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Workshop 5

Joint Venture Negotiations: Watching for Pitfalls

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I. Introduction

1.1 What is a Joint Venture?

(a) A joint venture refers to the business combination of two or more entities for a specific and defined purpose. In the commercial real estate context, a joint venture typically consists of joint ownership of a single entity or multiple related vehicles to acquire, develop, own, operate and/or dispose of one or more real property assets. While the limited liability company is utilized most frequently for ownership of real property, the parties to a joint venture may use different structures such as corporations or limited partnerships for various purposes, and a single "joint venture" enterprise may include multiple types of entities within a single related structure. The specific terms governing the joint venture relationship will be set forth in one or more contractual agreements, including limited liability company operating agreements, limited partnership agreements, framework agreements or strategic alliance agreements.

(b) Joint ventures may be used for many different purposes, and it is critical for the parties to define the scope of a particular venture at the outset of discussions. The material elements of the venture should be agreed to in a non-binding term sheet before proceeding to long-form documentation. For example, will the parties invest in a single asset or do they intend to create an ongoing relationship to invest in multiple assets over a defined period of time? Will the parties be obligated to present new investment opportunities to their joint venture partners, and would the other party be required to participate in any such opportunity that is presented? Common types of joint ventures include single-asset ventures, defined multi-asset ventures, programmatic investment ventures, discretionary funds and multi-party club deals.

(c) Each joint venture transaction is very fact specific, and the parties should expect each venture to be a highly negotiated transaction. The relative leverage and concerns of parties to a 50/50, co-managed joint venture to acquire, operate and sell an existing, stabilized asset will differ dramatically from the parties to a 95/5 shopping center development venture between an institutional capital partner (for example, a private equity fund, pension fund or life company) and a local developer. If it is the first joint venture between two parties, each will be concerned about establishing precedent that may or may not be critical to the particular project, but could be used to one party's advantage in future transactions. Additional complexities arise if more than two parties are involved, particularly with respect to capital contributions, exit rights and management decisions. Tax or ERISA issues that are specific to a single party may dictate a particular outcome or limitations of the venture; for example, a party which includes foreign investors may dictate that the investment be structured through a domestically controlled real estate investment trust (REIT), and that any sale of the asset be accomplished exclusively through

a sale of stock in such REIT. It is critical that the parties understand the key structuring motivations and requirements of each other party at an early stage, before incurring substantial cost, time and effort to negotiate a venture agreement which may be fundamentally flawed from the outset.

1.2 Basic Contents of a Joint Venture Agreement.

(a) This article will focus on a typical U.S. private equity model of joint venture, where a capital investor holds a substantial majority interest in a Delaware limited liability company, and a single operator member develops and/or manages the investment in exchange for fees and a "promoted" equity interest in the upside of the project.

(b) Each joint venture agreement will be unique and highly negotiated based on the relative leverage and specific needs of each party. Each joint venture agreement will include provisions that are necessary to establish the name, purpose and location of the entity, which are unlikely to be controversial. In most cases, the parties' efforts will focus on the following key elements:

(i) Contributions: How much will this investment cost?

(ii) Distributions: When and how do we take money out of the venture?

(iii) Management: How do we live with each other?

(iv) Transfers/Exit Strategy: When and how do we go our separate ways?

(c) In this article and the corresponding workshop, we will explore market practice and trends in real estate joint venture agreements, focusing on complex concepts that, where not carefully negotiated, become particularly susceptible to disputes among the parties or other unintended consequences. This article includes sample provisions relating to important issues in venture agreements between developers and capital sources, including distribution waterfalls, contribution obligations and remedies, relative governance rights and obligations, and exit strategies and mechanics. The workshop will focus on discussions and considerations that should be prioritized among the parties and their respective counsels to identify common pitfalls in a real estate joint venture, and the use of best practices to address potentially problematic issues in a clear and mutually satisfactory manner. As each joint venture agreement will be unique with many separate, complex provisions that are interdependent upon each other, readers are advised to always consider the totality of circumstances in negotiating each section of a joint venture agreement.

II. Contributions

2.1 Initial Contributions and Capital Calls.

(a) Most joint venture agreements will provide for initial capital contributions to be made by each party at (or recognize contributions made prior to) the formation of the venture. Initial contributions usually involve contributions of cash, property, receivables or services, and may also include the capitalization of pre-formation due diligence costs incurred by one or both parties. Many joint ventures require careful sequencing and understanding of the timing of transactions that will result in the initial contributions to the venture. For example, the joint venture (or a subsidiary) may be assuming a purchase agreement concurrently with the execution of the venture agreement. The agreement must then contemplate funding of deposits and purchase price installments to satisfy the closing obligations under the purchase agreement. The parties may also be agreeing to reconcile pursuit costs previously incurred by the member that is assigning the contract to the joint venture. Important questions arise that are often overlooked - will the pre-closing costs be funded pro-rata, or disproportionately (e.g., 50/50 until closing)? Will unanimous approval be required to waive any diligence contingencies or unsatisfied closing conditions? Does one party have the right to proceed if the other party elects not to proceed, or wrongfully fails to fund - and in what scenarios will the proceeding party be obligated to reimburse the non-proceeding party for its costs? It is also common for a developer to contribute previously acquired land (or an entity that owns such land) to the venture in exchange for credit toward its initial capital contribution. In this case, the non-contributing member will need to carefully establish the valuation of the contributed land, and also receive appropriate representations and warranties (in the venture agreement or a separate contribution agreement) from the developer regarding the contributed land and/or entity, along with the right to offset damages arising from breach of those representations and warranties against distributions otherwise payable to the developer under the venture agreement. In many ways, these issues present almost an entirely separate transaction to be carefully considered and negotiated, often at the same time that the parties are focused on the complex venture agreement that will govern their relationship going forward.

(b) Additional capital contributions may be required for various reasons during the term of the joint venture. These may be anticipated in advance, for example to fund scheduled equity contributions pursuant to an agreed development budget and schedule. In other cases, capital calls may be contemplated to fund unplanned but necessary expenses, for example, to preserve the property in emergency situations, to pay non-controllable expenses such as real estate taxes and insurance premiums, or to reimburse payments by one party under a guaranty given on behalf of the venture. In the case of such unplanned capital requirements, the burden may be disproportionately shifted to the party which bears, or is deemed to bear, greater responsibility for the additional expense. A primary example of an unplanned expense that is heavily negotiated in joint ventures, and can lead to expensive pitfalls, is the funding of cost overruns in a development transaction. The developer will want to avoid responsibility for overruns that are beyond its control, while the capital partner is generally loathe to fund more capital that it has allocated to the project. These negotiations can go in many directions, and will be viewed in context of other economic terms including the fees and promote that can be earned by the developer. If the developer is receiving steady market fees along with a healthy share of the upside through its promote distribution, it may agree to take additional risk for cost increases - particularly assuming it is comfortable with its budgeted numbers. The capital partner will often agree to share overruns created by unforeseen "force majeure" events, the definition of which should also be carefully scrutinized by the parties - and certainly has received increased attention in the post-COVID-19 world. The developer will also want to focus on its right to utilize contingencies and cost savings, and often will negotiate the right to recover all or a portion of its funded overruns after the capital partner has achieved an agreed return threshold under the distribution waterfall. As with the initial capital contributions, timing and sequencing will play a key role in defining what constitutes a "cost overrun." Will that term include amounts in excess of the budget that is approved and attached to the venture agreement at the initial closing? Depending on the project timeline, this could change significantly between the initial closing and the final budget established in connection with closing of the construction loan and execution of GMP contract. A current example would include the recent fluctuations of the pricing of lumber and other materials. Who bears the risk of these cost increases, which may or may not be considered "foreseeable" by a prudent developer, after the venture acquires the land but before it actually breaks ground on construction? Will the capital partner be obligated to move forward with funding construction if the budget materially increases before commencement, or can it force a sale of the property instead? These questions should receive significant attention at the term sheet stage of discussions between the parties to ensure a certain path forward on potentially contentious, and costly, issues that can arise in the early stages of the venture.

