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JOINT VENTURE DEVELOPMENT ISSUES

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J. Cary Barton is a graduate of Baylor University (B.A. 1962) and Harvard Law School (LL.B. 1965) and was admitted to the State Bar of Texas in 1965.

He worked for the Federal Power Commission and the U.S. Tax Court in Washington, D.C., following his graduation from law school. He served in the United States Air Force during the U.S.S. Pueblo crisis in Korea, including a year during which he was stationed at Osan AFB, Republic of Korea. He has been engaged in the private practice of law in Texas since 1969, consisting of six (6) years in Corpus Christi, 13 years in Austin and the period since 1988 in San Antonio.

He is currently the senior member of Barton, East & Caldwell, P.L.L.C., a thirteen-lawyer firm in San Antonio, Texas, that was founded in 1993. He is Board Certified in Commercial Real Estate Law by the Texas Board of Legal Specialization and his law practice consists primarily of representing real estate developers and investors in commercial real estate transactions.

Mr. Barton is a fellow of the American College of Real Estate Lawyers. He has been a member of the Real Estate Forms Committee of the State Bar of Texas since 1986. He served two four-year terms as a member of the Council of the Real Estate, Probate and Trust Law Section of the State Bar of Texas and a three-year term as a member of the Commission of the Texas Board of Legal Specialization that administers the annual examinations for board certification of real estate legal assistants. He is a Sustaining Life Member of the Texas Bar Foundation.

Texas Lawyer named Mr. Barton as one of five finalists for the first and second "Go To" Texas Real Estate Attorney awards for 2007 and 2012. He was selected as a Texas Super Lawyer in 2003-2014 by Texas Monthly and Law & Politics Magazine, including recognition as one of the Top 50 Lawyers in Central and South Texas in 2006-2007, one of the Top 50 Lawyers in Central and West Texas in 2009-2012 and one of the Top 100 Texas Super Lawyers in 2007. He was listed as one of San Antonio's Best Attorneys in Scene in SA Monthly in 2004-2014.

Mr. Barton received the fourth annual lifetime achievement award for contributions by a distinguished Texas real estate lawyer from the Real Estate, Probate and Trust Law Section of the State Bar of Texas in 2003.

He received the Best Speaker Award for the 2004 Advanced Real Estate Law Course of the State Bar of Texas for his presentation entitled "Feasibility Issues/Can I Do the Deal?"

He was one of four Texas lawyers granted a Standing Ovation award in 2009 for his contributions to continuing legal education programs sponsored by the State Bar of Texas.

He received the Ralph A. Mock Award from Texas Lawyers Concerned for Lawyers in 2009 in recognition of his assistance to impaired lawyers in Texas and was the 2012-2013 president of that organization.

He received the TexasBarCLE Weatherbie Workhorse Award at the 2010 Advanced Real Estate Law Course of the State Bar of Texas.

He is the editor of Texas Practice Guide: Business Entities, Volumes 1-4 (Thomson-Reuters, 2014).

He is a member of the Founders Council of the Real Estate Finance and Development Department of the School of Business of the University of Texas at San Antonio and of the Real Estate Council of San Antonio. He has recently served on the Relocation Committees for the San Antonio Children's Museum and Dress for Success – San Antonio.

He was listed in The Best Lawyers in America (Real Estate) (1987-1988 and 1997-2014) Woodward White; and named The Best Lawyers in America Lawyer of the Year in real estate in San Antonio (2014) Woodward White.

He was selected as one of two Outstanding San Antonio Real Estate Lawyers, San Antonio Business Journal (2012).

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JOINT VENTURE DEVELOPMENT ISSUES

I. INTRODUCTION

This presentation endeavors to describe some of the more important issues that a lawyer may commonly encounter in negotiating and documenting joint venture agreements for new multi-family projects in Texas. The author's interest in this topic began more than 35 years ago. See, Barton and Morrison, Equity Participation Arrangements between Institutional Lenders and Real Estate Developers, *Symposium – Real Estate Finance – An Emphasis on Texas Law*, St. Mary's Law Journal, Volume 12, No. 4, pages 929-1025 (1980-1981). It has continued to be a significant component of the author's legal practice since that time.

The reader should be aware that the author represents real estate developers almost exclusively. Accordingly, although no disrespect is intended toward our colleagues who represent investors and lenders, or their clients, the author's views of some of the issues discussed in the following pages almost certainly reflect the perspective from the side of the table where the author usually sits.

II. FINANCING NEW MULTI-FAMILY PROJECTS

A. Availability of Financing

1. General Considerations

Assume that a developer has determined that there is a need for a proposed new apartment project in the relevant market area and, if appropriate, that there will be a market for selling the project when it is completed. Also assume that the developer has determined that it will be feasible to obtain the necessary entitlements for the contemplated project. The developer then has to analyze the other threshold issue of whether financing is available for the development and construction of the new project. Although the determination of a market-driven need for the project would seem to render the availability of suitable financing a foregone conclusion, that is not necessarily the case.

2. Availability of Debt Financing

The major component of financing for the development and construction of a new real estate project is customarily debt financing provided by a bank or similar financial institution. In some prior periods of time, lenders would not provide financing for particular types of projects or would not provide financing in particular geographical areas. During the period from the mid-1990's through 2008, however, subject to some exceptions, the amount of financing which was available seemed to exceed the demand for financing for good quality projects of most product types in most geographical areas.

The housing bust of late 2008, the collapse of Lehman Brothers and disintegration of the CMBS financing market and related unemployment and financial uncertainties virtually eliminated financing for commercial real estate projects until the third quarter of 2010. The financing climate has been improving since that time, but the improvement is very focused by product type and location and financing may be more difficult to obtain for some types of real estate than others.

Although financing for the development of hotels, office buildings, retail projects or industrial properties is not impossible to obtain, such availability would appear to be somewhat limited and highly dependent upon special circumstances, such as exceptional location, high percentage of pre-leasing or occupancy, involvement of highly reputable sponsors and excellent credit-worthiness of the guarantors of the financing.

On the other hand, both construction and equity financing seem to be fairly readily available for well-planned and well-sponsored new multi-family projects. There have been reports of as many as a half-dozen construction lenders bidding to finance an individual new multi-family project. The market for selling new multi-family projects after they are completed also seems to be robust.

In some instances, debt financing may be available for real estate projects from various governmental or quasi-governmental sources. Although those lenders are sources of significant amounts of financing, and some information about programs of this type is set forth below, an analysis of the requirements and benefits of those programs is beyond the scope of this presentation. An enterprising developer, however, will be well advised by the developer's legal counsel to engage a mortgage broker who is knowledgeable about such programs to determine if they represent a feasible source of financing for a contemplated project.

3. Availability of Equity Financing

Equity financing for real estate projects can be obtained from institutions or private investors either in the form of traditional equity capital contributions or in the form of mezzanine financing which is nominally non-recourse debt and is secured by the ownership interests in the entity which owns the real estate project, without any subordinate liens on the real property itself.

Discussed below are some of the specific issues that will need to be resolved in negotiating the terms of equity financing for a particular real estate project. Such financing is generally readily available at this time for well-located and well-designed multi-family projects, although it may not be as easy to find for

other types of commercial properties. The individuals and organizations providing such financing and their legal counsel are sophisticated and experienced and often make value-added contributions in terms of due diligence efforts that complement the essential contribution of the funds made available from such sources.

Although a detailed discussion of such financing is beyond the scope of this presentation, significant amounts of equity financing have been raised in recent years through the syndication of low-income housing tax credits made available with respect to certain low-income multi-family projects.

B. Terms of Debt Financing

1. Term of Loan

A developer will want to confirm that debt financing can be obtained for a period of time which will allow the project in question to be developed, completed and leased to a level of occupancy which will support the refinancing or, if applicable, sale of the project. Construction financing typically available today for significant multi-family projects will involve an initial term of 36-48 months with 1-3 one-year extensions available dependent on the absence of defaults, the satisfaction of debt service coverage ratios, loan to value percentages or other financial conditions and the payment of extension fees of typically .20-.25 of one percent of the outstanding loan balance.

2. Cost of Debt Financing

Because of the recent history of low interest rates for new multi-family projects, debt financing for such projects may now be obtained at a cost that is much lower than has traditionally been the case. That situation is true not only with respect to conventionally-financed projects but also with respect to properties such as multi-family projects for low to moderate-income residents or senior citizens which are financed in part with the proceeds of tax-exempt bond financing. The tax-exempt feature of the interest payments on the bonds permits them to be issued at rates that are sufficiently below those prevailing for conventional debt financing to offset the customarily higher costs and regulatory requirements of obtaining tax-exempt financing. Similar savings are available with respect to projects built in tax-increment financing districts of various types.

Many projects are now financed at interest rates based on an agreed differential above the London Interbank Offered Rate, or LIBOR. Some question of the viability of that practice was raised by the disclosures in 2013 of manipulations of the procedures for setting LIBOR, but that news has seemingly been absorbed by the financial markets without lasting harm. From a borrower's perspective, it is relevant to inquire as to whether the lender is actually investing in LIBOR contracts for the specified interest periods or simply basing the interest rate on the loan on the LIBOR index for the corresponding period of time. The loan documents will usually provide that the borrower is liable for any damages caused by the borrower's prepayment of the loan, with such damages consisting of the breakage costs of early payment of an actual LIBOR contract. If there is no actual LIBOR contract, though, and the lender is simply indexing the interest rate on the loan to LIBOR, an argument can be made that there will be no damage created by early payment and the borrower should not be liable for some sort of artificial damages. This argument does not appear to be widely successful.

Loan documents often provide for the applicable interest rate to be "grossed-up" to reflect any regulatory reserve requirements which are applicable to the lender. The economic theory seems sound; since the reserve requirement reduces the amount of money the lender can lend, the lender needs to charge a higher rate on the reduced amount it can lend in order to earn the desired return on the combined amount of the loan and the associated reserve amount. The problem from the borrower's perspective is that reserve requirements vary among lenders, depending upon the regulators' assessment of the degree of risk associated with the lenders' loan portfolios. A well-capitalized borrower might argue that it should not be charged a premium caused by a lender's high-risk reserve requirement. The answer would seem to be making this type of reserve-adjusted calculation of interest based on the lowest risk reserve percentage imposed by the relevant regulator without regard to the risk reserve percentage imposed on the particular lender in question. Again, the borrower's position may not often prevail.

3. Guaranties Required for Debt Financing

Every developer has to face the reality that guaranties of the debt financing will be required by the lender either from the developer’s individual principals or well-capitalized entities within the developer's organization or both. During the development and construction period, these guaranties typically consist of payment guaranties of the entire indebtedness and completion guaranties regarding the construction of the project.

One aspect of completion guaranties that deserves attention is the need to address the effect of the insolvency or closure of the lender that results in the termination of the developer's access to the loan funds on which the developer was relying when the completion guaranty was provided. No developer ever contemplated that the developer itself might have to provide the funds necessary to complete the project pursuant to the completion guaranty. The completion guarantor will want its completion obligation to be

contingent on the continued funding of advances under the loan to pay the costs of construction even if the borrower is in default, as long as the guarantor is not in default. The guarantor will also want the lender to agree that, if the lender elects to have another person complete the project, the guarantor will be liable only for the amount by which the reasonable and necessary costs of construction of the project by the replacement contractor in accordance with the original approved plans and specifications exceeds the amount budgeted for such construction under the loan.

Another troublesome aspect of completion guaranties that needs to be addressed concerns the effect of a foreclosure (or deed in lieu thereof) on the guarantor's obligations. As already noted, a developer has never anticipated having to provide the funds necessary to complete the project (except to the extent that the expected debt and equity funds had been exhausted). A developer has even less of an understanding that it might not only have to provide the money necessary to complete the project but also might have to do so for the benefit of a purchaser at a foreclosure sale (or by deed in lieu of foreclosure) on land in which the developer no longer owns an interest.

When a project is completed and then achieves certain agreed revenue hurdles, the lender may be willing to release or reduce the level of repayment guaranty exposure of the developer except for specified non-recourse carve-out liabilities related primarily to wrongful acts by the developer. One aspect of non-recourse carve-out liabilities that the developer's counsel will want to analyze carefully is the extent to which the occurrence of a carve-out event will give rise to liability only for damages caused by the event or cause the guarantor to be liable for the entire debt. A guarantor will, of course, want most, if not all, of the relevant events to result in liability only for specific damages. A guarantor will want the events that result in full liability to be limited to events that are within the control of the developer, such as voluntary bankruptcy or a sale of the project without the lender's consent. A guarantor will usually be amenable to being liable if the guarantor's affiliate makes a transfer of its interest in the borrower without the lender's consent but will resist being liable if the investor transfers its interest in the borrower without the lender's consent.

An issue that is sometimes overlooked involves the relationship between the carve-out events that are listed in the guaranty agreement and the special purpose entity covenants that are set forth in another document such as the loan agreement. The special purpose entity covenants often include maintaining adequate capitalization within the borrower and not allowing the borrower to become insolvent. If those events are not excluded from the SPE covenants that constitute exceptions to the non-recourse nature of the guaranty, then the guarantor will be subject to full recourse liability in exactly the circumstances under which the guarantor thought the negotiated non-recourse nature of the transaction would provide protection.

Sometimes, lenders will offer to assuage the developer's concern with an SPE covenant requiring the maintenance of adequate capitalization by agreeing that the covenant will not be construed to require the principals of the borrower to make any additional capital contributions to the borrower. This is a potential trap for the guarantor, because the guarantor's primary liability for the loan would be triggered by the breach of the capital maintenance covenant notwithstanding the provision absolving the borrower's principals from having to make any additional contributions.

In recent transactions, the SPE covenants have included provisions that prohibit the borrower from accumulating unpaid trade payables of more than a specified percentage, such as 2%, of the loan amount or letting those liabilities remain unpaid for more than a specified period of time, such as 60 days. In an insolvency situation, such a covenant could come back to haunt a guarantor whose guaranty does not exclude such SPE covenant from the events that will trigger the guarantor's liability. Another aspect of this particular SPE covenant may be the need to be sure that the specified percentage limitation is applied with respect to the entire loan amount, funded and unfunded, to avoid tripping on the covenant during the early portion of the loan term when little or no funds may have been advanced on the loan.

Where an investor has the ability to remove a guarantor or its affiliate as the general partner or managing member of the borrowing entity, the guarantor will want to consider negotiating several issues with the lender. First, as a qualification to the traditional guaranty language saying that the guarantor is not released by amendments of the loan documents, the guarantor will want to include language stating that the guarantor is not bound by changes in the loan documents executed by an unaffiliated successor general partner or managing member that increase the loan amount or interest rate or would otherwise increase the liability of the guarantor. The guarantor will also want the lender to agree to provide separate notices and opportunities to cure default if the borrower's general partner or managing member is at any time not an affiliate of the guarantor. The guarantor will also want to consider requesting to be relieved of non-recourse carve-out liabilities that are caused by a successor general partner or managing member after the guarantor's affiliate has been removed from management control. This issue will be particularly important in connection with actions that give rise to a full springing guaranty on the part of the guarantor such as the filing of bankruptcy or the

encumbrance or transfer of the project without the lender's consent.

4. Required Debt to Equity Ratio

For a number of years, construction financing was provided on the strength of a so-called take-out commitment from a permanent lender to refinance or purchase the construction loan when the construction of the project was completed. In that arrangement, it was not uncommon for developers to be able to finance a project with little or no front-end cash equity.

Take-out commitments became virtually impossible to obtain after the real estate collapse of the late 1980's and it became necessary to finance projects by other means. Typically, those means involve a front-end cash equity commitment in the range of 25-35% of the total development cost for the project that is required to be expended for approved project costs before any of the proceeds of the construction loan can be drawn for the project.

Compliance with the debt to equity ratio is also established by appraisals at the outset of the transaction and periodically during the term of the construction loan. Developers will usually try to resist being required to provide appraisals during the course of constructing a project and will request that appraisals be required only when the loan is made initially and when renewals of the loan are being exercised or negotiated.

