockey II, which cannot be unreasonably withheld. *See e.g., American Quick Sign, Inc.* 899 So. 2d 461 (Fla. 5th DCA 2005); *Hillsborough County v. Kortum,* 585 So. 2d 1029, 1033 (Fla. 2d DCA 1991); *Dianne v. Wingate,* 84 So. 3d 427, 429 (Fla. 1st DCA 2002); *Sand Lake Shoppes Family Ltd. P'ship v. Sand Lake Courtyards, L.C.,* 816 So. 2d 143 (Fla. 5th DCA 2002); *Diefenderfer v. Forest Park Springs,* 599 So. 2d 1309, 1313 (Fla. 5th DCA 1992).

1995 Pool Easements

44. Paragraph 1 of Article XII of the 1995 Agreement granted the three Associations a 99-year easement for the non-exclusive use, repair and maintenance of their respective pool areas with the right to purchase those areas in fee simple for $1 after the 99 years. The fact that these easements are to be purchased after 99 years for $1 clearly establishes that these easements were not to be modified beyond the terms in the 1995 Agreement. While the 1995

[6] OR Book 14630 at Pages 799 to 808 ("1990 Parking Easement") (Exhibit 1).

Agreement was in force, Jockey Club, Inc. was responsible for expenses of the pool areas. When the 1995 Agreement was terminated, the easement provided that each Association was responsible for the cost, expense to maintain, repair, operate, and staff their pool easement areas.

45. On January 9, 1995, pursuant to Article XII, Paragraph 1 of the 1995 Agreement, Jockey Club, Inc. also entered into three separate Easement Agreements with Jockey I, Jockey II, and Jockey III, which were subsequently recorded in the Public Records of Miami-Dade County, Florida at OR Book 16725 at Pages 1808 to 1821, OR Book 16725 at Pages 1836 to 1849, and OR Book 16725 at Pages 1822 to 1835, respectively (the "1995 Pool Easements") (Exhibits 6, 7, and 72). Each of the respective 1995 Pool Easements provides that they are covenants running with the land and binding on all successors. The 1995 Pool Easements are valid and binding on Apeiron.

46. Each of the Pool Easements contained the same sketch labeled "Master Site Plan/Conceptual Landscaping Plan" as Exhibit "B". Exhibit "B" to the 1995 Pool Easements is a graphic depiction of the Jockey Club showing each of the three buildings and their adjacent Pool Easement Areas. This is more than sufficient to identify the easement areas and create a valid easement. *See Hynes,* 451 So.2d at 511; *Citgo Petroleum Corp.*, 706 So. 2d at 385; *Am. Quick Sign, Inc.,* 899 So. 2d at 465; *Kotick,* 143 Fla. at 393-94. Apeiron's Ninth Defense fails.

Miscellaneous

47. In 2002, following the Bankruptcy of the Property owner, the Property was conveyed out of the then-owner's bankruptcy by Trustee's Deed. As reflected in the Bankruptcy Court's Final Order Approving Sale of Property pursuant to 11 U.S.C. § 363 Free and Clear of Liens, Claims, Encumbrances and Interests, the Property now owned by Apeiron

was sold "free and clear of any and all liens, interests, encumbrances and claims," that were not "set forth in the public records."

48. As part of due diligence when Apeiron bought the Property in 2014, Apeiron learned there were open code violations and code enforcement liens on the Property and some of the violations were for failure to obtain a permit.

49. Apeiron understood, based on discussions with the prior owner, that the prior owner was not the one who performed work without permits and that JCMA was maintaining the property at that time.

50. Apeiron paid to resolve the open code violations and code enforcement liens related to the code enforcement issues on the Property's "Common Areas" in the amount of approximately $14,000. The amount of money paid by Apeiron to professionals to investigate and assist in resolving code enforcement issues is $11,580.45.

CONCLUSIONS OF LAW

1. The 1995 Agreement and the 1995 Pool Easements each provide that they are covenants that run with title to the "Common Areas," and Plaintiffs seek a declaration that they are covenants running with the land and also seek to enforce them, not simply to preserve their alleged limited, non-exclusive easement rights, but as restrictions precluding Apeiron from using (i.e., developing and even maintaining) all of its Property.
2. Florida Supreme Court case law on covenants running with the land controls the interpretation and construction of the 1995 Agreement and the 1995 Pool Easements.
3. The Court concludes that the 1995 Pool and 1990 Parking easements are in fact covenants running with the land.