2.2 Failure to Fund a Capital Call

(a) One of the most heavily negotiated provisions in a joint venture agreement will usually relate to the remedies available for one party's failure to fund a capital call when required. In this situation, the party which funded its own contribution as required will ordinarily have a few options:

(i) "Clawing back" its funded contribution, so that neither party funds the capital call and the venture does not receive the funds to the stated purpose of the call (note that this may not be appropriate where the venture has more than two members);

(ii) Funding the failed capital call on behalf of the defaulting member;

(iii) Funding a priority loan to the venture (this also may not be appropriate where the venture has more than two members);

(iv) Funding a priority loan to defaulting member, typically at a punitive interest rate, in which case the defaulting member is treated as having funded its capital contribution, but amounts otherwise distributed to such defaulting member will instead be paid first to the non-defaulting member until its loan is repaid;

(v) Funding an additional capital contribution to the venture up to the amount which the defaulting member failed to fund, followed by punitive dilution:

- Capital contributions funded on behalf of a defaulting member will be treated as having been made at 1.5 – 2.0 times the amount of such capital contributions

- Consider providing funding member with the right to convert loans to the company or a defaulting member into capital contributions followed by punitive dilution

- Potential pitfalls relating to punitive dilution include whether the promote distributions will be proportionally diluted, and whether the dilution should be based on capital contributions or fair market value. If dilution is based on funded capital and the value of the Project has increased significantly over time, then the equity value corresponding to the increased percentage could be significantly disproportionate to the amount that a member failed to fund.

2.3 Sample Operating Agreement Provisions

CAPITAL CONTRIBUTIONS AND FUNDING OF PROPERTY COSTS

"Current Company Budget and Plan" means, at any given time, the then approved overall budget and plan for the Company and the Property Companies, including the development, financing, operation, leasing, renovation and sale of the Properties prepared by Operating Member on a Property-by-Property basis and on an aggregate basis for the Properties. The Current Company Budget and Plan in effect as of the date of this Agreement is attached hereto as **Exhibit __**. The Current Company Budget and Plan shall be reviewed by the Members quarterly (or more frequently at the election of Manager).

"Discretionary Capital Contribution" means any Capital Contribution other than a Required Capital Contribution.

"Percentage Interest" initially means, with respect to Operating Member, 5%, and with respect to Manager, 95%; provided, however, the same may be adjusted pursuant to the terms of Section 1.3.

"Required Capital Contribution" means any Capital Contribution for which such capital is required in connection with (i) the preservation, repair, operation and/or maintenance of the Properties, (ii) any emergency at the Properties, (iii) causing the Properties to comply with Laws, (iv) amounts required to comply with any leases or financing documents, (v) operating shortfalls, (vi) the payment of property taxes, or (vii) funding any other item or matter contemplated by the Current Company Budget and Plan.

1.1. Initial Capital Contributions

The Capital Accounts for each of the Members shall be credited on the Effective Date as follows:

(a) Manager's Capital Account shall be credited in the amount of its Initial Capital Contribution.

(b) Operating Member's Capital Account shall be credited in the amount of its Initial Capital Contribution.

(c) Prior to the Effective Date, each Member has incurred costs and expenses in connection with the acquisition of the Properties. A schedule of such expenses is attached hereto as **Schedule ____** (the "Reimbursable Expenses"). It is the intent of the Members that upon the funding of the Initial Capital Contributions, the Members shall receive credit, as Capital Contributions, for the Reimbursable Expenses. Upon the Closing, the Members shall contribute additional capital such that, following such Capital Contributions, reconciliation shall have been made between the Members such that each Member shall have made aggregate Capital Contributions in accordance with such Member's initial Percentage Interest.

1.2. Additional Capital Contributions

Manager, in its sole and absolute discretion, may elect to call for additional contributions of capital to the Company, including, without limitation, for unliquidated or not-yet-due obligations, expenses, debts or deficits (including the prepayment of any debt or expenses), the establishment of cash reserves, or for any other purpose, including funding costs to be incurred by the Company or Property Companies, by delivering to the Members a written notice calling for a Capital Contribution (any such notice, a "Capital Call") setting forth (A) the total amount of such Capital Contribution (and the aggregate amount of all Capital Contributions previously funded), (B) the amount of each Member's share of such Capital Contribution, which shall be in proportion to such Members' respective initial Percentage Interests, (C) the specific purposes for which such Capital Contribution is being

requested and whether such Capital Contribution constitutes a Required Capital Contribution or a Discretionary Capital Contribution, and (D) the due date on which such Capital Contribution shall be contributed to the Company, which due date shall be at least ten (10) Business Days after the date on which the Capital Call is delivered to the Members. The Members shall contribute their respective shares of such Capital Contribution in immediately available funds on or before such due date. Any additional capital contributed to the Company by either of the Members shall be considered Capital Contributions to the Company. For the avoidance of doubt, the decision of Manager to call any additional Capital Contributions shall be made by Manager in its sole and absolute discretion.

1.2.1. Failure by a Member to Fund a Capital Contribution

(d) If any Member (in this context, the "Capital Non-Funding Member") fails at any time to contribute any portion of a Discretionary Capital Contribution which it is required to make under Section 1.2 by the due date therefor, then the other Member (in this context, the "Capital Funding Member") may, in its sole discretion, without any obligation to do so, elect to fund additional capital in an amount equal to the amount of any applicable Discretionary Capital Contribution of the Capital Non-Funding Member, in which event the Percentage Interests of the Members shall be automatically adjusted as described in the penultimate sentence of Section 1.3(b)(i) below.

(e) If any Member (in this context, the "Capital Defaulting Member") fails at any time to contribute any portion of a Required Capital Contribution which it is required to make under Section 1.2 by the due date therefor, then the other Member (in this context, the "Capital Non-Defaulting Member") shall have the right to seek the remedies described in subsections (i) and (ii) below.

(i) If the Capital Defaulting Member fails to make any Required Capital Contribution within the applicable time period required pursuant to Section 1.2, the Non-Capital Defaulting Member may, in its sole discretion, without any obligation to do so and without limitation of its other rights and remedies under this Agreement, elect to advance as a loan to the Capital Defaulting Member an amount equal to, but in lieu of what would have been, the amount of any applicable Required Capital Contribution of the Capital Defaulting Member (such loan being referred to herein as a "Default Loan"). A Default Loan shall be the obligation of the Capital Defaulting Member, shall bear interest at the lesser of (i) [twenty percent (20%)] per annum, compounding and payable monthly or (ii) the maximum rate of interest allowed by law, and shall be repaid out of the first distributions that are to be made to the Capital Defaulting Member pursuant to [Distribution and Winding Up Provisions]. The Capital Defaulting Member hereby grants a security interest in its membership interests in the Company to the Non-Capital Defaulting Member and the Capital Defaulting Member hereby irrevocably appoints the Non-Capital Defaulting Member, and any of its respective officers, as its attorney-in-fact coupled with an interest with full power to prepare and execute any documents, instruments and agreements, including, but not limited to, any note evidencing the Default Loan and such Uniform Commercial Code Financing Statements, continuation statements, and other security instruments as may be appropriate to perfect and continue its security interest in favor of the Non-Capital Defaulting Member. If the Capital Defaulting Member fails to pay the amount of the Default Loan, including accrued and unpaid interest, within three (3) months after the date when made (or earlier if the Non-Capital Defaulting Member determines in its reasonable discretion that the Default Loan must be converted to equity in order to avoid any applicable adverse REIT or UBTI compliance or tax matters), the Non-Capital Defaulting Member (a) may exercise all rights and remedies available to a secured party under the Uniform Commercial Code or (b) the Non-Capital Defaulting Member may elect to convert the Default Loan into an additional equity interest in the Company in which event the Percentage Interests of the Members shall be automatically adjusted, so that the Non-Capital Defaulting Member's Percentage Interest will be adjusted upward to be equal to a fraction (converted to a percentage) of A over B and where A equals the sum of: (A) the Non-Capital Defaulting Member's total funded Capital Contributions plus (B) two times the amount of any previously converted Default Loans (including interest which had accrued but not been paid on those Default Loans); plus (C) two times the amount of the applicable Default Loan (including all accrued and unpaid interest on such Default Loan), and where B equals the sum of: (a) the total Capital Contributions of all of the Members plus (b) the principal amount of all previously converted Default Loans (including interest which had accrued but not been paid on those Default Loans), plus (C) the amount of the applicable Default Loan (including all accrued and unpaid interest on such Default Loan), and the Capital Defaulting Member's Percentage Interest shall be automatically decreased such that the total Percentage Interests equal 100%. The Capital Defaulting Member agrees that the requirement of the Uniform Commercial Code that the Non-Capital Defaulting Member give the Capital Defaulting Member reasonable notice of any proposed sale or disposition of the Capital Defaulting Member's Membership Interests shall be met if such notice is given to the Capital Defaulting Member at least ten (10) days before the time of such sale or disposition.