5. Transferability Issues

One of the investor's main concern with the construction loan documents will typically relate to the extent to which the investor can transfer its interest in the borrowing entity (or in the single-purpose entity through which the investor owns its interest in the venture) without the lender's consent. The investor will also have a corollary concern with respect to the extent to which the investor can exercise its rights under the venture agreement to remove the developer as the venture manager without the lender's consent. Typically, a lender will be willing to allow the investor to take such actions as long as the developer and its guarantor remain in control or the investor provides an acceptable replacement developer and guarantor.

It is important to the developer to pursue an agreement with the investor that the developer cannot be removed as the venture manager or forced to sell its interest in the venture until the developer and the guarantor have been released from liability for the construction loan and other venture obligations. In some situations, the developer and guarantor may agree to accept an indemnification against such liabilities from a credit-worthy investor or affiliate.

C. Terms of Equity Financing

1. General Considerations

Assuming that the due diligence aspects of the project itself are favorable, the developer still has to demonstrate that the funds necessary to develop and construct the proposed project can be obtained on an economic basis which produces sufficient profit to the developer to justify the risk entailed in the project. It is assumed for this purpose that construction financing is available for the project if the equity financing can be obtained on a basis which is acceptable to the developer and the construction lender. This section of the presentation deals with the terms under which the developer and the equity investor may agree that such equity investment will be made available.

2. Initial Equity Contributions

A typical development transaction today involves third-party, first-lien mortgage financing equal to 65-75% of the total projected cost for development, construction and lease-up. The remaining 25-35% of the financing comes from one or more other sources, including (i) cash equity contributions, (ii) property contributions, (iii) deferral of payment of development fees that otherwise would be included as a legitimate soft cost, payable during construction, and (iv) third-party "soft-debt" participating or mezzanine loans.

Soft-debt participating mezzanine loans commonly are non-recourse and are secured by the ownership interests in the entity that owns the project. They are almost never secured by subordinate liens on the primary real estate because the construction lender does not want any other secured creditors participating in a bankruptcy proceeding involving the project entity or attempting to stay a foreclosure proceeding initiated by the construction lender.

The construction lender usually will require that the equity or soft-debt financing be funded on a "front-end" basis, at the beginning of the project, before any substantial construction loan funds are advanced. Occasionally, a construction lender will be sufficiently comfortable with a particular investor and/or developer that it will permit the equity or soft-debt financing to be funded either as the last dollars invested or to repay a portion of the construction loan on a "back-end" basis when the project has been completed, but such situations are rare.

A developer also may have a bias in favor of obtaining equity or soft-debt financing as early as possible, because the front-end investment minimizes the developer's concern that a failure by the investor to fund a back-end investment will expose the developer to increased likelihood of having to perform on its guaranty of the construction loan. The developer may also believe that the front-end investment will give the investor a greater incentive to make additional mandatory or optional contributions required to fund

future cash needs of the project. The fact that the debt leverage on the project is relatively low will also give some comfort to the developer that its guaranty of the construction loan may not be called upon.

A developer may not make a front-end equity capital contribution to the project, although such contributions may sometimes be required either in the form of cash, deferred developer fees or deferred reimbursement of some pre-development costs. In recent years, a co-investment obligation on the part of the developer has been more common, but such contributions typically represent a significantly smaller percentage of the required front-end equity than the developer's residual percentage of back-end distributions.

Sometimes, a developer and investor may reach a tentative agreement initially on the terms of their transaction before the costs of the project have been finally determined. In situations such as this, the developer may want the investor to have a binding obligation to proceed with the transaction if the final budget is not more than a specified percentage above the preliminary budget approved by the parties.

3. Obligations for Cost Overruns

The developer will usually agree to be responsible for guaranteeing the so-called "hard costs" of constructing a new project or acquiring and rehabilitating an existing project. Such an obligation is considered to be part of the package of services for which the developer will ultimately receive its fees and promoted interest and is usually not binding until the project has been substantially bid-out. A project's "hard costs" are the material and labor costs expended for the physical construction or acquisition and renovation of a property, including construction supervision and general conditions and the general contractor's fee, and will typically be subject to an agreed contingency amount as a first source of funds to defray cost overruns in individual line item cost categories after savings in other line item cost categories have been exhausted. In some situations, the developer will be able to negotiate a right to recoup any "hard cost" overrun contributions out of net proceeds of sale or refinancing before residual profits are distributed, but more commonly such contributions are non-reimbursable and represent part of the developer's cost of participating in the transaction. Development transactions of the nature being considered here typically involve a guaranteed maximum price contract rather than a fixed-fee or cost plus contract. Sometimes, cost savings on a GMAX contract are retained 100% by the owning entity and, in other instances, the developer is entitled to receive an agreed percentage of any cost savings as an incentive to achieve cost savings to the extent compatible with construction of the project in accordance with the approved plans and specifications. In some cases, a developer will be able to negotiate a construction agreement under which post-completion warranty costs are funded out of any cost savings before they are required to be funded by the developer's affiliated construction contractor. Developers will sometimes be able to negotiate provisions under which the venture partners will jointly contribute in accordance with their original capital percentages the funds necessary to pay the costs of unforeseeable hard costs overruns caused by unanticipated environmental or physical conditions or changes in governmental requirements, as well as cost increases attributable to enhancements in the scope of a project or upgrades in project amenities. The construction contract for the transaction will need to provide for the guaranteed maximum price of the project to be increased automatically to include any such unforeseeable hard costs overruns or scope change costs.

On the other hand, the parties to an equity transaction will often agree to be jointly responsible for bearing overruns in the so-called "soft costs" of developing and/or rehabilitating and stabilizing a project in accordance with their respective residual profits percentages. A project's "soft costs" include all other categories of costs required to develop, complete and stabilize a project, such as architectural, engineering, legal and other professional fees, permitting fees and other entitlement costs, financing fees and interest costs, marketing and lease-up costs and operating expenses incurred during the development and lease-up period. In retail, office or industrial projects, soft-costs can also include leasing commissions and leasehold improvement costs. These soft costs are subject to variances for events such as changes in regulatory policies, fluctuations in interest rates and delays in implementing the lease-up of a project over which the developer cannot exert much, if any, control. Accordingly, the parties will often agree to shoulder a proportionate mandatory contribution obligation for cost overruns in these categories. Contributions for such soft-cost overruns will usually be characterized as being reimbursable out of future distributions of net cash flow or net proceeds of sale or refinancing as described below. Sometimes, however, the parties agree that such proportionate contributions will be recouped, if at all, simply from the residual distributions of profits.

Recently, the distinction between "hard costs" and "soft costs" has been blurred, with some "soft costs" such as interest, taxes, marketing and lease-up and initial operating income and losses being treated as non-guaranteed items and the remaining "soft costs" being treated as guaranteed. In these instances, the developer is responsible for defraying any overruns in "guaranteed soft costs" but is allowed to use savings in those line items to offset overruns in "hard costs." If

the parties reach an agreement to this effect, it is important for the construction contract to be written in a way that automatically increases the guaranteed maximum price of the constructing the project by an amount equal to the lesser of actual hard costs overruns or guaranteed soft costs savings

In most situations, the developer and investor involved in an equity transaction will agree that contributions required to defray overruns in "non-guaranteed soft costs" and operating deficits which are incurred after the construction or renovation of the project is completed and lease-up has been accomplished will be funded by the parties in accordance with their ultimate residual ownership percentages in the partnership or in accordance with ownership percentages between their original capital percentages and their ultimate residual percentages. The obligation to make such additional contributions is often characterized as being a non-recourse liability, however, which is enforceable only by means of a dilution or loss of the defaulting partner's interest in the partnership. Dilution provisions are often difficult to negotiate because of (i) uncertainty as to the projected equity value of the project to be used as the denominator of the dilution formula and (ii) differences of opinion as to the weight to be given defaulted contributions by the developer and the investor in comparison with each other, in light of the fact that the investor's original contributions are usually in the form of cash and the developer's original contributions are usually in the form of so-called "sweat equity" and/or a disproportionately small amount of cash. This difficulty is often resolved by using a "default loan" procedure under which a defaulting partner's share of an additional capital contribution is provided by other partners by means of a deemed loan to the defaulting partner that is paid (with bonus interest) from amounts that would have otherwise been distributed to the defaulting partner in the future.

In a soft-debt participating or mezzanine loan transaction, the absence of a partnership structure requires that special attention be paid to the issue of whether and how the participating lender should make contributions to defray soft cost overruns and operating deficits. This issue is compounded by the fact that the interest on the participating debt financing will ordinarily be payable at stated rates and intervals, as opposed to the distribution of a preferred return as and when available as would be the case in a true equity transaction. Sometimes, this funding question is addressed by making additional loan proceeds available, while other lenders prefer to provide for an interest accrual feature under which interest that would otherwise be payable on the loan can be accrued to the extent it exceeds operating cash flow, ordinarily subject to some maximum amount of such accrual. The soft-debt investor will often also allow the developer to obtain reimbursement from future sale or refinancing proceeds, prior to the distribution of residual proceeds from such transaction, with respect to some or all of the contributions which the developer may make to defray soft cost overruns and operating deficits.

4. Preferred Return on Equity Contributions.

The preferred return which the investor will receive on its equity capital contributions is a negotiated amount that is greatly influenced by the market rate for similar investment funds. The investor's expectations must be reasonable in that context, of course, or the developer will either find an alternative source of capital or will ultimately deem the project to be unprofitable and walk-away at the earliest opportunity. The expectations of the investor will also be affected by the reputation, experience and financial condition of the developer, while the developer's expectations will be affected by the degree of difficulty that might be encountered in trying to locate another source of equity capital. Recent transactions in which the author has participated have provided for the investor to receive an internal rate of return on its contributions of as much as 15% before the developer would be entitled to any residual profit sharing distributions which are not attributable to the developer's own capital contributions.

5. Residual Distributions.

The ultimate goal of the typical developer is achieving a residual interest in the profits realized on the project upon ultimate sale which is as large as possible. The developer's share of the residual profits, or the "promote," is the pot at the end of the rainbow for most developers. That is the feature of the project which confirms how well the developer has performed in developing, constructing and operating the project and the element of the transaction which produces the ultimate pay-day when the project is sold or refinanced. The determination of that feature of a transaction is highly negotiable and can be affected by numerous factors. It would be unusual, however, to see a developer's residual profit-sharing percentage below 20% or above 50%. One aspect of the negotiation is the extent, if any, that the developer's own capital percentage will be promoted by the developer's residual percentage. A developer's usual objective is achieving an arrangement under which all of the developer's promoted interest is taken from the investor's capital percentage. For an excellent discussion of the complex analytical factors involved this issue see Carey, Real Estate JV Promote Calculations: Basic Concepts and Issues (Updated 2013), *The Real Estate Finance Journal*, Thomson Reuters (2013).

6. Allocations of Profits and Losses

Although partners have a great deal of flexibility in allocating profits, losses and other tax attributes among themselves in a partnership agreement, there are several limitations on that flexibility. First, such allocations must have the minimum substantial economic effect which is required by Section 704 of the Internal Revenue Code of 1986, as amended (the "Code"). Second, such allocations must operate in a manner which supports the economic agreements of the parties with respect to the procedures for making distributions by the partnership. Third, such allocations must operate in a manner which does not produce unintended or disproportionate tax consequences for the partners. These limitations are discussed in further detail below.

Although it is not the intent of this presentation to deal with the issue of substantial economic effect in detail, it has been the author's experience that the provisions inserted in partnership agreements to address this issue sometimes do not deal adequately with the economic objectives which are of paramount importance to the principals to the transaction. It has become fairly common practice to include in a partnership agreement catch-all liquidation provisions which provide for liquidating distributions to be made in accordance with final capital accounts as a safeguard against the disallowance of special allocations (even where no special allocations of losses were made in the first place). The author certainly has no quarrel with the inclusion of such provisions, but they are often used without sufficient attention being paid to the need to include allocation provisions which will produce the desired positive capital accounts with reference to which such liquidating distributions are supposed to be made.

For example, it is common to see partnership agreements where the investor is supposed to receive a return of its unrecovered capital contributions plus a preferred return on those contributions before the developer receives any distributions. In the provisions dealing with the distribution of the proceeds of sale or refinancing, that priority will be made clear. The provisions dealing with liquidating distributions, however, are often not supplemented by provisions which make special allocations of profits to the investor equal to the amount by which the investor's positive capital account immediately prior to such allocation is less than the sum of the investor's unrecovered capital contributions and cumulative preferred return. If that special allocation of profits is not made, then the investor may receive a smaller share of the total liquidating distributions than the parties intended, and the developer may receive a larger share of those distributions than it should. This result occurs because the final pro rata allocation of profits would augment the developer's positive capital account by a greater amount than intended, and the subsequent liquidating distributions in accordance with positive capital accounts would automatically produce such disproportionate distribution to the developer.

The opposite result can occur with respect to the parties if the partnership agreement does not make a special allocation of profits to the developer equal to any secondary priority which the developer is supposed to receive. For example, the developer may be entitled to a secondary priority in recognition of the fact that the developer waived or reduced its customary developer's fee during the construction of the project. If a special allocation of profits in that amount is not made before the final pro rata allocation of profits is made at the time the partnership is liquidated, and liquidating distributions are made in accordance with final positive capital accounts, the liquidating distributions received by the developer will not reflect that secondary priority amount.

Another area where the author has often encountered unintended consequences of this nature involves the relationship between provisions regarding net cash flow distributions and provisions pertaining to the allocation of taxable income from operations. Very often, net cash flow distributions are supposed to be made to the investor until the investor has received an amount equal to the current and accumulated preferred return on the investor’s unrecovered capital contributions. Taxable income from operations, on the other hand, is often supposed to be allocated first to offset taxable losses previously allocated among the partners and then pro rata among the partners in accordance with their respective residual ownership percentages. The interaction between these distribution and allocation provisions can seemingly result in a situation where the investor receives all of the net cash flow from operations, but the developer may have to recognize some of the taxable income attributable to such net cash flow. A better approach, it is believed, is one where taxable income is first allocated in accordance with cash flow distributions before it is allocated to offset prior loss allocations and then in accordance with residual ownership percentages.

Because of the investor's customary insistence on receiving a return of the investor's capital contributions (with or without any agreed preferred return) before the developer receives any distributions of the proceeds of sale or refinancing, there is usually not a front-end shift of capital which would give rise to "phantom" taxable income to the developer at the inception of the partnership. A corollary of this issue may arise, however, if the developer receives some sort of credit for development fees accrued during the course of construction. It seems that such credit should not give rise to taxable income by itself, as it represents nothing more than a claim on future profits from sale or

refinancing. If such credit is granted a priority over the investor's unrecovered capital contributions at the time the credit accrues, though, then a shift of capital may have occurred which is required to be recognized as income by the developer at that time. It is less clear what the result should be where the development fee credit begins to accrue a preferred return from the time the credit is earned, but the credit and the preferred return continue to be subordinate to the investor's unreturned capital contributions. It seems that no taxable event will have occurred in such a situation until the credit and return actually result in a distribution to the developer of future proceeds of sale or refinancing, but that conclusion is not free from doubt.

7. Distributions

Generally, net cash flow available for distribution will be distributed first to the partners that are entitled to receive a preferred return until the full amount of that preferred return for the current year and prior years has been received. Usually, net cash flow will thereafter be distributed to the partners in accordance with their residual profits percentages, although some investors require that some or all of such excess net cash flow be applied as a repayment of the investors' original capital contributions. Unless there is a special arrangement of that sort, excess net cash flow received by an investor above its preferred return for a particular year will usually not be applied to reduce the investor's unrecovered capital contributions, although that kind of an arrangement is not totally unprecedented.

The negotiations between the parties will usually include the questions of whether the preferred return to be received by the investor is cumulative and whether it is to be computed on a simple or compounded basis and, if compounded, with what frequency. An arrangement for the preferred return to be cumulative and compounded monthly or annually seems to be customary in many situations. Some partnership agreements provide for the preferred return or interest rate computations to be made in accordance with internal rate of return calculations at the negotiated rates. It should be noted, also, that some institutional investors require that the preferred return or interest payments on their equity or soft-debt contributions be paid at stated intervals as an operating cost of the partnership regardless of whether funds are otherwise available to pay those amounts. Commonly, the obligation to fund deficits resulting from these distribution requirements is shared proportionately by the parties in accordance with their ultimate residual sharing percentages on a non-recourse basis.