4. The Court further concludes that the now matured 1995 Agreement's easement allowing the Associations to step in if the property owner ceases site maintenance, is an easement running with the title.

5. Evidence of surrounding circumstances or other parol or extrinsic evidence may not be used to vary the express terms of the 1995 Agreement and the 1995 Pool Easements. *Knabb v. Reconstruction Finance Corp.*, 197 So. 707, 715 (Fla. 1940).

6. The burden created by an easement may not be increased beyond that reasonably contemplated by the parties at the time of its creation. *Easton v. Appler*, 548 So. 2d 691, 695 (Fla. 3d DCA 1989); *Walters v. McCall*, 450 So. 2d 1139, 1142 (Fla. 1st DCA 1984); *Gelfand v. Mortgage Investors of Washington*, 453 So. 2d 897, 899 (Fla. 4th DCA 1984).

7. The Associations seek to increase the scope and burden of their non-exclusive easements in the 1995 Agreement and the 1995 Pool Easements.

8. The Associations have clearly stated that they want no further development on the property. The Agreements dating all the way back in time (e.g. 1977) were in place to prevent that. But a close reading of the various agreements, the testimony presented, and the reasons and purpose for their consummation were always protections for the individual associations before the next round of development approvals were to proceed. They were always the result of serious negotiations between the associations and the owner/developer to improve its property that was burdened with non-exclusive easements. The associations both gave and received. But they do not own. Nor can they prohibit the current owner from developing or otherwise utilizing its own property.

9. The Court determines the language of the 1995 Agreement which "lessed out" the now razed Clubhouse included the Clubhouse and necessarily the land upon which it sat. That

is so because the language in paragraph 1 of Article II – Common Areas – was discussing portions of the property "presently constituting", and which "currently existed". Although the Clubhouse was demolished in 2009, the land remains within the lessed-out property. That land is not part of the common area.

10. Florida law is clear that the validity of an easement is not impaired, although not defined by metes and bounds in the instrument by which it is created, and failure to describe the boundary in granting an easement does not render the grant void. *Kotick v. Durrant,* 143 Fla. 386, 393-94, 196 So. 802 (1940) (citations omitted). "No particular form and language are necessary to create an easement; rather, any words clearly showing the intention of the parties to create a servitude on a sufficiently identifiable estate is sufficient." *Hynes,* 451 So.2d at 511 (quoting *Seaboard Air Lines Railway Co. v. Dorsey,* 111 Fla. 22, 149 So. 759, 761 (1933).

11. Nothing in the 1995 Agreement precludes Apeiron from developing its Property. No provisions in the 1995 Agreement, including any language in Articles XII and III, preclude further development of the Property. In fact, Article XII expressly reserved the developer's "ownership rights." The right to develop real property is one right within an owner's bundle of "ownership rights."

12. The Article III easement of use and enjoyment contains no language that suggests it was "specifically intended to survive" the 10 year term of the 1995 Agreement. In addition, there was no evidence that the Article III easement of use and enjoyment was the subject of any further written agreement.

13. The non-exclusive maintenance easement created by Paragraph 2, Article XII of the 1995 Agreement was, by its own terms, a stop-gap measure that allowed the Associations

to maintain the "Common Areas and provide Commons Services" at their expense, while the owner was not doing so, and was never intended to elevate the easement holders' rights over those of the owner.

14. To the extent the non-exclusive maintenance easement created by Paragraph 2, Article XII of the 1995 Agreement constitutes a viable covenant binding on Apeiron and its Property, the entirety of that paragraph, including the sentence that "[n]othing in this paragraph shall affect the [developer's] ownership rights or its right to encumber, sell or lease its properties, as well its right at any time to reopen or to recommence site maintenance," survived the termination of the 1995 Agreement. That sentence expressly limits the non-exclusive maintenance easement and reserves Apeiron's ownership rights and its right to recommence site maintenance of its Property, including all of the "Common Areas," at any time. Nothing in the 1995 Agreement precludes Apeiron (or any subsequent owner) from recommencing site maintenance if such maintenance had ceased.

15. Paragraph 2 of Article XII expressly reserves the developer's "ownership rights." The right to maintain real property is one right within an owner's bundle of "ownership rights." Paragraph 2 of Article XII expressly reserves the developer's right "at any time" to "recommence site maintenance."