(ii) If the Capital Defaulting Member fails to make any Required Capital Contribution within the applicable time period required pursuant to Section 1.2, the Non-Capital Defaulting Member may, in its sole discretion, without any obligation to do so and without limitation of its other rights and remedies under this Agreement, elect to withdraw the portion of such Required Capital Contribution made by such Non-Capital

Defaulting Member and advance as a loan to the Company an amount equal to, but in lieu of what would have been, the entire aggregate amount of any applicable Required Capital Contribution of all both Members (such loan being referred to herein as a "Company Loan"). A Company Loan shall be the obligation of the Company, shall bear interest at the lesser of (i) [twenty percent (20%)] per annum, compounding and payable monthly or (ii) the maximum rate of interest allowed by law, and shall be repaid out of any sums available to make such payments, as determined by Manager, prior to any distributions that are to be made to the Members pursuant to Sections 9.1 or 13.2(c).

1.3. Loans and Guarantees

(f) Should Manager determine that financing is necessary or desirable, then Operating Member shall exercise commercially reasonable efforts to arrange for such financing and such financing shall be (i) on terms acceptable to Manager, (ii) consistent with the Current Company Budget and Plan and (iii) otherwise in accordance with the terms of this Agreement. Further, Operating Member shall consult with and keep Manager regularly and completely informed regarding Operating Member's strategy and progress in obtaining such financing.

(g) In connection with any such financing, except to the extent agreed to by a Member, (A) neither such Member nor any of its Affiliates shall be obligated to provide any new guaranties or credit support or enhancement to any person or party in connection with the Properties, (B) any and all financings of the Properties or the Company shall be non-recourse to such Member and its Affiliates and (C) neither such Member nor its Affiliates shall have any personal liability therefor. Notwithstanding anything to the contrary contained herein, to the extent that (i) any guaranty or environmental indemnity or similar agreement is required in connection with any Company financing, and (ii) Manager or an Affiliate of Manager elects in its sole and absolute discretion (it being agreed that under no circumstance shall Manager or any of its Affiliates have any obligation at any time to so provide any such guaranty, indemnity or other similar agreement) to provide such guaranty, environmental indemnity or similar agreement (any of the foregoing is a "Manager Guaranty"), Manager shall receive as consideration for Manager's delivery of any such Manager Guaranty fees in the amounts set forth on Schedule ___, which fees shall be payable upon the closing of the subject financing or refinancing and per annum each year thereafter that the subject Manager Guaranty remains outstanding, but in no event longer than the payment in full of the subject loan. In the event of any claim under any such Manager Guaranty, and if the claim on the Manager Guaranty arises out of any matter other than a matter arising out of, or in connection with, the fraud, gross negligence or willful misconduct of Manager, then the Company shall indemnify, defend, hold harmless and reimburse Manager or the guarantor under such Manager Guaranty for any payments made on account of such Manager Guaranty; provided, however, in the event of any claim under such Manager Guaranty, which claim arises out of the fraud, gross negligence, willful misconduct or any other recourse-type of event committed (or caused by) Operating Member, Property Manager or any of their respective partners, employees, principals, directors, officers or Affiliates, Operating Member shall pay (or cause to be paid) to the guarantor or indemnitor under such Manager Guaranty an amount equal to one hundred percent (100%) of the amount of any payments made on account of such Manager Guaranty, and Operating Member shall not receive any credit to its Capital Account on account of such payment. Simultaneously with the delivery by Manager or its Affiliate of any Manager Guaranty, Operating Member shall cause [_____] to deliver to the guarantor or indemnitor under such Manager Guaranty a full payment guaranty, in a form reasonably acceptable to such guarantor or indemnitor, of Operating Member's obligation to make the payments to such guarantor or indemnitor as described in the preceding sentence.

III. Distributions

3.1 Distribution waterfall

(a) Parties to a joint venture will inevitably be focused on when, how and what amounts of cash will be distributed back to the members. The managing member may have discretion to distribute available cash when it deems appropriate, or there may be certain required triggers for mandatory distributions (i.e. quarterly, upon a capital event or when required to fund a member's tax liability relating to income from the venture).

(b) The priority of distributions of available cash among the parties is commonly known as the "waterfall." Loans to the venture (including default loans by members as described above) are typically paid prior to distributions of available cash to the members, and loans made by one member to a defaulting member are typically paid prior to distributions that would otherwise be payable to such defaulting member.

(c) The order of distributions between the parties is typically negotiated at the outset of the venture discussions, often based on a predetermined "preferred return" to the capital investor, and different levels of "promote" to the developer/ operating member. Distributions are typically made in accordance with percentage interests (i.e. 95/5) until the capital member has received a predetermined IRR (percentage based on return *of*

capital and return *on* capital) on its capital contributions, after which the operating member's interest is "promoted" and it receives a higher percentage of future distributions. For example, a promote structure of "15 over 10, 30 over 15" implies that distributions would be made in accordance with percentage interests (i.e. 95/5) until capital member has achieved a 10% IRR on its capital contributions. After the 10% IRR "hurdle" is cleared, developer/ operating member would receive 15% of distributions (with the remaining 85% split being shared based on percentage interests, i.e. 95/5) until investor member achieves a 15% IRR. Thereafter, developer/ operating member would receive 30% of distributions, including from any capital event, with the remaining 70% being shared based on percentage interests, i.e. 95/5.

3.2 Promote considerations. The promoted interest often serves as the developer/ operating member's primary economic incentive in the joint venture (together with fees that it or an affiliate may be paid pursuant to ancillary agreements such as development management agreements or property management agreements). Conversely, the capital partner needs to ensure that the developer has earned its promote by delivering on its obligations relating to the development or management of the project and achieving key milestone incentives. Thus, the joint venture agreement may provide for certain material events (for example, "bad boy" acts such as fraud, willful misconduct or unpermitted transfers) which would trigger a loss of the promote to the developer, and cause the distribution waterfall to revert to a pure percentage interest model. This will typically be tied to removal of the developer/ operating member as the managing member, and loss of its approval rights in major decisions (described below). This issue is typically among the most contested, as the developer will want to protect its promote in all but the most egregious circumstances. The definition of "bad acts" or "cause events" will be negotiated at length and typically includes some notice and cure rights, particularly where the bad act is committed by personnel other than senior management, and in some circumstances the developer will have the right to formally contest whether a "cause event" has actually occurred before a removal becomes effective, typically through an expedited arbitration proceeding. The capital member, on the other hand, will want to carefully limit such cure contest rights to matters that are susceptible of cure and appropriate to dispute resolution, and will take the position that the removal must be effective immediately, but subject to reinstatement if the developer is successful in disputing the occurrence of the cause event. Timing is also relevant, as the developer can credibly argue that a removal event that occurs five years after substantial completion of the project - after it has successfully completed its primary task of creating value through the development of the project itself - should be treated much differently than bad acts during construction that cause a major disruption to the project and require capital member to find a new developer to complete the project. Similarly, the developer may argue that while any cause event can rightfully lead to its removal from management, only a subset of "really bad acts" should result in the draconian remedy of promote loss, and that particularly this should not arise as a result of the death or disability of a designated key person. These issues are sometimes addressed through an agreement to "freeze" the promote at the time of removal, with the developer retaining a subordinated or discounted interest in the amount that would have been distributable as promote based on the project value at the time of removal. Considering what is at stake both economically and managerially, and the implications of the relationship of the parties and the future of the project, both parties will need to be comfortable with their respective rights if a negative event arises. In addition, the promote may be subject to "clawback" obligations whereby the developer/ operating member may be required to repay portions of its promoted distributions to the venture if future liabilities or economic losses result in developer/ operating member having received more than its proportionate share after adjustment for such losses. This clawback liability is less common in single asset ventures, but often seen in multiple asset or programmatic ventures, where the promote may be calculated on a portfolio-wide basis.

3.3 Sample Distribution Waterfall Provisions

PAYMENTS AND DISTRIBUTIONS

"Available Cash" means the aggregate cash revenues of the Company or Property Companies (without double counting), including, without limitation, rents (including base rents and percentage rents), tenant reimbursements, government incentive payments, sales proceeds, non-refundable deposits, option payments, insurance proceeds, the proceeds of any condemnation awards or title or casualty insurance, loan proceeds, back-charge recoveries and any reimbursements from any community facilities districts or similar municipal or governmental agencies or authorities, after payment of all costs and expenses of the Company or the Property Companies (without double counting) and the Properties in accordance with the Current Company Budget and Plan as the same come due (including any payments of management fees to the extent provided for herein). For the avoidance of doubt, "Available Cash" shall be calculated after repayment of Company Loans.