A developer will sometimes seek a special provision that causes preferred return which accrues during the construction period to be payable only out of future proceeds of sale or refinancing. This avoids building-up such a substantial amount of accrued preferred return during the development period (when there is no chance of realizing cash flow to pay it) that it becomes highly unlikely that the developer will receive any residual net cash flow distributions during the early years of operation of the project. Some investors are willing to agree to such a provision because they want the developer to have an immediate financial incentive to produce significant net cash flow distributions from the operations of the project as quickly as possible. In other cases, however, the investor may want to receive distributions of preferred return on a current basis throughout the development and construction period, in which event that cost has to be taken into account as part of the development budget for the project. In a situation of this latter type, the investor's committed capital contribution obligation may be sized to include the estimated funds necessary to fund the payment of a return to the investor during the development and lease-up period.

However the parties may have agreed to allocate the obligations to make additional capital contributions for soft-cost overruns and operating deficits, some understanding must be reached regarding the manner in which those contributions will be recovered out of future distributions. If the additional contributions are made by the partners in accordance with their residual ownership percentages, then the parties often will agree that the additional contributions should not bear any interest or preferred return. If the additional contributions are made disproportionately to the residual ownership percentages, however, then an interest factor or preferred return usually is demanded, and such compensation may be greater than the preferred return on the initial capital contributions. The priorities for recovering such additional contributions are negotiable — the parties will need to decide whether the contributions will be recouped before or after the investor's front-end equity contribution (and any preferred return thereon) has been distributed, or before or after any contributions by the developer or deferred portion of the developer's development fee (and any preferred return thereon) has been paid. It is often important to the success of the transaction to give priority to the distribution of additional contributions and the higher preferred return thereon in order to provide additional incentive for the parties to make such contributions when the project may not be performing as well as they had originally contemplated.

The parties providing equity or soft-debt financing typically will be entitled to receive essentially all proceeds of sale or refinancing from the transaction (subject to the method used to recoup additional contributions, as discussed in the preceding paragraph) until they receive an amount equal to their original contributions plus the unpaid amount of the preferred

return or interest on those contributions. To the extent that the developer contributes actual cash amounts as part of the initial capital contributions, it will often participate in the distributions attributable to those capital contributions and preferred return on a pro rata basis with the investors. If the developer makes its initial contribution in the form of deferred fees, then it typically will receive a distribution equal to the deferred fees from the proceeds of sale or refinancing of the project after the investors have received their original capital and the preferred return on that capital. Often, the developer will ask that the deferred fees bear a preferred return calculated on the same basis as the preferred return received by the investors, but the calculation period may not begin until the construction of the project has been completed (or pro rata as the development fees are earned). Because the developer will not actually receive the economic benefit of these deferred fees until residual profits realized on the sale or refinancing of the project are distributed, the developer often will want to characterize this distribution as a secondary capital transaction preference from the proceeds, rather than as deferred fees, hoping that such characterization of the nature of the distribution may support a more favorable characterization of the distribution for income tax purposes.

One typical economic distinction between a true equity situation and a soft-debt transaction is that there will usually be no time agreed upon by which the equity is required to be returned, while the debt will have a maturity date. If the project has not been sold prior to the maturity date of the debt, the project entity will be obligated to retire the debt and pay the participating lender an agreed percentage of the amount by which the appraised value of the project at that time exceeds the sum of the principal and accrued interest on the mortgage debt against the project and the participating debt which is secured by the interests in the ownership entity. If the mortgage debt on the project is refinanced prior to the maturity date of the participating debt financing, the mezzanine lender may have an option either to obtain the full amount of its participating interest at that time based on the appraised value of the project or to receive the net refinancing proceeds for application toward the participating interest at that time and retain the right to receive the balance of the participating interest in connection with a future sale or refinancing or at the maturity of the participating loan.

It should be noted that the developer usually does not guarantee the return of either the principal or preferred return of equity capital contributions or the principal or interest of mezzanine loans. The developer and its principals customarily do provide guaranties of project completion, environmental liabilities and "carve-out" obligations for the benefit of both equity investors and mezzanine lenders.

Because of potential usury concerns with the characterization of participating interests in profits in connection with mezzanine loans, such transactions have usually been characterized as being governed by the laws of states other than Texas which do not have usury limitations. These concerns may have been ameliorated to some extent by the amendments of the statutory provisions regarding the calculation of interest which were enacted by the 1997 session of the Texas Legislature and are now embodied in Chapter 306 of the Texas Finance Code. See, Acts 1997, 75th Leg., ch. 1396, section 1 et seq., effective September 1, 1997.

Under the provisions of Chapter 306 of the Finance Code, the concept of a "qualified commercial loan" is created, which is a commercial loan of either $3.0 million or more that is secured by real estate or $250,000 or more that is not secured by real estate or a renewal of either type of loan regardless of the amount of the loan at the time of renewal. Of particular importance here is the fact that the provisions of Chapter 306 expressly authorize and exclude from the definition of "interest" various forms of profit participation, equity participation and similar features.

In some cases, investors may insist on using some sort of preferred equity distribution arrangement to reflect enhanced risk factors or negotiating leverage. In such situations, the investor will receive distributions equivalent to its additional capital contributions and the preferred return thereon before the developer receives similar distributions. Likewise, the investor will receive distributions equivalent to its initial capital contributions and the preferred return thereon before the developer receives similar distributions. The investor may then insist on receiving distributions at a lower percentage until the investor receives a higher catch-up internal rate of return, with a final tranche of residual distribution percentages that are lower for the investor and higher for the developer after that catch-up internal rate of return has been achieved.

8. Development Fee

A developer will ordinarily expect to be paid a development fee equal to an agreed percentage of the total development budget for the project. That percentage is negotiable but often equals 2-3% of the total development budget (with or without land). In some instances, the development fee is payable in approximately equal installments over the contemplated period for development and construction or in monthly installments that are pro rata with the monthly advances of construction costs. In other cases, part of the development fee is paid in that manner and part is paid upon completion and/or sale or refinancing of the project. Sometimes, a developer can negotiate a

front-end payment of part of the development fee at closing in consideration of the extensive pre-development work the developer will have performed at that time. These funds are intended largely to reimburse the developer's cost of doing business and provide some modest level of profit to the developer.

9. General Contractor's Fee

A developer of the type of project being considered here will also typically serve as the general contractor for the project. In that capacity, the developer will receive a general contractor's fee equal to an agreed percentage of the construction budget, which is customarily paid pro rata as construction costs are expended for the project. A typical construction contract will provide for a 5-6% contractor's fee and a contingency of 2-4% of the construction budget. As noted earlier, the developer may also participate in construction savings under a construction contract.

10. Property Management Fees and Leasing Commissions

Most developers will have property management and leasing operations which they will want to employ in providing those services to the contemplated project. The developer's objective will be not only to generate fees in usual and customary amounts as compensation for those services but also to enhance the value of the property for purposes of increasing profits on sale and reducing exposure for loan defaults and calls on loan guaranties. Property management fees are very competitive and have declined considerably in recent years. A fee of 2-3% of gross receipts is often seen. Residential projects do not typically incur leasing commissions (as opposed to apartment locator fees) but those commissions have to be carefully negotiated between the developer and the investor in connection with other types of development projects.

11. Condominium Conversion Restriction.

The general contractor for many apartment complexes is affiliated with the developer. In this situation, the question arises as to the extent, if any, which implied warranties concerning the quality of the contractor's work can be effectively disclaimed in a sale contract and disclaimer provisions in the deed conveying the property to the initial buyer from the entity that owned the property during the construction period. The problem of implied warranties of construction becomes particularly acute if the property is subsequently converted to a condominium regime and the resulting condominium units are sold to individual buyers. There have been many construction defect lawsuits against developers by condominium owners associations and/or their members that might have been avoided if the properties had not been converted to condominium regimes.

This problem has given rise to the technique of imposing restrictions on condominium conversions in the deeds conveying multi-family properties to the first buyer from the entity that owned the property during construction. Such restrictions typically extend for the duration of the statute of repose in the relevant jurisdiction and prohibit condominium conversion during the restricted period unless the converter provides insurance acceptable to the original owner protecting the original owner and the developer and their respective affiliates against claims for construction defect liabilities initiated after the conversion.

In order to avoid an argument over the issue with an investor at the time a sale is being negotiated, a developer might want to consider including in the document creating the project entity a provision requiring such a condominium conversion restriction to be included in any sale contract unless the developer waives that requirement.

12. Exit Strategies

Two types of exit strategies will be highlighted here; exiting the construction loan and exiting the venture.

A developer will want to have a strategy from the outset for refinancing the construction loan and getting released from the guaranty of that loan without the necessity of obtaining the approval of the equity partner. Otherwise, the developer may get trapped on the loan and required to continue funding deficits because the investor will not approve any replacement financing. In order to avoid this problem, the developer will want the venture documents to contain a provision authorizing the developer to obtain replacement financing without the investor's consent. Section 4.05 of Appendix A sets forth a sample provision dealing with this issue.

A developer that is a merchant-builder as opposed to an investment-builder will also want to have a strategy for initiating a sale of the property to the investor or a third party. Article XIII of Appendix A sets forth sample provisions dealing with this issue.

13. Recent Case on Fiduciary Duty

A New York state trial court issued an opinion under Delaware law two years ago that poses significant concerns for commercial real estate developers. *See, Lichtenstein, et al. v. Wilkie Farr & Gallagher, LLP, et al.*, Supreme Court of New York, County of New York, Index No. 652092/12 (April 22, 2013). In that case, a developer had signed a $100 million springing guaranty that was triggered by the bankruptcy filing of the borrowing entity affiliated with the developer. The guaranty was issued in connection with acquisition loans totaling $7.4 billion. The developer claimed that the defendant law firm had

committed malpractice by advising him that he would be subject to unlimited personal liability to the creditors for allowing the waste of the borrower's assets if he refused to cause the borrower to file the bankruptcy proceedings that would trigger his springing guaranty. Based on that advice, the developer caused the borrower to file bankruptcy. The creditors then obtained judgments against the developer for $100 million on the springing guaranty. *See, Bank of America NA v. Lightstone Holdings LLC,* 32 Misc.3d 1244(A), 938 N.Y.S.2d 225 (Table), 2011 WL 4357491 (Sup. Ct. N.Y Cty., July 14, 2011. In the 2013 case, the developer had filed suit against the law firm for $100 million in damages on the grounds that the law firm had committed malpractice in advising the developer that he had a fiduciary duty to cause the borrower to file bankruptcy and that he should take that course of action in order to avoid the unlimited damages that might be incurred if he did not do so. In the cited opinion, the court dismissed the developer's complaint against the law firm.

A springing guaranty triggered by bankruptcy is a nearly universal feature of modern commercial real estate financing transactions. It is a result of a decades-long tug of war between lenders and developers over the proper balance between recourse and non-recourse liabilities for commercial loans. Full non-recourse financing became widespread in the 1970's because of the favorable income tax effect of such financing. Over the ensuing years, the concept of non-recourse carve-out liabilities began to emerge. When real estate development eventually resumed in the early 1990's after the real estate debacle triggered by the Tax Reform Act of 1986, lenders took the position that developers could continue to have some limited form of non-recourse financing, but that position was conditioned on the developers not putting the borrowers into bankruptcy. So, the concept of a springing guaranty triggered by bankruptcy became a standard commercial financing term.

What the recent *Lichtenstein* opinion highlights is a potentially irreconcilable conflict between the springing guaranty triggered by bankruptcy and the fiduciary duty of the guarantor or its affiliates to the borrower's other owners and/or creditors with respect to the initiation of bankruptcy in order to prevent the waste of the borrower's assets. Consideration is now being given to whether this fiduciary duty may be waived. See, e.g., Lefkort, *An Ounce of Fund Document Protection is Worth a Pound of Litigation Cure Later: Waivers of Fiduciary Duties in Fund Documents*, The Investment Lawyer, Vol. 20, No. 3 (March 2013). Efforts to insert such waivers into the organizational documents for project entities would certainly seem to be justified. Moreover, as counter-intuitive as it may seem, consideration might also be given to negotiating such waivers in loan documents, so as to forestall an argument by a lender that a guarantor has a fiduciary duty to the lender to file the very bankruptcy proceeding that is going to trigger the guarantor's springing guaranty.

14. Sample Joint Venture Agreement – Appendix A

Attached as Appendix A is a blank form of an Amended and Restated Company Agreement that is based on similar agreements that the author has previously negotiated on behalf of developers for transactions with private cash equity investors and private landowners who contributed land to the venture for the project.

III. CONCLUSION

The issues discussed above arise at the intersection of the legal and business aspects of real estate development transactions. Consequently, the efforts of both clients and their legal counsel are required to assure that the issues have been identified and resolved in a manner that is consistent with the clients' objectives for the transaction involved.

APPENDIX A

*** * ***

AMENDED AND RESTATED

COMPANY AGREEMENT

OF

XXXXXX APARTMENTS, LLC

THE SECURITIES REPRESENTED BY THIS DOCUMENT HAVE BEEN ACQUIRED FOR INVESTMENT AND HAVE NOT BEEN REGISTERED UNDER THE SECURITIES ACT OF 1933, AS AMENDED, THE TEXAS SECURITIES ACT, AS AMENDED, OR THE SECURITIES LAWS OF ANY OTHER STATE. WITHOUT SUCH REGISTRATION, OR PURSUANT TO AN AVAILABLE EXEMPTION TO SUCH REGISTRATION REQUIREMENTS, SUCH SECURITIES MAY NOT BE SOLD, PLEDGED, HYPOTHECATED OR OTHERWISE TRANSFERRED. THE MANAGING MEMBER IS ENTITLED TO REQUIRE SUCH EVIDENCE AS IT MAY CONSIDER NECESSARY THAT ANY TRANSFER COMPLIES WITH SUCH REGISTRATION REQUIREMENTS OR IS EXEMPT FROM SUCH REQUIREMENTS. ADDITIONALLY, ANY SALE OR OTHER TRANSFER OF THESE SECURITIES IS SUBJECT TO CERTAIN RESTRICTIONS THAT ARE SET FORTH IN THIS AMENDED AND RESTATED COMPANY AGREEMENT.

_____ __, 2015

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EXHIBITS:

AMENDED AND RESTATED

COMPANY AGREEMENT

OF

XXXXXX APARTMENTS, LLC

This AMENDED AND RESTATED COMPANY AGREEMENT OF XXXXXX APARTMENTS, LLC (this "*Agreement*"), is made and entered into as of the ___ day of _____, 2015 (the "*Effective Date*"), by and among _____, Ltd., a Texas limited partnership (the "*Managing Member"*); _____, a Texas limited liability company ("*Owner Investor Member*"); and _____, a Texas limited liability company ("*Co-Investor Member*"). The Managing Member, Owner Investor Member and Co-Investor Member are sometimes referred to hereinafter individually as a "*Member*" and collectively as the "*Members*."

RECITALS:

A. The Managing Member has previously entered into that certain Company Agreement of XXXXXX Apartments, LLC, dated _____ ___, 2015 (the "*Original Agreement*"), for the purpose of creating XXXXXX Apartments, LLC (the "*Company*"), as a limited liability company under the laws of the State of Texas. The Managing Member has previously caused a Certificate of Formation for the Company to be filed with the Office of the Secretary of State of the State of Texas on _____ __, 2015 (the "*Original Certificate*").

B. The Managing Member, the Owner Investor Member and the Co-Investor Member wish to amend and restate the Original Agreement in its entirety for the purpose of setting forth revised terms and conditions under which (i) the Owner Investor Member and the Co-Investor Member will be admitted to the Company as Members as of the Effective Date; and (ii) the Company will be governed from and after the Effective Date.

AGREEMENT:

NOW, THEREFORE, in consideration of the premises and the mutual undertakings of the parties hereinafter set forth, it is hereby agreed that the Original Agreement shall be and hereby is amended and restated as of the Effective Date so as to read in its entirety as follows:

ARTICLE I.
CONTINUATION OF LIMITED LIABILITY COMPANY

Section 1.01. General. The Members hereby agree to continue the Company as a limited liability company pursuant to the provisions of the Texas Business Organizations Code, as amended, governing limited liability companies (the "*Act*"), and hereby agree to continue the Company as herein provided, for the limited purposes and scope set forth herein. The Managing Member shall cause the due filing and recording of an appropriate amendment of the Original

Certificate in accordance with applicable statutory requirements in such offices and places, if any, as may be required by the laws of the State of Texas.