16. To the extent the non-exclusive maintenance easement created by Paragraph 2, Article XII of the 1995 Agreement constitutes a viable covenant binding on Apeiron and its Property, and there is any ambiguity or doubt about Apeiron's right, notwithstanding that non-exclusive easement to use its Property, the non-exclusive maintenance easement must be construed against the restriction and in favor Apeiron's free and unrestricted use of the Property. *Moore v. Stevens*, 106 So. 901, 903 (Fla. 1925).

17. To the extent the non-exclusive maintenance easement created by Paragraph 2, Article XII of the 1995 Agreement constitutes a viable covenant binding on Apeiron and its Property, the prior owner of the Property further removed the tennis courts and the spa facility from that non-exclusive maintenance easement pursuant to written notice sent in 2005. Thus those portions of Apeiron's Property are no longer subject to the non-exclusive maintenance easement, together with the other "lessed out" property, e.g., Jockey Club Clubhouse, the proposed 50 room hotel site, north and south marinas, etc. as provided in Article II Par. 1 of the 1995 Agreement.

18. Historically, the Associations have always paid for the right to use the developer's Property, and nothing in the 1995 Agreement requires Apeiron to reimburse or pay for the Associations' maintenance of the Property or the "Common Areas" while they were exercising their easement rights, and beyond.

19. The Court construes the 1995 Agreement against Plaintiffs' alleged restriction and in favor of Apeiron's free and unrestricted use of its Property. *Moore v. Stevens*, 106 So. 901, 903 (Fla. 1925).

20. Jockey Club Maintenance Association's right to maintain the "Common Areas" flows exclusively from the Associations' maintenance easement in Paragraph 2, Article XII of the 1995 Agreement. The Court has determined Apeiron may recommence site maintenance of its Property, including the "Common Areas," at any time and Apeiron has so notified the Plaintiffs. Thus, JCMA is no longer entitled or authorized to continue to maintain the "Common Areas" owned by Apeiron.[7]

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[7] The Court observes, but makes no finding, as to the result of this determination as it affects funds collected by JCMA from Jockey I and II (Jockey III having withdrawn from JCMA and having entered into its own common services/shared facilities agreement with Apeiron) and the future need for the existence of JCMA.

1995 Pool Easements

21. As to the pools, the Court determines that the property identification is easily identifiable based on their current existence and location. Apeiron's proposed development, including building each of the Plaintiff Associations a new pool, does not negatively affect or impact any rights claimed by Plaintiffs via the 1995 Pool Easements. Those rights will be significantly enhanced by making the current use rights exclusive or granting them ownership, which Jockey II's representative testified was the Associations' original desire.

22. However, there is insufficient evidence for this Court to find that Jockey I and II's withholding of consent to Apeiron's offer to build new pools was an unreasonable withholding of consent.

1990 Parking Easement.

23. The 1990 Parking Easement expressly contemplates the right to relocate the parking area and hot tub area to another part of the developer's property with prior written approval of Jockey II, which approval is not to be unreasonably withheld.

24. Apeiron sought to leave Jockey II's parking area where it is currently located and offered to build Jockey II a parking garage on its existing easement area. When Jockey II refused Apeiron's offer, Apeiron alternately proposed to relocate the existing parking easement area to the south west portion of its Property. Both proposals were rejected by Jockey II.

25. Jockey II took the position that there is no place on Apeiron's property where the parking area easement identified in the 1990 Parking Easement could be relocated. Such

a position, in light of also withholding consent on building a parking garage in the current easement area, constitutes an unreasonable withholding of Jockey II's approval.

26. As a result, the Court concludes that Apeiron's building of a covered parking garage on the existing parking easement area, to be done in consultation with Jockey II, is a reasonable "relocation" of the parking easement area.

Affirmative Defenses

27. As to Apeiron's affirmative defenses, the evidence showed there was no merit as to them as the majority do not address the specific easements at issue, the 1995 Agreement, nor were they based on matters controlling as to the final determination made herein.

The Court therefore hereby declares:

28. Apeiron was on notice of the 1990 Parking Easement, the 1995 Agreement, the 1995 Amendment, and the 1995 Pool Easements, which are all binding on Apeiron, when it purchased the property in 2014.

29. The perpetual, exclusive parking easement granted in favor of Jockey II by the 1990 Parking Easement is a valid and identifiable easement which runs with the land and with which Apeiron cannot interfere, absent consent and approval by Jockey II, consent not to be unreasonably withheld. Apeiron's offer to build a covered parking garage on the existing parking easement area, to be done in consultation with Jockey II, is a reasonable "relocation" of the parking easement area.