1.1. Payments and Distributions

(a) Distributions of Available Cash. Subject to the [provisions regarding Winding Up and Indemnification], Manager, on behalf of the Company, shall make payments and distributions to the Members of Available Cash (if any) on a monthly basis within fifteen (15) days following the end of each month; provided, however, Manager may cause the Company to reserve Available Cash in such amounts as Manager determines in its reasonable discretion, based on the projected Available Cash from the Properties, as is necessary to fund future obligations of the Company and future payments and distributions in conformance with this Section 1.1.1 and [Winding Up provision] hereof. Each time payments and distributions are available to be made pursuant to the foregoing, such payments and distributions shall be made in the following order of priority:

1.1.1.1.1. First Level. 100% to any Non-Capital Defaulting Member until such Non-Capital Defaulting Member has received all unpaid principal and interest payments on any Default Loans (which have not been converted) made by any Non-Capital Defaulting Member (which shall not be deemed a distribution by a partnership to a partner for federal income tax purposes).

1.1.1.1.2. Second Level. Next, of the remaining Available Cash: 100% to Manager and Operating Member (pro rata based on the ratio of their respective Capital Contributions) until the Members shall have received (through the date of distribution) a return of all Capital Contributions funded by the Members, taking into account all distributions to the Members pursuant to this Section 1.1.1.1.2.

1.1.1.1.3. Third Level. Next, of the remaining Available Cash: 100% to Manager and Operating Member (pro rata based on their respective Percentage Interests) until Manager shall have received (through the date of distribution) an Internal Rate of Return of 10%, compounded quarterly, with respect to all Capital Contributions funded by Manager, taking into account distributions to Manager pursuant to Section 1.1.1.2 and this Section 1.1.1.1.3.

1.1.1.1.4. Fourth Level. Next, of the remaining Available Cash: (a) 85% to Manager and Operating Member (pro rata based on the ratio of their respective Percentage Interests); and (b) 15% to Operating Member, until Manager has received (through the date of distribution) pursuant to Sections 1.1.1.1.2, 1.1.1.1.3 and this Section 1.1.1.1.4, a 15% Internal Rate of Return, compounded quarterly, with respect to all Capital Contributions funded by Manager.

1.1.1.1.5. Sixth Level. Thereafter, of the remaining Available Cash: (a) 70% to Manager and Operating Member (pro rata based on the ratio of their respective Percentage Interests); and (b) 30% to Operating Member.

For the purposes of this Agreement, any distributions to Operating Member pursuant to Sections 1.1.1.1.4 and 1.1.1.1.5 shall be referred to collectively as "Incentive Distributions."

1.2. Withdrawal of Capital or as a Member

Except as expressly provided in this Agreement or as otherwise agreed by the Members, no Member shall be entitled to withdraw capital or to receive distributions of or against capital without the prior written consent of, and upon the terms and conditions agreed upon by, all Members. The Members have (i) no right under Section 18-604 of the Act to withdraw or resign and receive the fair value of their Company interests, (ii) no right to demand or receive any distribution from the Company in any form other than cash and in accordance with the provisions of this Agreement concerning distributions, and (iii) no right under Section 18-606 of the Act to become a creditor of the Company with respect to distributions owed them.

IV. Management

4.1 Management Structures. A joint venture structured as a Delaware limited liability company will generally be either "member managed", "manager managed" or "board managed" in accordance with the Delaware LLC Act. Whichever format is decided upon, the joint venture parties will need to negotiate which party will have rights to govern the venture. In the 95/5 example, the developer/ operating member is often charged with managing the day-to-day operations of the venture, including reporting requirements (e.g., monthly, quarterly and annual

reports), preparation of budgets and business plans, establishment of bank accounts, preparation of tax returns, and compliance with requirements or applicable loan documents.

4.2 Major Decisions. The authority of the managing member is generally subject to express limitations in the joint venture agreement which require the unanimous approval of both members with respect to material issues, or "major decisions." A sample list of "major decisions" follows at the end of this section. In joint ventures with more than two members, "major decisions" may require a supermajority of members, rather than unanimous approval which could result in undue "holdup" rights to a minority member. The parties may negotiate whether both members may propose a "major decision" or if either party's rights will be limited to a veto right when such a decision is proposed by the other member. This right of a non-managing member to propose major decisions may be overlooked as a subtle change, but is potentially very significant as these provisions are often drafted primarily as a restriction on the operating member's rights (i.e., "operating member shall not take any action constituting a major decision without the prior written approval of capital member"). If the capital member has the right to propose actions for which only its approval is required, then the operating member may be practically at the mercy of the capital member in any material decision. In this case, it is common for the operating member to negotiate at least a subset of "fundamental decisions" that will require unanimous approval, while permitting the capital member to override its objections in major decisions that are not deemed "fundamental." As with many issues in a joint venture agreement, the resolution of these issues will often vary significantly based on the relative contributions of the members, i.e., the 95/5 capital member will have more influence than a 70/30 capital member.

4.3 Deadlocks. If the required parties are unable to agree with respect to a major decision, the joint venture agreement may provide for specific mechanisms to resolve the deadlock. Potential resolutions include (i) a right to trigger a buy/sell or put/call right (each as discussed below), (ii) acceleration of other exit rights, such as a forced sale of the property, or (iii) mandatory arbitration or mediation. Some joint venturers prefer a mandatory "cooling off" period where the top executives of each party are obligated to discuss potential resolutions to the deadlocked issue for a defined period of time prior to exercising available remedies. Others will not include any mechanism for deadlock, and instead by virtue of silence in the agreement as to a deadlock, force the parties either to agree or to abandon the proposed major decision. Given the drastic nature of a buy/sell or certain other potential deadlock resolution mechanisms, it is critical to understand the circumstances in which they might be imposed. For example, a minority member will often be at a significant disadvantage in a buy/sell situation due to both its disparity in access to capital relative to the majority member, and the size of the investment required to purchase the majority member's interest. If the majority member may exercise a buy/sell based on a deadlock in any major decision, then it may manipulate those provisions by manufacturing a deadlock (e.g., refusing to consent when requested, or knowingly proposing a major decision that the minority investor cannot accept) and either forcing a buy/sell or using the threat thereof to impose its will in all decisions on the minority investor. It is often appropriate, therefore, to limit the availability of certain deadlock mechanisms to an agreed subset of the most material major decisions, and/or imposing a limited "lockout" period (e.g., the first two years after formation of the venture, or through substantial completion and stabilization in the case of a development), during which time neither party can exercise those otherwise available mechanisms in the event of a deadlock.

4.4 Other Obligations

(a) Exclusivity and Non-Compete. Particularly in programmatic or multiple-asset joint ventures, the developer/ operating member may be subject to restrictions on its ability to conduct unrelated activities and pursue other investment, without the prior consent of the capital member. This may include the right of first opportunity of the capital member to invest in projects identified by the developer/ capital member, particularly if the projects meet specified investment criteria within a defined geographic region. The capital member will often want assurances that identified "key persons" are obligated to devote sufficient time to the joint venture and not to other competing projects.

(b) Operating Member Defaults. Where the developer/ operating member is designated as the managing member or otherwise charged with development or day-to-day operations of the venture, it will typically be subject to a variety of potential events of default, including:

- Breach of obligations (including failure to fund capital contributions)
- Fraud, willful misconduct, gross negligence
- Bankruptcy
- Criminal indictment or conviction

- Change of control/breach of transfer provisions
- Dilution of interest (*i.e.*, equity falls below a certain percentage interest)
- Breach of restrictive covenants
- Cross default with ancillary documents (asset management/property/development agreement)

Following such a default, the non-managing member may negotiate specific rights (which are generally in addition to remedies available at law or in equity, such as damage claims), including:

- Removal of operating member as manager
- Loss of the promote by operating member (this is often limited to a subset of the most material defaults, i.e. "bad boy" acts)
- Call Right—non-defaulting member will have the right to buy out operating member's interest at a discount
- Acceleration of exit rights by non-defaulting member
- Loss of any first offer rights by defaulting member in a forced sale of the project or the non-defaulting member's interest in the venture

(c) Duties of Joint Venturers.

(i) As members of a limited liability company, parties to a joint venture agreement are subject to traditional fiduciary duties under Delaware law, including the following:

- Duty of loyalty (i.e., duty to make decisions based on the best interests of the Company)
- Duty of care (i.e., duty to make decisions regarding the company with due care)
- Duty of disclosure (i.e., duty to disclose material information where action is being sought and duty to ensure the accuracy and honesty of disclosures)

(ii) In addition, Delaware law imposes an implied contractual covenant of good faith and fair dealing. Every contract implicitly contains an obligation of good faith and fair dealing in its performance and enforcement. The purpose of this implied contractual covenant of good faith and fair dealing is to enforce the reasonable expectations of parties to a contract where situations arise that are not expressly contemplated and provided for in the language of the contract.