Section 1.02. Name. The name of the Company is and shall be, and the business of the Company is and shall be conducted under the name of, "XXXXXX Apartments, LLC"; provided, however, that the Managing Member is authorized to select an operating name of the Project (as hereinafter defined) that may be different from the formal name of the Company, provided that the Managing Member files an appropriate assumed name certificate with the Secretary of State of the State of Texas.

Section 1.03. Texas Business Organizations Code. Except as expressly provided for herein to the contrary, the rights and obligations of the Members and the administration and termination of the Company shall be governed by the Act.

Section 1.04. Company Property. All real, personal and other property owned by the Company ("*Company Property*") shall be deemed owned by the Company as an entity, and no Member, individually, shall have any ownership of such Property. The Members hereby expressly waive any and all rights to partition the Company Property at any time. The Company shall hold all Company Property in its own name and not in the name of any Member. A Member's ownership interest in the Company shall be deemed personal property.

Section 1.05. Purposes of the Company.

(a) Limited Purposes. The principal purposes of the Company shall be: (i) to acquire the parcel of real property containing approximately _____ net acres described in Exhibit A attached hereto and incorporated herein ("*Land*"); (ii) to develop, construct, own, lease, operate, maintain, make loans and investments with respect to, finance, mortgage, sell, exchange or otherwise dispose of a multi-family rental residential real estate project containing approximately ___ apartment units and ancillary facilities on the Land (the "*Improvements*") (the Land and the Improvements are sometimes collectively referred to herein as the "*Project*"); (iii) to enter into and conduct any other business operations in connection with the Project; (iv) to enter into and perform its obligations under the Construction Loan Documents (as hereinafter defined); (v) to sell, transfer, service, convey, dispose of, pledge, assign, borrow money against, finance, refinance or otherwise deal with the Project to the extent permitted under the Construction Loan Documents; and (vi) to engage in any lawful act or activity, and to exercise any powers permitted to limited liability companies organized under the laws of Texas, that are related or incidental to and necessary, convenient or advisable for the accomplishment of the above mentioned purposes.

(b) Limitations on Debt, Actions. Notwithstanding anything to the contrary in the Construction Loan Documents or in any other document governing the formation, management or operation of the Company, the Company shall not (i) guarantee any obligation of any person or entity, including any affiliate, or become obligated for the debts of any other person or entity or hold out its credit as being available to pay the obligations of any other person or entity; (ii) engage, directly or indirectly, in any business other than as required or permitted to be performed under Section 1.05(a); (iii) incur, create or assume any indebtedness or liabilities other than (A)

the Construction Loan and any Swap Agreement (as defined in the Construction Loan Documents) between the Company and Construction Lender, and replacements for such financing; (B) development and construction costs and (C) unsecured trade payables (except retainage) that are incurred in the ordinary course of its business, are related to the ownership and operation of the Property, do not exceed two percent (2%) of the aggregate sum of the outstanding balance of the Construction Loan and Construction Lender's commitment to make future advances, are not evidenced by a note, must be paid within sixty (60) days and are otherwise expressly permitted under the Construction Loan Documents; (iv) make or permit to remain outstanding any loan or advance to, or own or acquire any stock or securities of, any person or entity, except that the Company may invest in those investments permitted under the Construction Loan Documents; (v) to the fullest extent permitted by law, engage in any dissolution, liquidation, consolidation, merger, sale or other transfer of any of its assets outside the ordinary course of the Company's business; (vi) buy or hold evidence of indebtedness issued by any other person or entity (other than cash or investment-grade securities); (vii) form, acquire or hold any subsidiary (whether corporate, partnership, limited liability company or other) or own any equity interest in any other entity; or (viii) own any asset or property other than the Project and incidental personal property necessary for the ownership or operation of the Project.

(c) Separateness Covenants. In order to maintain its status as a separate entity and to avoid any confusion or potential consolidation with any affiliate, the Company represents and warrants that in the conduct of its operations since its organization it has observed and will continue to observe the following covenants (collectively, the "*Separateness Provisions*"): (i) maintain books and records and bank accounts separate from those of any other person or entity; (ii) maintain its assets in such a manner that it is not costly or difficult to segregate, identify or ascertain such assets; (iii) comply with all organizational formalities necessary to maintain its separate existence; (iv) hold itself out to creditors and the public as a legal entity separate and distinct from any other entity; (v) maintain separate financial statements, showing its assets and liabilities separate and apart from those of any other person or entity and not have its assets listed on any financial statement of any other person or entity except that the Company's assets may be included in a consolidated financial statement of its affiliate so long as appropriate notation is made on such consolidated financial statement to indicate the separateness of the Company from such affiliate and to indicate that the Company's assets and credit are not available to satisfy the debts and other obligations of such affiliate or any other person or entity; (vi) prepare and file its own tax returns separate from those of any person or entity to the extent required by applicable law, and pay any taxes required to be paid by applicable law; (vii) allocate and charge fairly and reasonably any common employee or overhead shared with affiliates; (viii) not enter into any transaction with any affiliate, except on an arm's-length basis on terms which are intrinsically fair and no less favorable than would be available for unaffiliated third parties, and pursuant to written, enforceable agreements; (ix) conduct business in its own name, and use separate invoices and checks bearing its own name; (x) not commingle its assets or funds with those of any other person or entity; (xi) not assume, guarantee or pay the debts or obligations of any other person or entity; (xii) use commercially reasonable efforts to correct any known misunderstanding as to its separate identity; (xiii) not permit any affiliate to guarantee or pay its obligations (other than limited guarantees and indemnities pursuant to the Construction Loan Documents); (xiv) not make loans or advances to any other person or entity; (xv) pay its liabilities and expenses out of and to the extent of its own funds; (xvi) pay the salaries of its own

employees, if any, only from its own funds; and (xvii) cause the managers, officers, employees, agents and other representatives of the Company to act at all times with respect to the Company consistently and in furtherance of the foregoing and in the best interests of the Company.

(d) Failure of the Company to comply with any of the covenants contained in this Section 1.05 or any other covenants contained in this Agreement shall not affect the status of the Company as a separate legal entity.

(e) The Managing Member and the Company shall not have authority to, and shall not, without the prior written consent of the Owner Investor Member and Co-Investor Member, institute proceedings by the Company to be adjudicated bankrupt or insolvent; or consent to the institution of bankruptcy or insolvency proceedings against the Company; or file a petition seeking, or consent to, reorganization or relief under any applicable federal or state law relating to bankruptcy; or consent to the appointment of a receiver, liquidator, assignee, trustee, sequestrator (or other similar official) of the Company or any substantial part of its property; or make any assignment for the benefit of the Company's creditors; or admit in writing the Company's inability to pay its debts generally as they become due; or voluntarily dissolve, amend its organizational documents, transfer or encumber the Project or take any other action that would constitute a default under the Construction Loan Documents or any other agreement to which the Company is a party; or take any action in furtherance of any such action. Any other provision of this Agreement or otherwise applicable law to the contrary notwithstanding, in no event shall the Managing Member have any obligation to initiate, approve or otherwise cooperate in the taking of any of the foregoing acts by, for or against the Company, if and to the extent that any such act would create any liability for the Managing Member, the Developer Guarantor or any Affiliate of the Managing Member with respect to the Construction Loan or any replacement financing, regardless of whether Owner Investor Member and Co-Investor Member shall have consented to or requested the taking of any such action.

Section 1.06. Principal Place of Business. The principal place of business for the Company, and the principal office in the United States where records of the Company are to be kept and made available under Section 101.501 of the Act, is _____, ____ County, Texas _____. If the principal office and principal place of business of the Managing Member are relocated, the principal office and principal place of business of the Company will be relocated to be the same as that of the Managing Member; provided that in all events the principal office and principal place of business of the Company shall be in _____, Texas. The Managing Member may maintain other offices at such locations as the Managing Member may deem necessary or desirable. The Managing Member shall give the Investor Members written notice of any change in the principal place of business or principal office where the records of the Company are to be kept and made available under Section 101.501 of the Act not later than thirty (30) days after any such change.

Section 1.07. Registered Office and Registered Agent. The registered office of the Company is _____, _____ County, Texas _____, and the registered agent for service of process for the Company is _____. The Managing Member may from time to time designate a different registered office and/or registered agent for the Company with the approval of the Members. The Managing Member shall promptly provide

notice to the Members, and copies of all pleadings, subpoenas and other litigation or governmental notices received by the Company from the registered agent.

Section 1.08. Term of the Company. The term of the Company commenced on the date of filing of the Original Certificate with the Secretary of State of the State of Texas, and shall continue until December 31, 2065, unless earlier wound up and terminated, pursuant to the provisions of this Agreement.

Section 1.09. Definitions. In addition to the definitions provided elsewhere in this Agreement, the following terms shall have the meanings set out below:

(a) "*Accountants*" means _____ or such other firm of certified public accountants as is selected by Managing Member with the prior written approval of the Investor Members; provided, however, that Managing Member shall not need to obtain Investor Members' consent if Managing Member selects a "Big 4" accounting firm as the Accountants.

(b) *"Additional Capital Contributions"* means the capital contributions to be made by the Members to the Company pursuant to Section 3.03 hereof.

(c) *"Affiliate"* shall mean an individual or entity that controls, is controlled by or is under common control with the individual or entity to which reference is being made by reason of the possession, directly or indirectly, of the power to direct or cause the direction of the management policies of such person.

(d) "*Apartment Units*" means the apartment units in the Project.

(e) *"Approved Plans"* means the plans and specifications for the Project which have been approved by the Members.

(f) *"Business Day"* shall mean a day, other than a Saturday or Sunday, on which national banks are open for business in _____, Texas.

(g) *"Capital Contributions"* means Initial Capital Contributions and/or Additional Capital Contributions, as applicable.

(h) "*Co-Investor Member*" means _____.

(i) *"Code"* means the Internal Revenue Code of 1986, as amended and in effect from time to time and any successor to such statute.

(j) *"Company Interest"* means the Ownership Percentage of a Member and all other rights of such Member in or with respect to the Company under this Agreement.

(k) *"Construction Contingency"* means the contingency amount established in the Development Budget and the Construction Contract.

(l) *"Construction Contract"* means the Guaranteed Maximum Price Construction Contract in substantially the form approved by the Members to be entered into between the Company and the Contractor on or about the Effective Date, under which the Contractor agrees to construct the Improvements for the Company.

(m) *"Construction Lender"* means _____.

(n) *"Construction Loan"* means the loan in the maximum amount of $_____ obtained by the Company from the Construction Lender for the purpose of funding approximately seventy percent (70%) of the Total Project Cost, it being understood that material funding of the Construction Loan will not commence until the entire Initial Capital Contributions (excluding the deferred portion of the Initial Capital Contributions of the Managing Member to be funded concurrently with the payment of installments of the Development Fee) shall have been expended toward the costs of the Project.

(o) *"Construction Loan Documents"* means the documents evidencing, securing or relating to the Construction Loan.

(p) *"Contractor"* means _____, a Texas limited liability company, which is an Affiliate of the Managing Member.

(q) *"Developer"* means _____, a Texas limited partnership, which is an Affiliate of the Managing Member.

(r) *"Developer Guarantor"* means _____, a Texas limited partnership, which is an Affiliate of the Managing Member.

(s) "*Development Agreement*" means the development agreement of even date herewith in the form approved by the Members between the Company and the Developer.

(t) *"Development Budget"* means the budget setting forth the estimated Total Project Cost to be incurred by the Company for the organization of the Company, the acquisition of the Land and the pre-development, development, construction, financing, leasing and operation of the Project through the stabilized occupancy of the Project which has been most recently approved by the Members and the Construction Lender. A copy of the currently approved Development Budget is attached hereto as Exhibit B.

(u) *"Development Fee"* means an amount to be paid to the Developer by the Company that is equal to $_____. The Development Fee will be paid in monthly installments based on the same percentage as the amount paid for that month by the Company to the Contractor under the Construction Contract represents of the Guaranteed Maximum Price, with any remaining unpaid portion of the Development Fee to be paid in full within thirty (30) days after the Substantial Completion of the Project.

(v) *"Formation Agreement"* means the Agreement to Form Limited Liability Company previously executed by the Developer and _____, an Affiliate of Owner Investor Member, dated effective as of _____, for the purpose

of setting forth the terms and conditions under which such parties agreed to form a new limited liability company as therein described.

(w) *"General Contractor's Fee"* means an amount to be paid by the Company to the Contractor for the construction of the Improvements under the Construction Contract that is equal to $_____. The General Contractor's Fee will be payable by the Company to the Contractor monthly in proportion to the expenditure of the Guaranteed Maximum Price for the construction of the Project, with any remaining portion of the General Contractor's Fee to be paid not later than thirty (30) days after the Substantial Completion of the Project.

(x) *"Guaranteed Cost Overrun"* means an amount by which the Actual Hard Costs (as defined in the Construction Contract) exceed or would exceed the Guaranteed Maximum Price.

(y) *"Guaranteed Maximum Price"* means the guaranteed maximum price specified in the Construction Contract as the maximum amount to be paid to the Contractor for construction of the Improvements, which amount (i) shall include the General Contractor's Fee and a contingency amount of $_____ and (ii) shall be subject to increase in an amount equal to the Guaranteed Maximum Price Adjustment.

(z) "*Guaranteed Maximum Price Adjustment*" means the sum of (i) an amount that is equal to the lesser of (A) the amount by which the "Actual Hard Costs" (as defined in the Construction Contract) required to complete the construction of the Project in accordance with the Construction Contract exceed the Guaranteed Maximum Price originally specified in the Construction Contract; and (B) the aggregate amount of cost savings actually realized with respect to the Guaranteed Soft Costs in the Development Budget; plus (ii) the sum of Unforeseeable Guaranteed Cost Overruns described in Section 3.13 hereof and Scope Change Costs described in Section 3.14 of this Agreement.

(aa) "*Guaranteed Soft Costs*" means the costs in the Development Budget other than Construction Costs excluding (A) interest; (B) taxes; (C) marketing costs; and (D) net operating income or losses.

(bb) *"Improvements"* has the meaning assigned to such term in Section 1.05 hereof.

(cc) *"Income" or "Loss"* means, for each fiscal year or other period, an amount equal to the Company's taxable items of income and gain with respect to Income, and loss or deduction with respect to Loss, for such fiscal year or other period, determined in accordance with Code Section 703(a) (for this purpose, all items of income, gain, loss or deduction required to be stated separately pursuant to Code Section 703(a)(1) shall be included in taxable income or loss) with the following adjustments:

(i) gain or loss from the disposition of any Company asset that, because of the application of the provisions of Treasury Regulations Sections 1.704-1(b)(2)(iv)(d) or (f), has a Carrying Value that differs from the asset's adjusted tax basis, will be computed based upon the Carrying Value (rather than the adjusted tax basis) of such asset in

accordance with the provisions of Treasury Regulations Sections 1.704-1(b)(2)(iv)(g) and 1.704-1(b)(4)(i);

(ii) any income of the Company that is exempt from federal income tax and not otherwise taken into account in computing Income shall be added to such taxable income;

(iii) any expenditures of the Company described in Code Section 705(a)(2)(B) or treated as Code Section 705(a)(2)(B) expenditures under Treasury Regulations Section 1.704-1(b)(2)(iv)(i) and not otherwise taken into account in computing Losses shall be subtracted from such taxable losses;

(iv) in lieu of the depreciation, amortization and other cost recovery deductions taken into account in computing such taxable income or loss, there shall be taken into account depreciation for such fiscal year or other period as determined under Treasury Regulation Section 1.704-1(b)(2)(iv)(g)(3);

(v) to the extent an adjustment to the adjusted tax basis of any Company asset pursuant to Code Section 734(b) or 743(b) is required pursuant to Treasury Regulations Section 1.704-1(b)(2)(iv)(m)(4) to be taken into account in determining Capital Accounts as a result of a distribution other than in liquidation of a Member's Company Interest, the amount of such adjustment shall be treated as an item of gain (if the adjustment increases the basis of the asset) or loss (if the adjustment decreases the basis of the asset) from the disposition of the asset and shall be taken into account for purposes of computing Income and Loss; and

(vi) any increase or decrease to Carrying Value shall be included in the computation of Income and Loss.