30. The 1995 Pool Easements in favor of Jockey I and II are valid and identifiable easements which run with the land with which Apeiron cannot interfere. The Court determines that bathrooms adjacent to, connected to, attached to or otherwise, are necessarily part of the easement for the health and safety of the users of the pool easements.

31. The Common Areas, as defined in the 1995 Agreement, are identifiable, run with the title, and include the property now owned by Apeiron as set forth in Article II, Par. I.

32. The existing rights of Phases I, II and III and the Club or any other party, contained in Article X, Paragraph 2 remain in effect with respect to parking, lighting, access, ingress and egress, as does the commitment in Paragraph 4 that at no time in the future will cabanas or other permanent structures be built which would obstruct any person's view of the bay from Jockey I's Pool Area deck.

33. Pursuant to Article XII, ¶2 of the 1995 Agreement, Jockey I, II and III[8] were granted an event specific and limited license and easement to enter upon the Common Areas to enable them to continue to operate, at their expense, either jointly or severally, all of the Common Areas, in order to provide for themselves all of the Common Services relating to the Common Areas in the event the owner ceased site maintenance, and until such time as site maintenance was recommenced by the owner. Upon the expiration of the 1995 Agreement in 2005, those easement rights, permitting them to operate as above, vested for a period of 99 years. This vesting, however, did not create a permanent easement allowing Jockey I, II and III, jointly or severally, to provides for themselves all of the common services relating to the common areas. The easement is limited solely for the periods of time when, and if, the owner ceases site maintenance. It is a self-help easement that resets each time site maintenance is resumed by the owner.

34. Apeiron properly notified the Plaintiffs that it was recommencing site maintenance of the Common Areas, as provided in Article XII, Paragraph 2 of the 1995 Agreement. The license and easement, now running with the title for a period of 99 years, having matured

[8] Jockey III is not included in these determinations as they have since entered into a separate common services agreement with Apeiron.

at the expiration of the other agreement terms, permits Jockey I and II to continue their ability to operate "at their expense…all of the Common Area, and to provide for themselves all of the common services relating to the Common Areas …and shall only apply at any time the Club ceases site maintenance…" For purposes of this analysis Apeiron is now "the Club".

35. Thus, Apeiron has the right to not only develop, but to recommence its site maintenance of the Common Areas, which includes the provision of Common Services. Jockey I and II retain an easement to recommence those site maintenance duties if Apeiron, or any subsequent owner, ceases site maintenance. That is the extent of this provision of the easement.

36. As a result, Jockey I and II are not entitled to any monies back for the period of time they voluntarily continued maintenance from the date of notice to the date hereof.

37. Jockey III shall pay its monthly obligations to the Maintenance Association pursuant to the Articles of Incorporation, which is the controlling document for the Maintenance Association, through May 2017 but is otherwise released from any further obligations thereunder.

38. The Court declines to address the further constitution or relevance of the Maintenance Association and leaves that determination to the Plaintiffs and Maintenance Association.

39. Apeiron is not prohibited from developing on the Common Areas encumbered by the Common Services easement to Jockey I and Jockey II (for the 99 year period which commenced in 2005), but the easement continues as to Jockey I and II's right to enter upon the Common Areas and provide for themselves the Common Services relating to the Common Area, should Apeiron, or any other owner, cease site maintenance.

Both parties have both won and lost, the Court determines there is no prevailing party in this action for purposes of Article XIII(7)(c), or otherwise.

DONE AND ORDERED in Chambers at Miami-Dade County, Florida, on 07/05/17.

JOHN W. THORNTON
CIRCUIT COURT JUDGE

FINAL ORDERS AS TO ALL PARTIES
SRS DISPOSITION NUMBER 3
THE COURT DISMISSES THIS CASE AGAINST ANY PARTY NOT LISTED IN THIS FINAL ORDER OR PREVIOUS ORDER(S). THIS CASE IS CLOSED AS TO ALL PARTIES.
Judge's Initials JWT

The parties served with this Order are indicated in the accompanying 11th Circuit email confirmation which includes all emails provided by the submitter. The movant shall IMMEDIATELY serve a true and correct copy of this Order, by mail, facsimile, email or hand-delivery, to all parties/counsel of record for whom service is not indicated by the accompanying 11th Circuit confirmation, and file proof of service with the Clerk of Court.

Signed and stamped original Order sent to court file by Judge Thornton's staff.

Copies to counsel of record