(iii) Under Delaware law, partners in a limited partnership and members in a limited liability company may, and often do, modify/eliminate the fiduciary duties they owe to one another in their partnership agreement or LLC agreement. In some cases, the parties expressly replace the traditional fiduciary duties with a mutually agreeable standard of care. These modifications must be express, clear and unambiguous. However, the implied contractual covenant of good faith and fair dealing cannot be eliminated or limited.

4.5 Sample Major Decision List.

Except as otherwise specifically provided for in this Agreement, any decision, approval or consent with respect to the following matters, and any modification or revocation thereof, or consent or waiver with respect thereto, is a Major Decision that requires the approval of both Members unless such matter has already been expressly Approved in the Business Plan or Budget then in effect:

A. creation of any Lien on the Business Property not contemplated by the Existing Financing, contesting the validity, amount or enforceability of any Lien and approval of the terms and conditions of any indebtedness (including the Existing Financing) of the Company for money borrowed by the Company or any Liens against the Business Property, including, without limitation, all material loan documents in connection therewith and any modification, amendment or refinancing of any Existing Financing;

B. approval of any action or inaction by the Company that would violate an affirmative or negative covenant or other provision of a Loan Document, Major Lease or other Material Agreement binding on the Company or the Business Property **[Note: If a Major Decision Deadlock/buy-sell trigger exists, consider excluding this section as a trigger.]**;

C. approval of the terms and conditions of any management, leasing, construction or other Material Agreement relating to the Company or the Business Property or modifying any agreement, including, without limitation, any management, leasing, construction or other Material Agreement, after the same has been approved by the Members and executed by the Company (but only if the consent of both of the Members shall have been required as a condition to the Company's executing such agreement) or the approval or implementation of any modification or termination of, or waiver under, any agreement or other document described herein whose approval constitutes a Major Decision;

D. exercise any right or privilege or enforce any remedy of the Company under the Contract of Sale;

E. any Major Lease, any amendment, modification or termination to a Major Lease or to any other lease of Business Property that does not comply with applicable leasing guidelines set forth in the Approved Business Plan and forms of lease agreements;

F. approval of the appointment or replacement of any property manager, contractors, sales and leasing agents, management agents, attorneys and other professionals (including, without limitation, changing the Accountants, Capital Member tax preparer or retaining or discharging accounting, financial or auditing specialists to assist the Accountants), except to the extent already described in or permitted by this Agreement and the appointing any officers or authorized agents of the Company, including, without limitation, the appointment of each Independent Director.

G. except as contemplated by [provisions regarding liquidation and dissolution of the Company)\, approval of the sale or other disposition of any portion or all of the Business Property other than sale or disposition of personal property being replaced in the ordinary course of business (including the terms and conditions of any sale or comparable agreement), the liquidation or dissolution of the Company or any other Capital Transaction; granting easement and/or modifying site plan and/or entering into a zoning lot or land use agreement;

H. acquisition either directly or indirectly through another Person in which the Company is an equity participant of: (i) any additional Business Property; (ii) any property that is not part of the Business Property; (iii) any part of any other assets that is not currently approved in the Business Plan or Budget or (iv) the shares of capital stock of or other equity interest in any Person;

I. other than the creation of trade receivables in the ordinary course of business and provided for in the Budget, making any loan or incurring any debt whatsoever, extending credit or acting as guarantor or surety to, for or on behalf of any other Person;

J. commencing or threatening any litigation, legal proceeding, casualty or condemnation of any type on behalf of the Company or the Business Property and the direction of any such proceeding, including, without limitation, the settling, compromising or taking any other material action with respect to any litigation, legal proceeding, casualty or condemnation of any type by, against or involving the Company or the Business Property;

K. issuance or sale of additional Membership Interests or admission of a new member in the Company other than in accordance with the Agreement or formation by the Company of any corporation, partnership, limited liability company or other legal entity;

L. filing or commencement of any Bankruptcy Proceeding by or on behalf of the Company; consenting to the institution or continuation of any involuntary Bankruptcy Proceeding against the Company or the conversion of an involuntary proceeding into a voluntary proceeding; the admission in writing by the

Company of its inability to pay its debts generally as they become due; or the making by the Company of a general assignment for the benefit of its creditors;

M. approving the Business Plan (or any modification thereof) or taking any material action that is inconsistent with or prohibited by the Approved Business Plan or Approved Budget then in effect or this Agreement;

N. expending any funds or entering into any contract or incurring any liability or obligation that (i) involves more than $____ in the aggregate, whether or not in the ordinary course of business, or (ii) in a manner that is inconsistent with the Approved Budget then in effect except as expressly permitted for Required Capital Contributions;

O. except for the Operating Account, opening or changing the terms of each bank account in the name of or on behalf of the Company or designating any Person to withdraw funds from or sign checks drawn on any such account;

P. the execution of any contract of sale, or the taking of any action or the making of any decision on behalf of the Company under any contract of sale (except as expressly set forth in this Agreement);

Q. establishing any reserves on behalf of the Company;

R. making any improvement, rehabilitation, alteration or material repair with respect to the Business Property and approving the plans and specifications therefor or deciding whether to repair or rebuild after, and determining the application of any insurance or coordination proceeds from any material damage to any of the improvements on the Business Property, or any part thereof, arising out of a casualty or condemnation (except such repairs as may be necessary to protect the Business Property, the costs of which are Emergency Costs);

S. obtaining any and all property, casualty and/or any other insurance policies, including determination of the costs and premiums thereof, the insurance carrier and the types and amounts;

T. during any construction or rehabilitation of the Business Property, making or approving any material change orders or other change or modification to any plans and specifications applicable to the Business Property, it being agreed that it shall be deemed to be material if the proposed change would cause either (i) more than a variance of the lesser of five percent (5%) or [$_____] from the line item in question or from any "total" line item, set forth in the Approved Budget (taking into account all other changes affecting such line item) or (ii) any Existing Financing to be out of balance or otherwise in default;

U. if the Business Property is subject to any construction, renovation or rehabilitation project, agreeing to any change orders or any material change in the project or the cost thereof;

V. except as otherwise specifically provided in this Agreement, requiring or requesting any Capital Contribution other than to pay Necessary Expenses;

W. taking any action in respect of the Business Property relating to environmental matters other than to obtain environmental studies and reports and conduct (or arrange for) evaluations and analyzes thereof;

X. making or agreeing to any changes to the zoning of the Business Property; and approving the terms and provisions of any restrictive covenants or easement agreements or any documents establishing a cooperative, condominium or similar association or related entity affecting the Business Property or any portion thereof;

Y. the making of any press release for any purpose relating to the Company, the Business Property and/or a press release involving the Capital Member or its involvement in the Company and/or the Business Property or any material communications, whether written or verbal, with any governmental authority;

Z. any action described in this Agreement that refers to action by "the Members", "both Members" or "each Member" or contains language comparable to those phrases or making any decision, approval or consent or taking any action that is not described herein and that (1) is not in the ordinary

course of business of the Company or (2) the Capital Member reasonably expects is likely to materially and adversely affect the Company, the Business Property, any Member or the business or operations of the Company;

AA. executing or amending or supplementing any documents or instruments to be placed of public record or which will encumber the Business Property or effect the Company;

BB. entering into any swap, hedge, cap, collar or other interest rate protection agreement;

CC. any amendment or modification of this Agreement, including, without limitation, modification of the Term of the Company or the business of the Company or altering the nature of the business of the Company; and

DD. the terms and conditions of any collective bargaining agreement, union contract or similar agreement relating to the Company or the Business Property and the making of any severance or similar payment (including the amount to be paid) to any employee of the Company or, if the Owner is responsible for the payment, whether in whole or in part, of such severance or similar payment, of the Property Manager.

4.6 Sample Exclusivity/ First Opportunity Provisions

OTHER BUSINESS OPPORTUNITIES

1.1. Right of First Opportunity

In the event that, during the [twenty-four (24)] month period following the date of this Agreement, [NAME OF ENTITY], any of its direct or indirect owners, principals or Affiliates, including, without limitation, Key Principal and any entity in which Key Principal owns any direct or indirect equity or debt interest (collectively, an "Operator Party") identifies any opportunity to invest in (either by acquisition, participation in a joint venture, provision of financing or otherwise) any real estate transaction that, based on its base case underwriting results in an IRR to equity equal to or greater than [15%], assuming financing in an amount not greater than [70%] loan-to-cost (any such transaction, a "ROFO Transaction"), prior to entering into any such ROFO Transaction, Operator shall cause the applicable Operator Party to provide Manager, on the following terms and conditions, with the first opportunity to participate in such ROFO Transaction.