(dd) "*Indemnity Agreement*" means the indemnity agreement of even date herewith in the form approved by the Members setting forth the terms and conditions under which the Company will indemnify the Developer Guarantor and its affiliates for guaranty obligations assumed by them in connection with the Construction Loan.

(ee) "*Initial Capital Contributions"* means the Initial Capital Contributions in the aggregate amount of $_____ to be made by the Members pursuant to Section 3.02 hereof.

(ff) *"Investor Members"* means Owner Investor Member and Co-Investor Member.

(gg) *"Land"* has the meaning assigned to such term in Section 1.05 hereof.

(hh) *"Lender Guaranty"* means a guaranty in favor of the Construction Lender by Developer Guarantor of (i) repayment of the portion of the principal and accrued interest of the Construction Loan that may be required by the Construction Lender; and (ii) the completion of construction of the Project by the General Contractor substantially in accordance with the Approved Plans and the Construction Contract, which instrument will excuse Developer Guarantor from performance of the completion guaranty thereunder if (A) Construction Lender

ceases funding the proceeds of the Construction Loan budgeted for construction of the Project to Developer Guarantor for any reason other than default of Developer Guarantor under such instrument; or (B) Construction Lender forecloses on the liens securing the Construction Loan or accepts a conveyance of the Project in lieu of foreclosure.

(ii) *"Majority in Interest of Members"* means Members holding more than fifty percent (50%) of the Ownership Percentages in the Company.

(jj) *"Management Agreement"* means the agreement of even date herewith in substantially the form approved by the Members between the Managing Agent and the Company under which the Managing Agent will provide property management services with respect to the Project in consideration of the payment of the Management Fee by the Company to the Managing Agent.

(kk) *"Management Fee"* means an amount, payable monthly in arrears, which is equal to the greater of (i) _____ percent (____%) of the gross revenues of the Company from the Project for the preceding calendar month or (ii) $_____ per month, beginning not more than _____ (__) days prior to the projected initial occupancy of Apartment Units in the Project.

(ll) *"Managing Agent"* means_____, a Texas limited partnership, which is an Affiliate of the Managing Member.

(mm) *"Net Available Cash"* has the meaning assigned to such term in Section 6.06.

(nn) *"Net Income"* means, for any taxable period, the excess, if any, of the Company's items of Income over the Company's items of Loss for such taxable period, but which shall not include any items of Income or Loss allocated pursuant to Section 6.03(b).

(oo) *"Net Loss"* means, for any taxable period, the excess, if any, of the Company's items of loss and deduction over the Company's items of income and gain for such taxable period, but which shall not include any items of Income or Loss allocated pursuant to Section 6.03(b).

(pp) *"Operating Budget"* means the annual budget for the operation of the Project during the period of time beginning approximately _____ (__) days prior to the date on which it is contemplated that the initial occupancy of apartment units in the Project will occur.

(qq) "*Owner Investor Member*" means _____.

(rr) *"Ownership Percentage"* has the meaning assigned to such term as set forth in Section 6.01 hereof.

(ss) *"Permits"* means all zoning, subdivision, site plan, grading, utility, building and other permits, consents, licenses, entitlements and approvals required for the development and construction of the Project which are usually and customarily obtained prior to commencement of construction of properties similar to the Project.

(tt) *"Pre-Development Activities"* means the activities by or on behalf of the Members and the Company taken in contemplation of the development of the Project and the formation of the Company, including negotiating, executing and implementing the Formation Agreement, working with the design team in designing the Project, obtaining the Permits, acquiring the Property, obtaining the Construction Loan and negotiating and executing the Project Documents and the Construction Loan Documents.

(uu) *"Pre-Development Costs"* means the costs and expenses incurred prior to the Effective Date in accordance with the Development Budget for legal, accounting, architectural, engineering, environmental, surveying and other services required in connection with the preparation and execution of the Formation Agreement, the Original Agreement, the Original Certificate, this Agreement and the Project Documents and in conducting the Pre-Development Activities, as well as fees, deposits and other costs incurred in connection with acquiring the Land and obtaining the Permits, deposits and expenses pertaining to the proposed Construction Loan and other similar costs and expenses usually and customarily expended and incurred in connection with activities in the nature of the Pre-Development Activities contemplated in this Agreement.

(vv) *"Preferred Return"* means a return that is calculated either (i) at a rate of 10% per annum, compounded annually, on such Member's Unrecovered Initial Capital Contributions, from the date each such Initial Capital Contribution is made to the date of payment; or (ii) at a rate of 15% per annum, compounded annually, on such Member's Unrecovered Additional Capital Contributions, from the date each such Additional Capital Contribution is made to the date of payment; or (iii) at a rate of 18% per annum, compounded annually, on such Member's Unrecovered Priority Contributions, from the date each such Additional Capital Contribution is made to the date of payment. The Preferred Return will be distributed pursuant to Sections 3.11, 6.07(b) and 6.07(d) hereof.

(ww) "*Priority Contributions*" has the meaning set forth in Section 3.11.

(xx) *"Project Documents"* means this Agreement and the Development Budget, Construction Contract, Development Agreement, Management Agreement and Indemnity Agreement.

(yy) "*Representative*" means the person designated from time to time by each Member to represent its respective interests in all matters requiring the consent or approval of the Members, as such person may vary from time to time. The initial Representative of Managing Member shall be _____. The initial Representative of Owner Investor Member shall be _____. The initial Representative of Co-Investor Member shall be _____. Each Member may, upon written notice to other Members, at any time and from time to time, appoint, substitute and replace a Representative.

(zz) "*Scope Change Contributions*" has the meaning set forth in Section 3.14.

(aaa) "*Scope Change Costs*" has the meaning set forth in Section 3.14.

(bbb) "*Scope Change Orders*" has the meaning set forth in Section 3.14.

(ccc) "*Stabilized Occupancy*" means the date upon which (a) Substantial Completion shall have been achieved and (b) an average occupancy of at least __% of the Apartment Units in the Project shall have been maintained for at least three (3) consecutive months under executed leases conforming to the leasing guidelines.

(ddd) "*Substantial Completion*" means the time at which temporary or permanent certificates of occupancy shall have been issued for all of the Apartment Units in the Project.

(eee) *"Total Project Cost"* means total anticipated costs to be incurred by the Company for the organization of the Company, the acquisition of the Property and the pre-development, development, construction, financing and operation of the Project through the Stabilized Occupancy of the Project as set forth in the Development Budget.

(fff) *"Treasury Regulations"* means the regulations promulgated by the Department of the Treasury pursuant to the Code.

(ggg) "*Unforeseeable Conditions*" has the meaning set forth in Section 3.13.

(hhh) "*Unforeseeable Guaranteed Costs Contributions*" has the meaning set forth in Section 3.13.

(iii) "*Unforeseeable Guaranteed Costs Overrun*" has the meaning set forth in Section 3.13.

(jjj) *"Unrecovered Additional Capital Contributions"* means a Member's Additional Capital Contributions to the Company that have not theretofore been recouped by distributions from the Company to the Member with respect to the Member's Unrecovered Additional Capital Contributions.

(kkk) *"Unrecovered Initial Capital Contributions"* means a Member's Initial Capital Contributions to the Company that have not theretofore been recouped by distributions from the Company to the Member with respect to the Member's Unrecovered Additional Capital Contributions.

(lll) *"Unrecovered Priority Contributions"* means a Member's Priority Capital Contributions to the Company that have not theretofore been recouped by distributions from the Company to the Member with respect to the Member's Unrecovered Priority Capital Contributions.

Section 1.10. Recitals. The Recitals set forth above are hereby incorporated herein by reference as part of this Agreement for all purposes.

ARTICLE II.
MEMBERS OF THE COMPANY

Section 2.01. Managing Member. The name and address of the sole Managing Member of the Company are:

_____
_____
_____
Attn: _____

Section 2.02. Owner Investor Member. The name and address of the Owner Investor Member of the Company are:

_____
_____
_____
Attn: _____

Section 2.03. Co-Investor Member. The name and address of the Co-Investor Member of the Company are:

_____
Address: _____
_____
Attn: _____

ARTICLE III.
FINANCING, CONTRIBUTIONS AND ACCOUNTS

Section 3.01. General Financing Policy. The Members agree that it shall be the general policy of the Company that, after the Initial Capital Contributions of the Members as set forth in Section 3.02 herein have been expended, all additional monies necessary to carry on the activities and goals of the Company shall be obtained from the Construction Loan, Additional Capital Contributions and Project revenues.

Section 3.02. Initial Capital Contributions. The Owner Investor Member, Co-Investor Member and the Managing Member will be obligated to make Initial Capital Contributions to the Company in kind or in cash in the amounts and at the times set forth below:

(a) The Owner Investor Member will be obligated to make an Initial Capital Contribution to the Company equal to $_____, or _____% of aggregate Initial Capital Contributions contemplated in the Approved Budget, with such Initial Capital Contribution to be made as follows:

(i) The Owner Investor Member is contributing an amount equal to $_____ of its Initial Capital Contribution to the Company as of the Effective Date, consisting of $_____ as the agreed value of the Land and cash in the amount of $_____; and

(ii) The Owner Investor Member will contribute the balance of its Initial Capital Contribution in the amount of $_____ to the Company in cash in installments as and when required under Section 3.02(d) hereto.

(b) The Co-Investor Member will be obligated to make an Initial Capital Contribution to the Company equal to $_____, or _____% of aggregate Initial Capital Contributions contemplated in the Approved Budget, with such Initial Capital Contribution to be made as follows:

(i) The Co-Investor Member is contributing an amount equal to $_____ of its Initial Capital Contribution to the Company in cash as of the Effective Date; and

(ii) The Co-Investor Member will contribute the balance of its Initial Capital Contribution in the amount of $_____ to the Company in cash in installments as and when required under Section 3.02(d) hereto.

(c) The Managing Member will be obligated to make an Initial Capital Contribution to the Company equal to $_____, or __% of the aggregate Initial Capital Contributions contemplated in the Approved Budget, with such Initial Capital Contribution to be made as follows:

(i) The Managing Member is contributing an amount equal to $_____ of its Initial Capital Contribution to the Company in cash as of the Effective Date; and

(ii) The Managing Member will contribute an amount equal to $_____ of its Initial Capital Contribution to the Company in cash in installments as and when required under Section 3.02(d) hereto; and

(iii) The Managing Member will contribute the balance of its Initial Capital Contribution in the amount of $_____ to the Company in monthly installments that are equal to one-half (1/2) of the monthly installments of the Development Fee paid by the Company to the Developer, with such monthly installments of the Managing Member's Initial Capital Contribution to be paid at the same time that the monthly installments of the Development Fee are earned and paid.

(d) The Owner Investor Member, the Co-Investor Member and the Managing Member will contribute the balances of their respective Initial Capital Contributions to be contributed under Sections 3.02(a)(ii), 3.02(b)(ii) and 3.02(c)(ii), respectively, pro rata in proportion to the balances to be contributed by each such Member under such provisions within ten (10) days after requests therefor by the Managing Member (each a "*Call for Capital*

Contributions") as and when required by the Company to fund the costs of the Company and the Project that are required to be funded prior to the commencement of the funding of such costs from the proceeds of the Construction Loan.

(e) The obligations of the Members to make Initial Capital Contributions and Scope Change Contributions to the Company are recourse obligations of each Member that are secured by a security interest in each Member's Company Interest as more fully set forth in Section 3.11 hereof.

Section 3.03. Additional Capital Contributions. The Members may, but shall not be obligated to, make Additional Capital Contributions beyond the Initial Capital Contributions described in Section 3.02 above which are required by the Company to pay any costs of owning and operating the Project and administering the Company, including Unforeseeable Guaranteed Cost Overruns, but excluding Scope Change Costs, which exceed the funds otherwise available from the Initial Capital Contributions or operating revenues of the Company, in accordance with the following provisions:

(a) In the event the Managing Member determines from time to time that Additional Capital Contributions will be necessary and in the Company's best interest, the Managing Member shall notify the Investor Members of such need and the amount of the proposed Additional Capital Contribution required in connection therewith in writing (an "*Additional Capital Contribution Request*"), which amount may include estimated future needs of the Company for up to six (6) months in advance.

(b) The Managing Member and the Investor Members shall have ten (10) days from their receipt of an Additional Capital Contribution Request from the Managing Member in which to (i) elect to make all or a portion of such needed Additional Capital Contribution in proportion to their respective Ownership Percentages or otherwise in the amounts mutually agreed upon by the Participating Member (as hereinafter defined) and (ii) give written notice (an "*Acceptance Notice*") of such election to the Managing Member. A Member's failure to give an Acceptance Notice to the Managing Member in a timely manner shall be deemed to be a decision by the Member that it does not desire to participate in such Additional Capital Contribution.

(c) If and to the extent that (i) a Member (a "*Non-participating Member*") either (A) does not give an Acceptance Notice to the Managing Member with respect to an Additional Capital Contribution Request, or (B) gives an Acceptance Notice but subsequently fails to fund such Additional Capital Contribution; and (ii) another Member (a "*Participating Member*") gives an Acceptance Notice with respect to its share of an Additional Capital Contribution and funds such Additional Capital Contribution, then (iii) the Managing Member shall give the Participating Member the opportunity to make the Additional Capital Contribution that the Non-participating Member failed to make and to receive all distributions attributable to such Additional Capital Contribution and the Preferred Return thereon.

(d) If and to the extent that (i) the Members fail to make any portion of the Additional Capital Contributions for which an Additional Capital Contribution Request has been made; then (ii) the Managing Member shall give any one or more other persons designated by the Managing

Member the opportunity to make the Additional Capital Contributions that the Members failed to make and to receive all distributions attributable to such Additional Capital Contributions and the Preferred Return thereon under Section 6.07(b) and (c) hereof. Upon making such Additional Capital Contributions and agreeing in writing to be bound by this Agreement, such other persons shall become assignees in the Company with respect to the limited interest in the Company so acquired.

Section 3.04. No Withdrawal of Contributions. No Member shall be entitled to withdraw any part of such Member's capital account or to receive any distribution from the Company, nor shall there be any obligation to return to any Member any part of such Member's capital account or capital contributions to the Company for as long as the Company continues in existence, subject to the provisions in Section 6.07 and Article XI. The foregoing provisions shall not be applicable in the event that a reconciliation of the Initial Capital Contributions conducted at the time that all or substantially all of the Initial Capital Contributions shall have been made reveals that the Members have theretofore made Initial Capital Contributions which are not in proportion to their pro rata shares of 95% by the Investor Members and 5% by the Managing Member and a refund or other adjustment is appropriate to restore such percentages.

Section 3.05. No Interest on Capital Contributions. Without modifying the provisions hereof regarding the distribution of Preferred Return, it is understood and agreed that no interest shall be paid by the Company on any Member's capital account.

Section 3.06. Loans or Advances by Members. Loans or advances by any Member to the Company shall not be considered contributions to the capital of the Company and shall not increase the capital account of the lending or advancing Member. Any Member ("*Lending Member*") may loan sums to the Company upon then competitive market conditions as reasonably determined by the Managing Member.

Section 3.07. Effect of Transfers Among Members. Any Member who shall acquire all or part of the Company Interest of any other Member in accordance with the express provisions of this Agreement, or as otherwise mutually agreed by the Members, shall, with respect to the Company Interest so acquired, be deemed to be a Member of the same class as its transferor. If the transferor does not retain any Company Interest in the Company, the transferee shall succeed to such predecessor Member's capital account, except for appropriate capital account adjustments that may be required pursuant to applicable tax regulations.

Section 3.08. Liability of Members. Unless otherwise specifically provided herein or otherwise agreed to in writing by a Member, no Member shall be personally and/or corporately liable for any of the debts of the Company or be required to contribute any additional capital to the Company. No Member shall be obligated to guarantee any third-party loans or other financing arrangements made to or with the Company and shall have no liability or recourse whatsoever with respect thereto.

Section 3.09. No Priorities. Except as otherwise specifically provided in this Agreement, no Member shall have any priority or preference over any other Member with respect to distributions from the Company.

Section 3.10. Construction Loan Provisions. The terms and provisions of the Construction Loan Documents have been approved in all material respects by the Managing Member, the Developer Guarantor and the Investor Members.

Section 3.11. Security Interest Provisions. The obligation of each of the Members to fund the balance of its respective Initial Capital Contributions or Scope Change Contributions is secured by a security interest in its respective Company Interest as provided in Section 3.02(e). In the event that any Member (a "*Non-Contributing Member*") fails to make any portion of its Initial Capital Contribution or Scope Change Contribution when it becomes due after the Managing Member has issued a Call for Capital Contributions in accordance with Section 3.02(d), any of the other Members (the "*Contributing Members*") which have made all of its Initial Capital Contributions and Scope Change Contributions then or theretofore due may elect either or both of (i) to pursue, on behalf of the Company, any remedies that may be cumulatively available to the Company for collection of such Initial Capital Contribution or Scope Change Contribution, including foreclosure of such security interest in the Non-Contributing Member's Company Interest; or (ii) to advance to the Company the amount of funds not so contributed by the Non-Contributing Member, in which event the funds advanced by the Contributing Members shall be treated as "*Priority Contributions*." The Contributing Members shall be entitled to receive distributions equal to their Priority Contributions and the Preferred Return thereon from the amounts that would otherwise be distributed to the Non-Contributing Member before the Non-Contributing Member is entitled to receive any further distributions and such amounts shall be treated for all tax and accounting purposes as distributions to the Non-Contributing Member.

Section 3.12. No Third Party Rights. The right of the Company or the Managing Member to require any Capital Contributions to be made under the terms of this Agreement shall not be construed as conferring any rights or benefits to or upon any party not a party to this Agreement including, but not limited to, any tenant of any part of the Project, or the holder of any obligations secured by a mortgage, deed to secure debt, deed of trust or other lien or encumbrance upon or affecting the Company, any Company Interest, the Project, the Land, or any part thereof or interest therein, or any other creditor of the Company.

Section 3.13. Contributions for Unforeseeable Guaranteed Cost Overruns. To the extent that a Guaranteed Cost Overrun (an "*Unforeseeable Guaranteed Costs Overrun*") is due to riot, insurrection, unbudgeted and unforeseeable governmental requirements, unforeseeable environmental or site conditions or unexpected adverse weather or other acts of God ("*Unforeseeable Conditions*") that increase the cost of construction of the Improvements as certified by the Project architect, the amount of the Unforeseeable Guaranteed Costs Overrun which is due to any such Unforeseeable Conditions and which is not offset by soft cost savings previously realized and not previously applied shall be added to the Development Budget and the Guaranteed Maximum Price and, subject to Section 3.03, be contributed to the Company ("*Unforeseeable Guaranteed Costs Contributions*") by the Members in accordance with their Ownership Percentages as and when required by the Company, and such contributions shall be credited to the Members' Capital Accounts as Additional Capital Contributions, and shall be added to the amount payable by the Company to the Contractor under the Construction Contract if such Unforeseeable Guaranteed Costs Overrun is payable under the Construction Contract.

Such Additional Capital Contributions shall begin to accrue Preferred Return on the date such amounts are contributed to the Company by the Members.

Section 3.14. Scope Change Contributions. If all of the Members have approved, in their respective sole discretion, a change order (a "*Scope Change Order*") amending the Approved Plans and the Development Budget to reflect increases in the scope of, or improving the amenities of, the Improvements, the cost (the "*Scope Change Cost*") of such Scope Change Order shall be borne in the following manner. If there is then unused Construction Contingency in the Development Budget sufficient to defray such Scope Change Cost and the applicable Lender approves a reallocation of an amount from the Construction Contingency sufficient to defray the Scope Change Cost, the Scope Change Cost shall be defrayed by such reallocation from the Construction Contingency. If, and to the extent that, the unused Construction Contingency (or the portion thereof that the Lender agrees can be used for such purpose) is not sufficient to defray the Scope Change Cost, the Development Budget and the Guaranteed Maximum Price shall be increased and the Members shall make Capital Contributions ("*Scope Change Contributions*") as and when required to defray the Scope Change Cost. Such Scope Change Contributions shall be made within ten (10) days after a call for capital contributions is issued by the Managing Member and shall be made by the Members in proportion to their Ownership Percentages. In addition, if, and to the extent that, any amount previously reallocated from the Construction Contingency to defray a Scope Change Cost is thereafter required to defray other costs incurred by the Contractor pursuant to the Construction Contract, the Development Budget and the Guaranteed Maximum Price shall be increased and the Members shall make Scope Change Contributions in proportion to their Ownership Percentages to defray such other costs incurred by the Contractor within ten (10) days after a call for Scope Change Contributions is issued by the Managing. Scope Change Contributions shall receive Additional Capital Contribution credit and begin to accrue Preferred Return on the date such amounts are contributed to the Company by the applicable Member.

ARTICLE IV.
MANAGEMENT OF THE COMPANY

Section 4.01. Duties of Managing Member.

(a) Subject to the limitations, duties and obligations imposed in this Agreement or by applicable law, the Managing Member shall manage and control all activities of the Company. Except as otherwise expressly provided herein, all management powers over the business affairs of the Company shall be exclusively vested in the Managing Member and, except as otherwise expressly provided herein, the Investor Members shall have no right of management power over the business and affairs of the Company or the Project.

(b) Each of the Members hereby approves the following documents prepared by or at the request of the Managing Member (collectively, the "*Approved Project Documents*") and authorizes the Managing Member to cause the Company to execute, implement and perform such Approved Project Documents in accordance with their respective terms, including the payment of compensation to Affiliates of the Managing Member as provided in such Approved Project

Documents and the other expenditures of funds contemplated therein, without further approval by the Members:

(i) The Development Budget set forth in Exhibit B attached hereto and incorporated herein by reference;

(ii) The Development Agreement in the form approved by the Members and incorporated herein by reference;

(iii) The Construction Contract in the form approved by the Members and incorporated herein by reference;

(iv) The Management Agreement in the form approved by the Members and incorporated herein by reference; and

(v) The Indemnity Agreement in the form approved by the Members and incorporated herein by reference.

(c) Subject to the provisions of Section 4.02 hereof and to the limitations, duties and obligations imposed in this Agreement or by applicable law, the Managing Member, at the expense of and on behalf of the Company, shall conduct, and shall have all requisite power and authority to conduct or cause to be conducted, the business and affairs of the Company in accordance with the Approved Project Documents without any further approval of either the Owner Investor Member and Co-Investor Member being required.

Section 4.02. Major Decisions. Except as otherwise provided to the contrary in this Agreement, without the prior written approval of a Majority in Interest of the Members (excluding Members then in default), the officers, employees, managers and Members of the Company shall have no right, power or authority to take any of the actions set forth below:

(a) The entering into of a contract or other arrangement, or series of related contracts or other arrangements, obligating the Company in excess of the greater of (i) more than five percent (5%) of the amount authorized in the Development Budget or the applicable Operating Budget excluding non-controllable expenditures such as insurance, taxes, utilities and debt service or (ii) $25,000 in the case of an emergency expenditure not contemplated in the Development Budget or applicable Operating Budget or Management Agreement;

(b) The approval of (i) any amendment, modification or termination of the Development Agreement, the Construction Contract, or the Management Agreement; (ii) the execution, amendment, modification or termination of any other contract between the Company and the Managing Member or an Affiliate thereof; or (iii) any contract in replacement thereof or the amendment, modification, termination or replacement of any such replacement contract;

(c) The approval of the execution by the Company of any third-party service or supply contract other than a cable television contract or telephone contract which cannot, by its terms, be cancelled by the Company upon not more than thirty (30) days' written notice;

(d) Any amendment of this Agreement or any appendix or exhibit hereof; any amendment of the certificate of formation of the Company; or any merger or consolidation of the Company with any other entity;

(e) The issuance of additional Company Interests in the Company;

(f) Any transaction or other dealings (including the creation of any contract not authorized herein and modifications thereof) between the Company and any Member, or any Affiliate of any Member (all of which shall be conducted on an arm's length basis);

(g) The payment by the Company to the Managing Member or any Affiliate of the Managing Member, or any of their respective directors, officers, shareholders, partners, managers, or members, of any salary, commissions, bonuses, fees, or other compensation not authorized herein or contemplated in the Development Budget or an Operating Budget;

(h) Except for a sale of the Project consummated pursuant to Article XIII, the sale, lease (except ordinary tenant leases of Apartment Units in the Project for a term not exceeding thirteen months), mortgage, ground lease, transfer or other disposition of the Company Property, or any material portion thereof, excluding the retirement and replacement of furnishings, fixtures and equipment in the ordinary course of business;

(i) The entry into a like-kind exchange pursuant to Section 1031 of the Code, with regard to the Company Property;

(j) The entry into any reciprocal easement agreement or other easement agreement affecting the Land or any of the Company Property other than utility and access easements required in connection with the development of the Project;

(k) Subject to Section 4.05, below, the financing, refinancing, pledge or encumbrance of any Company Property, and all documents and agreements relating thereto, or any material changes to the terms and conditions thereof;

(l) Subject to Sections 4.14(f) and 4.15(b), below, the selection of any leasing agent (other than Managing Agent pursuant to the Management Agreement) or real estate broker to lease or sell all or any portion of the Project;

(m) Except for ordinary accounts payable and receivable, the making of any loan by or to the Company or consenting to the Company or any Member on behalf of the Company becoming a surety, guarantor, indemnitor or accommodation party to any obligation or for any Person;

(n) Any decision to acquire title to any real estate other than the Project;

(o) Subject to Section 1.05(e), the institution by the Company of any lawsuit, arbitration or other legal proceeding, the confession of any judgment against the Company, or the settlement of any insurance claim against the Company, in each instance in excess of $25,000;

(p) Any agreement to allow for the condemnation (or conveyance in lieu thereof) of any portion of the Project;

(q) Subject to Section 1.05(e), the filing for voluntary bankruptcy or the proceeding with any business action causing the Company to be subject to, or otherwise consenting to, an involuntary bankruptcy or its equivalent;

(r) The conducting of any business or activity other than the business contemplated by Section 1.05(a);

(s) The acquisition of any corporation, limited liability company, partnership, association, business or business division from any Person, whether by ownership interest purchase, asset purchase, contribution, merger or other business combination or action to cause the Company to legally merge or consolidate with or be a party to a transfer of a substantial portion of its assets or reorganization with any other Person;

(t) Each Operating Budget and each amendment and modification to each Operating Budget, except for an amendment authorizing an increase not exceeding five percent (5%) annually in any line item in the Operating Budget and any amendment of any line item in the Operating Budget authorizing increases for the actual costs of taxes, insurance, utilities or debt service or as otherwise authorized in the Management Agreement;

(u) The establishment of, or increase or decrease of, any operating reserves or loan reserves (except as otherwise required under the Construction Loan Documents) not otherwise approved by the Members in connection with the Members' approval of the Operating Budget;

(v) The making of any tax election not otherwise specifically required by this Agreement;

(w) The withdrawal, removal or replacement of the Managing Member;

(x) The performance of any act that would make it impossible to carry on the ordinary business of the Company;

(y) The conversion of any material asset of the Company to use by any Member;

(z) The taking of any action that will require the winding-up of the Company;

(aa) The hiring, firing or change of any accounting, tax or law firm that will represent or otherwise perform work on behalf of the Company;

(bb) Any action that would cause any Member to be personally liable for any debt, liability or obligation of the Company or of any other Member, without the prior consent of the first such Member;

(cc) Except as otherwise provided herein, requiring any Additional Capital Contribution by any Member;

(dd) The change or addition of any of the Company's banks for the holding of Company funds;

(ee) The granting of any guaranty by Managing Member or any Member on behalf of the Company;

(ff) The making by Managing Member of any loan to the Company or capital contribution to the Company, other than an Initial Capital Contribution or Additional Capital Contribution as contemplated herein;

(gg) Entering into any agreement to do any of the foregoing; and

(hh) Causing or permitting any entity in which the Company owns an interest to take any action that, if taken by the Company, would require the consent of Members under this Agreement, without first obtaining such consent.

Section 4.03. Consultation with Members. Without in any manner limiting the right of the Owner Investor Member and Co-Investor Member to consent to and approve Major Decisions, the Managing Member agrees to consult with the Owner Investor Member and Co-Investor Member from time to time with respect to matters pertaining to the Project by holding periodic meetings with the Representatives of Owner Investor Member and Co-Investor Member, and the Representatives of Owner Investor Member and Co-Investor Member shall have the right to advise the Managing Member with respect to such matters, it being agreed, however, that the Managing Member will have the sole and exclusive right to make any and all decisions on behalf of the Company, except as otherwise provided in Section 1.05 and those Major Decisions defined in Section 4.02 hereof.

Section 4.04. Restrictions on Authority of Members.

(a) None of the Members shall have any authority with respect to the Company or this Agreement to:

(i) Do any act in contravention of this Agreement; or

(ii) Do any act which would make it impossible to carry on the business of the Company; provided, however, that this prohibition shall not apply to the sale or other disposition of all or substantially all of the Company Property in accordance with this Agreement; or

(iii) Possess any Company Property or assign the right of the Company or its Members in specific Company Property;

(b) Only the Managing Member shall have any authority to execute instruments or take any other action that is binding upon the Company.

Section 4.05. Refinancing Construction Loan.

(a) Any other provision hereof to the contrary notwithstanding, but subject to Section 4.05(b), the Managing Member will have sole and exclusive authority to obtain and approve financing necessary to refinance the Construction Loan upon completion of the Project if the Developer Guarantor or any affiliate thereof then continues to have any liability of any kind with respect to the Construction Loan. Unless otherwise approved by the Investor Members, any such refinancing obtained by the Managing Member must (i) have an original principal amount that is not greater than the sum of (A) 100% of the then outstanding principal and accrued interest owed on the Construction Loan plus (B) usual and customary closing costs and transaction fees; (ii) have a term of not less than three (3) years; (iii) bear interest at a rate that is not more than ____% of the average of not less than two (2) quotes obtained by the Managing Member from institutional long-term lenders for loans having similar terms and collateral; (iv) be payable in equal monthly installment payments of principal and interest based on an amortization period of not less than twenty (20) years; and (v) be open to prepayment and subject to prepayment premiums or penalties in accordance with terms and conditions which are substantially consistent with those that are then being generally quoted for similar loans.

(b) The provisions of Section 4.05(a) to the contrary notwithstanding, however, the Investor Members will be entitled to seek alternative financing sastisfactory to the Investor Members which is fully nonrecourse to the Developer and its affiliates, for a period ending nine (9) months prior to the maturity date of the Construction Loan. The provisions of Section 4.05(a) regarding the authority of the Managing Member to obtain refinancing without the approval of the Investor Members will not be applicable until and unless the Investor Members shall have been unable to obtain such alternative financing within such period of time.

Section 4.06. Other Activities. The Managing Member shall devote such attention and business capacity to the affairs of the Company as are necessary to properly and efficiently manage and supervise the business and affairs of the Company. The Members hereby acknowledge that during the term of the Company (a) any or all of the Members and their respective Affiliates may acquire interests in and/or manage, or may continue to own interests in and/or manage, other real estate, other ventures or companies which are or may be engaged in the ownership, leasing, management and operation of investments in real estate or other businesses and which are or may be in competition with the Company, and (b) any or all of the Members and their Affiliates or Affiliated Entities may engage, or may continue to engage, in other distinct or related businesses. Neither the Company nor any Member shall have any right with respect to any such other real estate, ventures, companies or businesses, nor shall any Member have any obligation to offer any interest in such other activities to the Company or to any other Member of the Company.