(a) Operator shall give written notice (the "Offer Notice") to Manager of a Operator Party's desire to engage in said ROFO Transaction, which Offer Notice shall state the purchase price, investment amount or financing amount, as applicable (the "Proposed Price"), the timing for the closing of such ROFO Transaction and the other material economic terms of such ROFO Transaction, including the terms of the proposed joint venture between Operator and Manager, which proposed joint venture terms shall be the same in all material respects as the terms of this Agreement (the "Proposed Terms"). Proposed Price and Proposed Terms are sometimes collectively referred herein as the "Offer Notice Parameters".

(b) Within a period ("Response Period") of fifteen (15) days after Operator gives the Offer Notice to Manager, Manager shall give written notice (the "Response Notice") to Operator that: (i) Manager will participate in the ROFO Transaction at the Proposed Price and upon the Proposed Terms, or (ii) Manager will waive its right to participate in the ROFO Transaction. In the event that Manager does not give the Response Notice to Operator prior to the end of the Response Period, Manager shall be deemed to have waived its right to participate in the ROFO Transaction and Operator shall be permitted to proceed in accordance with paragraph (c) below.

(c) In the event Operator is not, pursuant to the preceding paragraphs, obligated to include Manager in the ROFO Transaction, Operator shall have the right to engage in the ROFO Transaction (an "Offer Parameters Disposition Transaction") for not less than 95% of the Proposed Price and on terms not materially different than the Proposed Terms for a period of six (6) months after the expiration of the Response Period. If the Offer Parameters Disposition Transaction is not closed on or prior to the final day of applicable six (6) month period, then Operator may not enter into the ROFO Transaction without sending a new Offer Notice and otherwise complying with the provisions of paragraph (a) above. If the Offer Parameters Disposition Transaction is closed on or prior to the end of the final day of the applicable six (6) month period, Manager's rights under paragraph (a) shall terminate as to the subject ROFO Transaction and paragraph (a) will, as to the subject ROFO Transaction in question be null, void and of no further force and effect.

(d) If Manager elects to participate in the ROFO Transaction pursuant to paragraph (a) above, then Operator and Manager shall proceed diligently and in good faith to prepare and complete the necessary

documentation for such ROFO Transaction, all at the Proposed Price and on the Proposed Terms. The closing of such sale ROFO Transaction shall be held at the place and time contained in the Offer Notice Parameters. Operator, Manager and each of their respective designees, as applicable, shall each promptly take such actions as are reasonably required to effectuate the ROFO Transaction

(e) If Manager delivers to Operator three (3) successive Response Notices waiving Manager's right to participate in ROFO Transactions in any twelve (12) month period, then Manager's rights under paragraph (a) shall terminate and thereafter paragraph (a) will be null, void and of no further force and effect.

(f) For avoidance of doubt the foregoing provisions are intended to bind Key Principal. Key Principal is executing a joinder to this agreement to reflect that it is bound by these provisions.

1.2. Non-Competition

1.3. During the Term, without the prior written consent of Manager, which may be granted or withheld in Manager's sole and absolute discretion, neither Operating Member nor any of its Affiliates shall manage, operate or acquire any direct or indirect interest in any retail properties in the [_____] Metropolitan Statistical Area.

4.7 Sample Default Provisions.

DEFAULT AND REMEDIES

1.1. Events of Default

The occurrence of any of the following events by or with respect to a Member (the "Defaulting Member"; and each other Member shall be referred to herein as a "Non-Defaulting Member") shall be defaults hereunder and if not cured within the applicable notice and cure period provided below, if any, with respect to such default shall constitute an "Event of Default" hereunder:

(a) The occurrence of any of the events prohibited in [Transfer provisions];

(b) With respect to the Operating Member, the failure of Operating Member or its Affiliate to perform any of their respective obligations under this Agreement, the Property Management Agreement, the Leasing Agreement, the Development Management Agreement or any Ancillary Agreement or the breach by Operating Member or its Affiliate of any of the terms, conditions, representations, warranties or covenants of this Agreement, the Property Management Agreement, the Leasing Agreement, the Development Management Agreement or any Ancillary Agreement and a continuation of such failure or breach for more than ten (10) days with respect to a monetary failure or breach or thirty (30) days with respect to a non-monetary failure or breach, in each case after notice by a Non-Defaulting Member to Operating Member or Operating Member's Affiliate that Operating Member or its Affiliate has failed to perform any of its obligations under, or has breached, this Agreement, the Property Management Agreement, the Leasing Agreement, the Development Management Agreement or any Ancillary Agreement; provided, however, with respect to any non-monetary failure or breach, if such failure or breach is susceptible to cure but cannot reasonably be cured within such thirty (30) day period, such period shall be extended up to a maximum of sixty (60) additional days so long as Operating Member or its Affiliate in good faith commences all reasonable curative efforts within thirty (30) days of its receipt of such notice from the Non-Defaulting Member and diligently and expeditiously continues its curative efforts to completion;

(c) Any act or omission constituting gross negligence, material misrepresentation, fraud or willful misconduct;

(d) With respect to the Operating Member, if the Operating Member, Property Manager, Leasing Agent or Development Manager willfully violates any law, regulation or order applicable to the Company, the Property Companies or the Properties;

(e) With respect to the Operating Member, [INSERT NAME OF ONE OR MORE PRINCIPALS] misappropriates, converts or willfully misapplies funds of the Company;

(f) With respect to the Operating Member, if any employee of the Operating Member, Property Manager, Leasing Agent, Development Manager or any of their respective Affiliates misappropriates, converts or willfully misapplies funds of the Company unless (A) such employee is promptly dismissed and (B) the Company is compensated by the Operating Member for any funds misappropriated, converted or willfully misapplied by such

employee within ten (10) Business Days of the Operating Member acquiring knowledge of such misappropriation, conversion or willful misapplication;

(g) With respect to the Operating Member, if the Operating Member makes a misrepresentation hereunder;

(h) With respect to the Operating Member, if [INSERT NAME OF ONE OR MORE PRINCIPALS] is convicted of a felony;

(i) With respect to the Operating Member, if the Operating Member causes the Company or any Property Company to do any of (e) through (g) above;

(j) With respect to the Operating Member, if the Operating Member shall fail to fund the Capital Contributions required to be funded by Operating Member at the Closing;

(k) With respect to the Operating Member, if Operating Member shall apply for or consent to the appointment of a receiver, trustee or liquidator of Operating Member or of all or a substantial part of its assets, admit in writing its inability to pay its debts as they come due, make a general assignment for the benefit of creditors, take advantage of any insolvency law, or file an answer admitting the material allegations of a petition filed against Operating Member in any bankruptcy or reorganization, or a judgment or decree shall be entered by any court of competent jurisdiction, on the application of a creditor, adjudicating Operating Member bankrupt or insolvent or approving a petition seeking reorganization of Operating Member or appointing a receiver, trustee or liquidator of Operating Member or a decree shall continue unstayed and in effect for any period of ninety (90) consecutive days;

(l) With respect to the Operating Member, the filing of a voluntary petition in bankruptcy or insolvency or a petition for liquidation or reorganization under any bankruptcy law by Operating Member, or Operating Member shall consent to, acquiesce in, or fail timely to controvert, an involuntary petition in bankruptcy, insolvency or an involuntary petition for liquidation or reorganization filed against it; or

(m) With respect to the Operating Member, the filing against Operating Member of a petition seeking adjudication of Operating Member as insolvent or seeking liquidation or reorganization or appointment of a receiver, trustee or liquidator of all or a substantial part of Operating Member's assets, if such petition is not dismissed within ninety (90) days.

1.2. Remedies

Upon the occurrence of any Event of Default, the Non-Defaulting Member may elect to do one or more of the following, as applicable:

(n) enforce any covenant by the Defaulting Member to advance money or to take or forbear from any other action hereunder; and/or

(o) pursue any other remedy permitted by this Agreement, under the Act, at law or in equity, including, without limitation, the right to seek injunctive relief.

1.3. Replacement of Operating Member; Operating Member Default

Upon the happening of any Event of Default by or on behalf of Operating Member, Manager may elect, by giving written notice to Operating Member, to (i) remove Operating Member as Operating Member of the Company and assume the role of Operating Member or designate any Person to become Operating Member in the Company and assume the role of Operating Member ("Replacement Operating Member"), and (ii) cause the Company to terminate the Property Management Agreement, the Leasing Agreement and the Development Management Agreement. Further, in the event Operating Member is removed as Operating Member as a result of the happening of any Event of Default, Manager shall have the right to purchase Operating Member's Company Interest at a price equal to the amount Operating Member would receive if the Properties were sold at Fair Market Value and the Company were wound up and proceeds distributed as described in [Winding-Up provision], or, if the Event of Default resulted from the fraud, gross negligence or intentional misconduct of Operating Member, at a price equal to 80% of the amount Operating Member would receive if the Properties were sold at Fair Market Value and the Company were wound up and proceeds distributed as described in [Winding-Up provision]. For purposes of this Section 1.3, the term "Fair Market Value" shall mean fair market value as determined by an appraisal obtained by Manager.

1.4. Waiver of Fiduciary Duties

Operator acknowledges and agrees that, in accordance with the terms of this Agreement, Manager may make decisions as a Member in the Company in a manner to protect the best interests of the members of Manager, without regard to the impact such decisions may have on Operator, including, without limitation, the effect of any such decisions upon Operator's distributions under [Distribution provisions] hereof. Operator further acknowledges and agrees that Manager would not have become a Member in the Company if this arrangement were not acceptable to Operator. Therefore, Operator waives any claim that it may otherwise have had against Manager based on statutory or case law to the effect that Manager owes any fiduciary duty to Operator, or that Manager may be liable to Operator for breach of any fiduciary obligations in favor of Operator, provided that Manager's actions or failure to act are permitted by the express terms of this Agreement. By initialing below, Operator acknowledges that it has read the provisions of this Section and has discussed their meaning with its legal counsel.

Operator's Initials: _____

1.5. Cumulative Remedies

No remedy conferred upon the Company or any Member in this Agreement is intended to be exclusive of any other remedy herein or by law provided or permitted, but rather each shall be cumulative and shall be in addition to every other remedy given hereunder or now or hereafter existing at law, in equity or by statute.

V. TRANSFER/EXIT STRATEGY

5.1 Transfer Restrictions and Permitted Transfers. Joint ventures are often formed in reliance on the identity, expertise and creditworthiness of the selected partner institutions and specific individuals within a member organization. At the same time, members will require some flexibility to operate their organization in the ordinary course of business and permit certain transfers to occur during the term of the joint venture. The transfer provisions in a joint venture agreement thus become critically important and should be tailored to the specific needs of each party, but within certain general guidelines:

(a) The joint venture agreement must be clear as to whether it is restricting only direct transfers, versus indirect transfers. In other words, how high up the chain do you have to go? Phrases such as "Member may not transfer" as opposed to "Member may not allow transfers" include subtle but important distinctions.

(b) Exceptions are often needed to permit transfers of non-controlling, limited partner interests in private equity funds and stock in publicly-traded companies.

(c) Pledges of a member's interest as security for a loan may be requested, but each member needs to consider the consequence of a potential foreclosure on such pledge. Will the foreclosing lender be in position to satisfy the pledging member's outstanding obligations under the venture agreement?

(d) If third party transfers are to be permitted, each party needs to consider potential consequences of a transfer, including the introduction of competitors, enemies or uncreditworthy parties as new members of the venture.

(e) Any of the following transfers should generally require consent of the other party:

- Transfers that would require registration of interests of company under securities act
- Transfers that would violate laws (including federal or state securities laws)
- Transfers that would require company to register as investment company under Investment Company Act of 1940
- Transfers that would result in company having to pay transfer taxes (unless paid by transferor and transferee)

- Transfers that would result in the company's assets being deemed "plan assets" for purposes of ERISA

- Transfers that would result in company being treated as a publicly traded partnership under the tax code

- Transfers that would result in a technical termination of the partnership

- Transfers that would result in a material breach of any third party financing

- Transfers that would result in the company or a member losing a gaming license (restriction is very important in gaming transactions or where one member has gaming licenses)

- Transfers to "Prohibited Persons" (e.g., OFAC listed persons)

(f) The following transfers are often negotiated as permitted transfers without the consent of the other member:

- Transfers to affiliates/controlled entities, but "only for so long as such entity is an affiliate". This qualification prevents circumvention of transfer restrictions as a result of transferring to an affiliate and subsequently selling interests in that affiliate to a third party

- Transfers among JV partners (but if there are more than two members, each member needs to avoid one member obtaining a controlling interest as a result of such transfer)

(g) The joint venturers may agree to provide flexibility to the other member to exit the venture after an agreed "lockout period" through a sale of their interests in the venture to a third party. This right will typically be accompanied by a right of first offer or right of first refusal in favor of the other members.

- Right of first refusal, where the non-selling member has a right to match any offer actually accepted by the selling member, has more chilling effect on ability to transfer.

- In a right of first offer, the selling member is typically required to put the initial price on the table. However, some members want ability to test market so they require the non-selling member to put price on the table while selling member retains right to try and beat the non-selling member's price in the market.

- Often, in right of first offer scenarios, selling member is permitted to sell to third party for 95-98% of the price offered to the non-selling member in order to compensate selling member for additional transaction costs in a third party transaction.

(h) Tagalong/dragalong rights may also be negotiated to enhance a party's ability to exit the venture after any agreed lockout period.

- Tagalong rights allows non-selling member to sell interests together with selling member in connection with proposed sale

- Dragalong rights allows selling member to force non-selling member to sell its interests in connection with proposed sale

5.2 Forced Sale Right. After a certain lockout period, members may negotiate the right to cause a sale of the company or the assets of the company. A forced sale right is typically accompanied by right of first offer or right of first refusal in favor of the other members.

5.3 Buy-Sell. After the occurrence of certain trigger events, a particular member may designate a price for the entire company which will be used to calculate the price at which the other member(s) must elect either (x)

to buy the designating member's interest or (y) to sell its interest to the designating member. The price to be paid for the interests should be determined based on a hypothetical liquidation of the company in a sale of its assets for the designated price.

5.4 Sample Transfer Provisions.

"Affiliate" means, as to any Person, any other Person which directly or indirectly controls, or is under common control with, or is controlled by, such Person and, if such Person is an individual, any member of such individual's family (which shall include parents, spouse, children, as well as the spouse of any of the foregoing) and any trust whose principal beneficiary is such individual or one or more members of such family and any Person who is controlled by any such member or trust. As used in this definition, "control" (including, with its correlative meanings, "controlled by" and "under common control with") shall mean possession, directly or indirectly, of power to direct or cause the direction of management or policies (whether through ownership of securities or partnership or other ownership interests, by contract or otherwise), provided that, in any event, any Person which owns directly or indirectly 10% or more, except where this Agreement provides for a higher percentage, of the securities having ordinary voting power for the election of directors or other governing body of a corporation or 10% or more, except where this Agreement provides for a higher percentage, of the partnership or other ownership interests of any other Person (other than as a limited partner of such other Person or a non-managing and non-controlling member of a limited liability company) will be deemed to control such corporation or other Person. Notwithstanding anything to the contrary herein, an "Affiliate" of a Person shall not include any other Person whose affiliation with the first Person arises solely as a result of the contractual relationship of the respective parties pursuant to this Agreement.

"Change of Control" means (a) any time that [_____] ceases to have, directly or indirectly, sole management rights over Operating Member; (b) any time that [_____] ceases to own, directly or indirectly, more than 50% of both the capital interests and the profits interests in Operating Member, or (c) upon the death, or judicial determination of incompetency and/or bankruptcy of [_____].

1.1. Transfers and Hypothecations of Operator's Company Interest

Except as permitted by Section 1.2, Operator shall not sell, mortgage, pledge, hypothecate, convey, transfer, encumber or assign, directly or indirectly, voluntarily or by operation of law (any of the foregoing is a "Transfer"), its Company Interest or any portion thereof; nor shall Operator have the right to substitute another person or party in its place or stead without the written consent of each other Member, which consent may be granted or withheld in each such other Member's sole and absolute discretion. Any purported Transfer in violation of the terms hereof shall be null and void.

1.2. No Changes in Ownership of Operator

Operator may cause or permit any Transfer, directly or indirectly, of any ownership interest in Operator, whether by operation of law or otherwise or through any change in ownership of interests in any entity that directly or indirectly holds an interest in Operator, provided that such Transfer shall not result in (i) a Change of Control, or (ii) more than 25% (taken in the aggregate with all other Transfers under this Section 1.2(ii)) of the direct or indirect ownership interests in Operator being Transferred.