Section 4.07. INDEMNIFICATION BY THE COMPANY. THE COMPANY, BUT NOT ANY MEMBER, SHALL INDEMNIFY, DEFEND AND HOLD ANY MEMBER AND ANY OFFICER, DIRECTOR, SHAREHOLDER, MEMBER, MANAGER, PARTNER, EMPLOYEE, REPRESENTATIVE, AGENT OR AFFILIATE OF ANY OF THE MEMBERS OR THE COMPANY ("*INDEMNITEE*") HARMLESS AGAINST ANY LIABILITY OR LOSS ARISING AS A RESULT OF ANY CLAIM OR LEGAL PROCEEDING RELATING TO THE

PERFORMANCE OR NONPERFORMANCE OF ANY ACT CONCERNING THE ACTIVITIES OF THE COMPANY IN ACCORDANCE WITH THIS AGREEMENT, TO THE FULLEST EXTENT PERMITTED BY ARTICLE 8.101 OF THE ACT, WHICH IS HEREBY ADOPTED BY THE COMPANY, **SPECIFICALLY INCLUDING (I) CLAIMS ARISING DUE TO SUCH INDEMNITEE'S SOLE, PARTIAL OR CONCURRENT NEGLIGENCE AND STRICT LIABILITY, BUT EXCLUDING CLAIMS ARISING DUE TO SUCH INDEMNITEE'S GROSS NEGLIGENCE OR WILLFUL MISCONDUCT AND (II) CLAIMS ARISING IN CONNECTION WITH THE GUARANTY OF ANY OBLIGATIONS OF THE COMPANY.** THE INDEMNIFICATION AUTHORIZED HEREIN SHALL INCLUDE, BUT IS NOT LIMITED TO, THE PAYMENT OF REASONABLE ATTORNEY'S FEES AND OTHER EXPENSES INCURRED IN SETTLING OR DEFENDING ANY CLAIMS, THREATENED ACTION OR FINALLY ADJUDICATED LEGAL PROCEEDINGS. THE INDEMNIFICATION PROVIDED HEREIN SHALL BE IN ADDITION TO ANY OTHER RIGHTS TO WHICH AN INDEMNITEE MAY BE ENTITLED UNDER ANY AGREEMENT, VOTE OF THE MEMBERS, AS A MATTER OF LAW OR OTHERWISE, AND SHALL CONTINUE AS TO AN INDEMNITEE WHO HAS CEASED TO SERVE IN SUCH CAPACITY AND SHALL INURE TO THE BENEFIT OF THE HEIRS, SUCCESSORS, ASSIGNS, ADMINISTRATORS AND LEGAL REPRESENTATIVES OF THE INDEMNITEE. PROVIDED THAT EACH OF THE INVESTOR MEMBERS PAYS THE EXCESS PREMIUM COSTS ATTRIBUTABLE THERETO, IF ANY, THE MANAGING MEMBER SHALL CAUSE ALL INSURANCE POLICIES CARRIED BY THE COMPANY TO NAME EACH OF THE INVESTOR MEMBERS AS AN ADDITIONAL INSURED. NO INDEMNITEE SHALL BE LIABLE, RESPONSIBLE OR ACCOUNTABLE IN DAMAGES OR OTHERWISE TO ANY MEMBER OR THE COMPANY FOR THE DOING OF ANY ACT OR THE FAILURE TO DO ANY ACT, THE EFFECT OF WHICH MAY CAUSE OR RESULT IN LOSS OR DAMAGE TO THE COMPANY OR THE MEMBERS, EXCEPT TO THE EXTENT THAT SUCH ACT OR FAILURE TO ACT CONSTITUTES GROSS NEGLIGENCE OR WILLFUL MISCONDUCT.

Section 4.08. Approvals by the Members. Unless specifically provided to the contrary herein, in any instance under this Agreement in which the consent or approval of the Owner Investor Member and the Co-Investor Member to any Major Decision is required, the Managing Member shall (unless the Owner Investor Member and Co-Investor Member otherwise agree) send a written request for such consent or approval to the Representatives of the Owner Investor Member and Co-Investor Member. The Representative of the Member whose approval or consent is required or requested shall use commercially reasonably efforts to convey its approval or disapproval by the Response Date as hereinafter defined. Additionally, as to any matter for which an Investor Member's consent is being sought, in the event that said Investor Member's Representative gives notice that the Member is withholding its consent, such notice to the Managing Member shall contain specific reasons for disapproval, together with a clear statement of what changes are necessary, if any, in order for such consent to be obtained. Any request for approval or consent to any matter required by the terms, conditions and provisions of this Agreement, or by law, to be submitted for consideration and vote of the Members shall be transmitted to the Members by the Managing Member in the manner provided for notices pursuant to the provisions of Article XIV. The "Response Date" shall be the date by which the vote of a Member must be received by the Company in order to be counted. Except as otherwise

specifically provided in this Agreement, any proposals submitted to the Members by notice in the manner provided for in this Section shall be approved if and as of the date when the Company receives the consent or approval of the requisite Members.

Section 4.09. Voting.

(a) In any instance under this Agreement in which the written consent or written approval of a Member to any proposed action is required, such written consent or written approval may be given in writing signed at a special or regular meeting of the Members, or may be given in writing by a written consent in lieu of a meeting signed by the Members as required in the applicable provision requiring the consent or approval.

(b) At any time when any Member is in default of its obligations hereunder (a "*Defaulting Member*"), then such Defaulting Member shall not be entitled to vote on, approve, consent to or decide any matter relating to this Company so long as such Member remains a Defaulting Member; during such period, all votes, approvals, consents and decisions, as applicable, otherwise required or permitted by such Defaulting Member shall be made solely by the other Members. If the default which caused such Member to be a Defaulting Member shall have been cured, then such pre-existing default, which shall have been so cured, shall no longer constitute a ban on the voting, approval, consenting or decision making, as applicable, by such Member. Further, if any Member files any voluntary petition in bankruptcy or any petition seeking a reorganization, arrangement, composition or other relief or makes an assignment for the benefit of creditors, or if a receiver is appointed for a Member or the assets of such Member and such appointment is not set aside within ninety (90) days thereafter or if a Member should be adjudicated bankrupt in an involuntary proceeding brought by other parties and such adjudication is not set aside within ninety (90) days thereafter, then, in any such event, neither such Member nor any receiver, trustee, assignee or other party exercising control over the assets of such Member shall be entitled to vote on, approve, consent to or decide any matter of Company business including, without limitation, any approval of Major Decisions or other approvals provided for in this Agreement.

Section 4.10. Reliance on Managing Member's Authority. Without in any manner limiting the right of the Owner Investor Member and Co-Investor Member to consent to and approve Major Decisions, no mortgagee, grantee, independent contractor, or other person or entity dealing with the Company shall be required to investigate the authority of the Managing Member or to secure the approval or confirmation by the Owner Investor Member and Co-Investor Member of any act of the Managing Member in connection with the conduct of the Company's business, and any third party may rely upon such act or acts of the Managing Member as if it were the sole party in interest.

Section 4.11. Compensation of Managing Member.

(a) To the extent provided for in the Development Budget or Operating Budget or otherwise reasonably required by the Company, the Managing Member shall be entitled to reimbursement by the Company for any and all cash out-of-pocket expenses actually incurred by the Managing Member or its Affiliates on behalf of the Company.

(b) The Contractor, which is an Affiliate of the Managing Member, shall be entitled to receive the General Contractor's Fee and expense reimbursements from the Company as provided in the Construction Contract.

(c) The Managing Agent, which is an Affiliate of the Managing Member, shall be entitled to receive the Management Fee and expense reimbursements from the Company as provided in the Management Agreement.

(d) The Developer, which is an Affiliate of the Managing Member, shall be entitled to receive the Development Fee and expense reimbursements from the Company as provided in the Development Agreement.

(e) Except for the Managing Member's interest in distributions from the Company, if any, in accordance with this Agreement and the other reimbursements or compensation described in this Section 4.11, and other fees to which the Managing Member or its Affiliates are expressly entitled herein or as mutually agreed in writing by the Members, the Managing Member shall not be entitled to receive compensation from the Company for services heretofore performed or to be hereafter performed by the Managing Member under this Agreement.

Section 4.12. Standard of Care for Managing Member. In connection with the carrying out of its duties and obligations hereunder and not waived as provided in Section 1.05, the following standard of care shall govern the conduct and actions of the Managing Member:

(a) The Managing Member shall devote such time and attention as are reasonably necessary to manage and supervise the business of the Company properly and efficiently and in accordance with this Agreement.

(b) All actions and decisions by the Managing Member will be taken and/or made with a degree of fiduciary responsibility, care, and diligence which is consistent with actions usually and customarily taken or omitted to be taken by prudent business persons in substantially similar circumstances.

(c) The Managing Member shall be responsible for implementing all Major Decisions, as well as the usual and ordinary business and affairs of the Company, but only to the extent that funds of the Company are available for such purposes.

(d) The Managing Member shall not be liable to the Company or to any other Member for any debts owed by the Company to any other Member or for or by reason of any acts or omissions taken or omitted in good faith and reasonably believed to be in the best interest of the Company, or for errors of judgment, but shall only be liable for fraud, bad faith, breach of fiduciary duty, willful misconduct, gross negligence, or breach of an express provision of this Agreement.

Section 4.13. Removal of Managing Member.

(a) Right to Remove. The Managing Member may be removed as the Managing Member of the Company, but not as a Member of the Company, by unanimous approval of all

Investor Members other than any Affiliate of the Managing Member (the "*Independent Members*"), if (i) a court of competent jurisdiction renders a final judgment as to which all rights of appeal have been exhausted or expired that (A) the Managing Member or any of its managers, members or officers is guilty of or liable for fraud, dishonesty, embezzlement, misappropriation of funds, breach of fiduciary obligation, gross negligence or willful misconduct in management of the Company; or (B) the Managing Member has failed or refused to perform in a material respect a duty called for under this Agreement or otherwise breached a material agreement contained in this Agreement, that in each case has or is reasonably likely to materially adversely affect the Company, and has failed to cure or satisfy such breach or failure within thirty (30) days after receipt of written notice from the Independent Members specifying such failure or breach and the action necessary to cure or satisfy same; or (ii) a sale, transfer or other disposition of the Managing Member's Company Interest in violation of this Agreement has been made and such sale, transfer or other disposition has not been rescinded within thirty (30) days after receipt of written notice from the Independent Members to the Managing Member that such sale, transfer or other disposition should be rescinded.

(b) New Managing Member . Any action for removal of the Managing Member is conditioned on a new Managing Member, selected by unanimous approval of the Independent Members, being admitted to the Company immediately prior to the effective date of such removal. In connection with such admission, (i) the new Managing Member shall execute a written instrument pursuant to which it agrees to be bound by this Agreement, specifies its address for notices, and makes such representations, warranties, and covenants as the Independent Members, by unanimous approval, reasonably specify; and (ii) the new Managing Member shall be assigned a Company Interest in the Company equal to one percent (1%) of the Company Interest previously owned by the removed Managing Member automatically and without further action on the part of the removed Managing Member. The new Managing Member so selected shall be admitted to the Company as a Managing Member on such terms, and the removal of the old Managing Member as such shall be effective, only immediately subsequent to the admission of the new Managing Member.

(c) Restrictions. In addition, the Managing Member may not be removed until and unless the Managing Member, the Developer Guarantor and all other Affiliates of the Managing Member and the Developer Guarantor shall have been fully and unconditionally released from any and all liabilities (other than liabilities arising from or in connection with the reason for removal and liabilities pursuant to this Agreement) with respect to the Construction Loan, the Lender Guaranty and other indebtedness of the Company.

(d) Status of Removal of Managing Member. A removed Managing Member shall continue to have all of the rights as a Member with respect to its Company Interest (as reduced pursuant to Section 4.13(b) hereof) after such removal. Removal of the Managing Member shall not affect any compensation which Developer, Contractor or Managing Agent has the right to receive under the Approved Project Documents.

Section 4.14. Restriction on Condominium Conversion. Unless otherwise agreed by the Managing Member in its sole discretion, the sale of the Project will be subject to a restriction prohibiting the conversion of the Project into a condominium regime prior to the expiration of

the Texas statute of repose unless the buyer has provided insurance acceptable to the Managing Member in its sole discretion protecting the Company, the Contractor, the Developer, the Members and their respective Affiliates against claims for construction defects initiated after such conversion.

Section 4.15. Attorneys.

(a) The initial attorneys for the Company shall be_____ ("*YYY*"); provided, however, that any changes to the attorneys for the Company shall require the consent of Managing Member and Investor Members; provided, further, however, that in the event that day to day management of the Company becomes vested in Owner Investor Member pursuant to the terms of this Agreement, Owner Investor Member may select _____ ("ZZZ") to represent the Company without Approval of Managing Member. The Company specifically acknowledges and agrees that YYY and/or ZZZ shall be permitted to render legal advice and to provide legal services to the Company from time to time, and each Member covenants and agrees that such representation of the Company by YYY and/or ZZZ shall not alone (i) result in the existence of an attorney/client relationship between YYY, on the one hand, and Owner Investor Member (and/or its Affiliates), on the other hand; (ii) result in the existence of an attorney/client relationship between ZZZ, on the one hand, and Managing Member (and/or its Affiliates), on the other hand; and/or (iii) disqualify YYY and/or ZZZ from providing legal advice and legal services for the activities contemplated in this Agreement at any time in the future.

(b) The Members acknowledge and agree that YYY has represented Managing Member (and its Affiliates) in connection with this Agreement and all other agreements contemplated by this Agreement and/or pertaining to the Company and its business. From time to time, and at the request of Managing Member (and/or its Affiliates), YYY may render legal advice and provide legal services to Managing Member (and/or its Affiliates) with respect to the Company and/or the business of the Company and related matters at fees and costs to be paid by the Managing Member (and/or its Affiliates) or the Company as herein provided. In no event shall an attorney/client relationship exist between YYY on the one hand, and the Investor Members (or their Affiliates), on the other hand, with respect to the Company and/or the business of the Company and related matters as a result of any such representation. Except as set forth in this Agreement, the Company shall not be obligated to pay any fees, costs and expenses as a result of such representation.

(c) The Members acknowledge and agree that ZZZ has represented Owner Investor Member (and its Affiliates) in connection with this Agreement and all other agreements contemplated by this Agreement and/or pertaining to the Company and its business. From time to time, and at the request of Owner Investor Member (and/or its Affiliates), ZZZ may render legal advice and provide legal services to Owner Investor Member (and/or its Affiliates) with respect to the Company and/or the business of the Company and related matters at fees and costs to be paid by Owner Investor Member (and/or its Affiliates) or the Company as herein provided. In no event shall an attorney/client relationship exist between ZZZ, on the one hand, and Managing Member (or its Affiliates), on the other hand, with respect to the Company and/or the business of the Company and related matters as a result of any such representation. Except as set

forth in this Agreement, the Company shall not be obligated to pay any fees, costs and expenses as a result of such representation.

ARTICLE V.
STATUS OF MEMBERS

Section 5.01. No Liability of Members. Without limiting the provisions of Article XIII hereof, the Members will not be bound by, or personally liable for, the expenses, liabilities, or obligations of the Company, except to the extent expressly provided herein.

Section 5.02. No Participation by Investor Members. Except as otherwise expressly set forth herein, the Investor Members will not take part in or participate in the control of the business of the Company. In no event shall Investor Members have any right or authority to act for or bind the Company.

Section 5.03. Limitation on Distributions. The Members, in their capacity as Members, will not be entitled to receive any distributions from the Company, except as expressly provided in this Agreement.

Section 5.04. No Partitioning. The Members will not have the right to require or seek partition of the Company Property at any time.

Section 5.05. Reliance. The Members hereby designate the following persons as their respective authorized representatives for approvals and any other actions hereunder, and each other Member shall be irrevocably entitled to rely on any approval or other action taken by any one of such representatives unless otherwise notified in writing by the respective Member replacing one or more of such representatives, and provided such Member designates one or more replacement representatives:

Member	Authorized Representative(s)
Managing Member	
Owner Investor Member	
Co-Investor Member	

ARTICLE VI.
ALLOCATIONS, DISTRIBUTIONS AND ACCOUNTING

Section 6.01. Ownership of the Company. The Company shall be owned initially by the Members in the percentage interests (individually, an "*Ownership Percentage*" and collectively, the "*Ownership Percentages*") set forth below:

Member	Ownership Percentage
Managing Member	%
Owner Investor Member	%
Co-Investor Member	%

Section 6.02. Capital Accounts.