1.3. Transfers and Hypothecations of Manager's Company Interest

(a) Manager shall have the right to Transfer its Company Interest or any portion thereof, or any indirect interest in Manager's Company Interest, and shall have the right to substitute another person or party in its place or stead without the consent of Operating Member, so long as Manager complies with this Section 1.3.

(b) In the event Manager desires to Transfer its Manager's Company Interest (a "Manager Sale"), Manager may elect to do so and require that Operating Member sell all of Operating Member's Company Interest and Operating Member shall agree to sell all of its Company Interest on the terms and conditions approved by Manager so long as Manager shall comply with the following (the "Drag Along Requirements"):

1.3.1.1.1. Such sale is to a third party not Affiliated with Manager on bona fide terms and conditions;

1.3.1.1.2. The terms and conditions of such sale are non-recourse to Operating Member other than for representations and warranties limited to authority and title to its Company Interest;

1.3.1.1.3. Any such sale calculates the purchase price based on the third party buyer's values for all of the Company's assets ("Company Value") and the amount payable to Manager and Operating Member determined as if all of the assets of the Company were sold at the Company Value and the proceeds thereof distributed to the Members in accordance with [Winding-Up provision]; and

1.3.1.1.4. The terms and conditions applicable to the purchase of Operating Member's Company Interests are otherwise on terms and conditions that are consistent with those applicable to Manager and which do not discriminate against Operating Member in favor of Manager.

(c) Subject to the terms and conditions of Sections 1.3(b), in addition to the actions described above, Operating Member agrees to cooperate in consummating any such Manager Sale, including, but not limited to, by (i) becoming a party to, executing and delivering the sale agreement (the "Sale Agreement") and all other appropriate related agreements, (ii) delivering at the consummation of such Manager Sale, instruments of transfer for the interests of the Company held by such Member reasonably required by the Company, duly endorsed for transfer, free and clear of all claims, liens and encumbrances, and (iii) taking any other necessary or appropriate action in furtherance thereof, including the execution and delivery of any other appropriate agreements, certificates, instruments and other documents. In furtherance of the foregoing and by way of illustration, but subject to the terms and conditions of Sections 1.3(b), each Member agrees to make any representation or warranty and agrees to be bound by any covenant, obligation or other agreement in the Sale Agreement that Manager has agreed to make or be bound by, including, but not limited to, representations and warranties with respect to such Member, its ownership of and good title to such Member's Company Interest, agreements with respect to amounts paid into escrow, amounts subject to holdbacks or amounts subject to post-closing purchase price adjustments.

1.4. Prohibited Transfers

In addition to the other limitations on Transfer set forth in this Agreement, the Company and the Manager shall not recognize any Transfer, and the Members agree that no Member shall take any action, that may cause the Company to be treated as a publicly-traded partnership for tax purposes.

5.5 Sample Buy/Sell Provisions.

(a) Notwithstanding the Lockout Period, in the event the Members' fail to agree on a matter which requires the approval of all Members, and such failure continues for a period of twenty (20) days after either Member delivers notice in writing to the other Member that a deadlock exists with respect to such matter and that such deadlock will trigger the rights under this Section if not resolved during such twenty (20) day period, each Member shall have the right, but not the obligation, to implement the buy/sell procedures set forth in this Section, by giving written notice thereof (the "Buy/Sell Notice") to the other Member hereto (the initiating Member, in each case, the "Offering Party"). The Buy/Sell Notice shall set forth a Specified Value of the Company, and specifically stating that the Offering Party is initiating the "Buy/Sell" provisions of this Section. "Specified Value" shall mean the value designated by the Offering Party in the Buy/Sell Notice transmitted pursuant to this Section (a) for all of the assets of the Company. Upon receipt of the Buy-Sell Notice, the Responding Party shall have fifteen (15) days (the "Response Notice Period") to provide to the Offering Party one of the following two (2) written notices (each a "Response Notice") specifying the Responding Party's election:

(i) to purchase the Membership Interest of the Offering Party in the Company for the applicable Allocated Buy/Sell Purchase Price (the "Purchase Option"), or

(ii) to sell its entire Membership Interest in the Company to the Offering Party for the applicable Allocated Buy/Sell Purchase Price (the "Sale Option").

(b) Responding Party's Election to Purchase. If the Responding Party timely delivers a Response Notice that specifies a Purchase Option, then the Responding Party and the Offering Party shall close

the purchase and sale of the Membership Interest of the Offering Party in the Company in accordance with the Closing Procedures below.

(c) Responding Party's Election to Sell. If the Responding Party timely delivers a Response Notice that specifies a Sale Option, or the Responding Party fails to timely deliver a Response Notice (which failure shall be deemed to constitute election of a Sale Option made on the last day of the Response Notice Period), then the Responding Party shall transfer its entire Membership Interest in the Company to the Offering Party in accordance with the Closing Procedures below.

Closing Procedures

(d) The provisions of this Section shall govern the closing of the sale and purchase of a Membership Interest (the "Membership Interest Closing"), if required pursuant to the terms of the [Buy-Sell Provision].

(e) The following terms shall have the following meanings:

(1) "Allocated Buy/Sell Purchase Price" shall mean the portion of the Specified Value that the Selling Member would obtain upon the closing of the sale of the Property for a purchase price equal to the Specified Value, after deducting from the Specified Value an amount equal to (i) with respect to any applicable Loans that are not prepayable without penalty or other material expense, the lesser of (1) all loan assumption and transfer fees and costs payable to Lender in connection with a transfer of the Property subject to such Loans, or (2) all prepayment premiums or defeasance costs or other material expenses associated with prepayment of such Loans, and (ii) deemed transaction costs equal to [2.5%] of the Specified Value.

(2) "Purchasing Member" shall mean the Member that is required to purchase the other Member's Membership Interest in accordance with the terms of this Article.

(3) "Selling Member" shall mean the Member that is required to sell its Membership Interest to the other Member in accordance with the terms of this Article.

(f) Within thirty (30) days after the determination of the Allocated Buy/Sell Purchase Price (the "Earnest Money Deposit Date") in accordance with the terms of this Article, the Purchasing Member shall deliver to the Selling Member a non-refundable earnest money deposit (in immediately available funds) in an amount equal to four percent (4%) of the Allocated Buy/Sell Purchase Price (the "Earnest Money Deposit").

(g) The Membership Interest Closing shall take place within sixty (60) days following the establishment of the Earnest Money Deposit Date; provided that in the event any required Lender approvals have not been obtained within such sixty (60) day period, the Purchasing Member may extend the date of the Membership Interest Closing for up to ninety (90) days in order to obtain same; provided that each Member shall use good faith, diligent efforts to promptly obtain such consents. If any required Lender consents are not received by the scheduled Membership Interest Closing date (as the same may be extended in accordance with the immediately preceding sentence), the Purchasing Member shall have the right to receive a refund of its Earnest Money Deposit provided that it has satisfied its covenant to use good faith, diligent efforts to obtain such consents. Payment of the Allocated Buy/Sell Purchase Price, less the applicable Earnest Money Deposit, shall be made in cash at the closing by wire transfer of immediately available funds. The Selling Member shall convey its entire Membership Interest to the Purchasing Member, free and clear of any liens, charges or other encumbrances thereon or pledges thereof, by an assignment of membership interest.

(h) There will be a final accounting with respect to the Company. The profits, losses and tax treatment of the Company that have accrued to the date of such Membership Interest Closing shall be accounted for, and each Member shall be entitled to receive when, and to the extent, paid by the Company, its share of Cash Flow, Capital Proceeds, profits and losses (and separate items of income, gain, loss, deduction or credit) to the date of such Membership Interest Closing.

(i) If the Membership Interest Closing fails to occur by reason of a default or breach by the Purchasing Member which is not cured within five (5) days following written notice thereof given by the Selling Member, then the Selling Member, as its sole remedy for such failure of the Purchasing Member to complete the Membership Interest Closing, shall be entitled to (i) to the extent previously provided, retain the Earnest Money Deposit as liquidated damages, and (ii) thereafter cause a sale of the Property or transfer its Membership Interest free of any obligation to the Purchasing Member.

(j) If the Membership Interest Closing fails to occur by reason of a default or breach of the Selling Member which is not fully cured within five (5) days following written notice thereof given by the Purchasing Member, then the Purchasing Member shall be entitled to (i) enforce the remedy of specific performance against the Selling Member and/or (ii) exercise any other right or remedy for such default or breach of the Selling Member available to the Purchasing Member at law, in equity or otherwise.