(a) The Company shall maintain for each Member a separate capital account, the initial balance of which shall be equal to the cash amount and agreed value of all capital contributions initially made by such Member pursuant to Section 3.02 hereof. Such capital account shall be increased by (i) the cash amount of all other capital contributions made by such Member pursuant to this Agreement, and (ii) all items of Company income and gain (including income and gain exempt from tax) computed in accordance with Section 6.03 hereof and allocated to such Member pursuant to Section 6.04 hereof, and decreased by (iii) the cash amount of all distributions made to such Member pursuant to this Agreement, and (iv) all items of Company deduction and loss computed in accordance with Section 6.03 hereof and allocated to such Member pursuant to Section 6.04 hereof. To the extent not otherwise specified in this Section 6.02, the capital accounts of the Members shall be maintained in accordance with Treas. Reg. §1.704-1(b)(2).

(b) For purposes of computing the amount of any item of income, gain, deduction or loss to be reflected in the Members' capital accounts, the determination, recognition and classification of any such item shall be the same as its determination, recognition and classification for federal income tax purposes (including any method of depreciation, cost recovery or amortization used for this purpose); provided, that:

(i) In accordance with the requirements of Section 704(b) of the Code, any deductions for depreciation, cost recovery or amortization attributable to any contributed property shall be determined as if the adjusted basis of such property on the date it was acquired by the Company was equal to the Agreed Value of such property.

(ii) Any income, gain or loss attributable to the taxable disposition of any Company Property shall be determined as if the adjusted basis of such property as of such date of disposition was equal in amount to the Company's Carrying Value (as hereinafter defined) with respect to such property as of such date. As used herein, the term "*Carrying Value*" shall mean (a) with respect to a contributed property, the Agreed Value of such property reduced (but not below zero) by all depreciation and cost recovery deductions charged to the Members' capital accounts pursuant to this Section 6.02 with respect to such property, as well as any other charges to such Carrying Values for sales, retirements and other dispositions of assets included in the contributed property, as of the time of determination, and (b) with respect to any other property, the adjusted basis of such property for federal income tax purposes as of the time of determination.

(iii) If the Company's adjusted basis in a depreciable or cost recovery property is reduced for federal income tax purposes pursuant to Section 48(q)(1) of the Code, the

amount of such reduction shall, solely for purposes hereof, be deemed to be an additional depreciation or cost recovery deduction in the year such property is placed in service and shall be allocated among the Members pursuant to Section 6.03. Any restoration of such basis pursuant to Section 48(q)(2) of the Code shall be allocated in the same manner to the Members to which such deemed deduction was allocated.

(c) Generally, a transferee of a Company Interest resulting from a transfer permitted by this Agreement will succeed to the capital account relating to the Company Interest transferred. If, however, the transfer causes a termination of the Company under Section 708(b)(1)(B) of the Code, the Company properties shall be deemed to have been distributed in liquidation of this Company to the Members (including the transferee of a Company Interest) and recontributed by such Members and transferees in reconstitution of the Company. In such event, the Carrying Values of Company properties shall be adjusted immediately before such deemed distribution pursuant to Treasury Regulation Section 1.074-1(b)(2)(iv)(f), and such adjusted Carrying Values shall constitute the Agreed Values of such properties upon such deemed contribution to the reconstituted Company. The capital accounts of such reconstituted Company shall be maintained in accordance with the principles of this Section 6.02.

(d) No Member shall be required to contribute (except as provided in Section 3.02 hereof) or lend any cash or property to the Company or to restore any deficit balance in its capital account.

Section 6.03. Allocation of Net Income or Net Loss For Capital Account Purposes. For purposes of maintaining the capital accounts and in determining the rights of the Members among themselves, after giving effect to the special allocations set forth in Section 6.03(b), Net Income or Net Loss for any taxable year (or portion thereof) shall be allocated to the Members as follows:

(a) Generally. For any fiscal year (or portion thereof), after giving effect to the special allocations set forth in Section 6.03(b), and subject to Section 6.03(a)(iii), Net Income or Net Loss shall be allocated among the Members as follows:

(i) Allocation of Net Income. Net Income, if any, shall be allocated among the Members as follows:

(A) First, among the Members in accordance with, and to the extent of, any amount by which the cumulative Net Loss previously allocated to each such Member pursuant to Section 6.03(a)(ii)(B) for all previous taxable years exceeds the cumulative amount of Net Income allocated to the Members under this 6.03(a)(i)(A);

(B) Second, among the Members in accordance with, and to the extent of, the amount by which each Member's aggregate accrued Preferred Return calculated with respect to Unrecovered Capital Contributions exceeds the

cumulative Net Income previously allocated to such Member pursuant to this Section 6.03(a)(i)(B); and

(C) Thereafter, among the Members in accordance with their respective Ownership Percentages.

(ii) Allocation of Net Loss. Net Loss, if any, shall be allocated among the Members as follows:

(A) First, among the Members in accordance with, and to the extent of, any amount by which the cumulative Net Income previously allocated to each such Member pursuant to Section 6.03(a)(i) for all previous taxable years exceeds the cumulative amount of Net Loss allocated to the Members under this 6.03(a)(ii)(A);

(B) Second, among the Members in accordance with, and to the extent of, their respective positive capital accounts; and

(C) Thereafter, among the Members in accordance with their respective Ownership Percentages.

(iii) Stop Loss. To the extent an allocation of Net Loss pursuant to Section 6.03(a)(ii) would cause or increase a deficit balance in any Member's Adjusted Capital Account (as defined below) as of the end of the fiscal year for which the allocation is made, the amount thereof shall instead be allocated to Members having positive Adjusted Capital Account balances as of the end of such fiscal year, if any, in proportion thereto and to the extent thereof, and any remainder shall be allocated to the Managing Member . For subsequent years in which there is Net Income, items of Net Income shall first be allocated to the Members in the reverse order of allocation pursuant to this Section 6.03(a)(iii) before any allocations are made pursuant to Section 6.03(a)(i).

(b) Regulatory Allocations. Prior to making any allocations provided in Section 6.03(a), the following mandatory allocations shall be made:

(i) Qualified Income Offset. Except as provided in Section 6.03(b)(ii) hereof, in the event any Member unexpectedly receives any adjustments, allocations or distributions described in Treasury Regulation Sections 1.704-1(b)(2)(ii)(d)(4) through (d)(6), items of Company Income shall be specially allocated to such Member in an amount and manner sufficient to eliminate, to the extent required by the Treasury Regulations, the Adjusted Capital Account Deficit (hereinafter defined) created by such adjustments, allocations or distributions as quickly as possible. As used herein, the term "*Adjusted Capital Account Deficit*" shall mean, with respect to any Member, the deficit balance, if any, in such Member's capital account as of the end of the relevant taxable year, after giving effect to the following adjustments:

(A) Increase the capital account by (i) any additional Capital Contributions the Member is, or pursuant to Treasury Regulation Section 1.704-

1(b)(2)(ii)(c) is treated as, unconditionally obligated to make, (ii) the amount of the Member's share of any "Member minimum gain" (as defined in Treasury Regulation Section 1.704-2(d)), and (iii) the amount of the Member's share of any "Member nonrecourse debt minimum gain" (as defined in Treasury Regulation Section 1.704-2(i)(2)) and

(B) Decrease the capital account by the amount of any items described in Treas. Reg. §1.704-1(b)(2)(ii)(d)(4), 1.704-1(b)(2)(ii)(d)(5) and 1.704-1(b)(2)(ii)(d)(6).

The foregoing definition of Adjusted Capital Account Deficit is intended to comply with the provisions of Treas. Reg. §1.704-1(b)(2)(ii)(d) and shall be interpreted consistently therewith.

(ii) Minimum Gain Chargeback. Notwithstanding any other provision of this Section 6.03, if there is a net decrease in "Company minimum gain" (as defined in Treasury Regulations Section 1.704-2(b)(2) and as computed under Treasury Regulation Section 1.704-2(d)) or "Member nonrecourse debt minimum gain" (as defined in Treasury Regulations Section 1.704-2(i)(2)) during any taxable year, then each Member shall be specially allocated items of Income for such year (and, if necessary, subsequent years) in an amount equal to such Member's share of the net decrease in minimum gain amount (as determined pursuant to Treasury Regulations Sections 1.704-2(g) and (i)(4), as applicable). This Section 6.03(b)(ii) is intended to comply with the minimum gain chargeback requirement in such Section of the Treasury Regulations and shall be interpreted consistently therewith.

(iii) Gross Income Allocations. In the event any Member has an Adjusted Capital Account Deficit for any fiscal year, such Member shall be specially allocated items of Income to reduce such excess as quickly as possible.

(iv) Nonrecourse Deductions. Nonrecourse Deductions (hereinafter defined) for any taxable year shall be allocated among the Members in a manner which is reasonably consistent with some other significant allocation attributable to the property securing the nonrecourse debt, as required by Treasury Regulations Section 1.704-1(b)(4)(iv). As used herein, the term "*Nonrecourse Deductions*" shall have the meaning set forth in Treasury Regulations Section 1.704-1(b)(4)(iv)(b). The amount of Nonrecourse Deductions for a Company taxable year equals the net increase, if any, in the amount which shall be determined according to the provisions of Treasury Regulations Section 1.704-1(b)(4)(iv)(b).

(v) Curative Allocations. For purposes of this Agreement, "*Regulatory Allocations*" shall mean allocations made to a Member (or predecessor) under Sections 6.03(b)(i) through (iv), inclusive. Notwithstanding any other provision of this Section 6.03(b), other items of Income and Loss will be allocated among the Members so that, to the extent possible, the net amount of those allocations of other items and the

Regulatory Allocations to each Member will be equal to the net amount that would have been allocated to the Member if the Regulatory Allocations had not occurred.

Section 6.04. Allocations for Tax Purposes.

(a) For federal income tax purposes, except as otherwise provided in this Section 6.04, each item of income, gain, loss, deduction and credit of the Company shall be allocated among the Members in the same manner as its corresponding item of "book" income, gain, loss or deduction has been allocated pursuant to Section 6.03 hereof.

(b) In accordance with Code Section 704(c) and the Treasury Regulations thereunder, solely for federal income tax purposes, items of taxable income, gain, loss and deduction with respect to any Company asset having a Carrying Value that differs from its adjusted basis for federal income tax purposes shall be allocated among the Members in a manner that takes into account the amount of such difference at the time it arose. Such allocations shall be made by the Members using any method the Managing Member determines that is set forth in Treasury Regulations Section 1.704-3. Allocations pursuant to this paragraph (b) are solely for federal income tax purposes and shall not affect the Members' Capital Accounts.

(c) All items of income, gain, loss, deduction, credit and basis allocation recognized by the Company for federal income tax purposes and allocated to the Members in accordance with the provisions hereof shall be determined without regard to any election under Section 754 of the Code which may be made by the Company; provided, however, such allocations, once made, shall be adjusted as necessary to take into account those adjustments permitted by Sections 734 and 743 of the Code.

(d) Depreciation or amortization recapture under Internal Revenue Code Sections 1245 and 1250, as well as any other type of recapture of ordinary income items shall, to the maximum extent possible, be allocated to the Members that were allocated the depreciation, amortization, or other deductions giving rise to such recapture amounts.

(e) Each item of Company income, gain, loss, deduction and credit attributable to a transferred Company Interest shall, for federal income tax purposes, be determined on a monthly basis (or other basis, as required or permitted by Section 706 of the Code) and shall be allocated to the Members who own Company Interests as of the close of business on the date preceding the first day of the month in which the transfer is recognized by the Company; provided, however, that gain or loss on a sale or other disposition of all or a substantial portion of the assets of the Company shall be allocated to the holder of the Company interest on the date of sale. The Managing Member may revise, alter or otherwise modify such methods of determination and allocation to the extent required by Section 706 of the Code and regulations or rulings promulgated thereunder.

Section 6.05. Credits. Credits for the Company for any year or part thereof, as determined for federal income tax purposes, shall be allocated to the Members according to their respective Ownership Percentages at the time of such allocation.

Section 6.06. Net Available Cash. "*Net Available Cash*" is defined to be all Company cash not required for Company operations (including Company liabilities and obligations to third parties) or a reserve for expenses or capital replacements, as determined by the Managing Member. In determining Net Available Cash, the Managing Member will deduct (i) any amount required to be paid to the Contractor with respect to the Maximum Guaranteed Price Adjustment; (ii) any amount required to be paid to the Developer Guarantor as reimbursement for amounts paid by the Developer Guarantor prior to the determination of the Maximum Guaranteed Price Adjustment; and (iii) reimbursements to the Managing Member or its Affiliates for amounts advanced on behalf of the Company for the payment of authorized costs and expenses or for Overrun Payments under Section 6.10.

Section 6.07. Distribution of Net Available Cash. Subject to the requirements of the Construction Lender (or any replacement lender) and the Developer Guarantor, including the Developer Guarantor's approval during the time that the Developer Guarantor is guaranteeing the repayment of any portion of any indebtedness related to the Project, Net Available Cash shall be distributed promptly among the Members in the following order:

(a) First, to repay the Members and their Affiliates any sums lent to, or paid on behalf of, the Company plus any interest accrued thereon, to extinguish Company liabilities and obligations;

(b) Second, to the Members pro rata in payment of such Members' Preferred Return on their Unrecovered Additional Capital Contributions;

(c) Third, to the Members in payment of such Members' Unrecovered Additional Capital Contributions, with each such distribution being allocated among such Members in proportion to their Unrecovered Additional Capital Contributions;

(d) Fourth, to the Members pro rata in payment of such Members' Preferred Return on their Unrecovered Initial Capital Contributions;

(e) Fifth, to the Members in payment of such Members' Unrecovered Initial Capital Contributions, with each such distribution being allocated among such Members in proportion to their Unrecovered Initial Capital Contributions;

(f) Sixth, until the Owner Investor Member has achieved a cumulative __% annual return, (inclusive of distributions under Sections 6.07(b)-(e), above, and this Section 6.07(f)), distributions shall be made as follows: (i) __% to the Owner Investor Member and Co-Investor Member pro rata on the basis of each such Member's Initial Capital Contributions; and (ii) __% to the Managing Member;

(g) Seventh, only after the Owner Investor Member has received the cumulative __% annual return specified in Subsection (f) (inclusive of distributions under Section 6.07(b)-(e), above), to the Managing Member until the Managing Member has been reimbursed for all Overrun Payments (as hereinafter defined in Section 6.10); and

(h) Eighth, thereafter, distributions shall be made as follows: (i) __% to the Owner Investor Member and Co-Investor Member, pro rata on the basis of each such Member's Initial Capital Contributions; and (ii) __% to the Managing Member.

Section 6.08. Accounting.

(a) The accounting year of the Company shall end on the last day of December of each calendar year unless otherwise determined by the Accountants for the Company.

(b) The Managing Member, on behalf of the Company, shall keep and maintain complete, accurate and current books of account and other financial records of the Company on a modified cash basis, to include accrual of property taxes and insurance premiums in accordance with applicable tax laws and regulations and sound accounting principles consistently applied. Such books of account and other records for the current and preceding fiscal year shall be maintained at the office of the Company for a period of five (5) years after the fiscal year to which they apply.

(c) Promptly after the end of each fiscal year, at the request of any Member or Construction Lender, such books of account and other records for the preceding fiscal year shall be examined at the expense of the Company by the Accountants; unless otherwise permitted, the scope of such examination shall be sufficient to enable the Accountants to express an unqualified opinion, or if such opinion is qualified, to explain the grounds and reasons for any such qualification. The Managing Member shall use reasonable efforts to have the results of such examination by the Independent Auditors delivered to any lender requesting such examination and the Members by the last day of the following March.

(d) The Managing Member shall cause to be prepared financial statements (including a balance sheet, income statement, statement of cash flow) of the Company as of the last day of each fiscal year. All such annual statements shall be prepared on the basis of the accounting principles specified in Section 6.08(b). Copies of the annual statements shall be furnished to each Member on or before the 90th day after the end of each fiscal year. From and after commencement of leasing operations, the Managing Member shall cause to be prepared and furnished to the Investor Members monthly operating reports within twenty (20) days after the end of each calendar month which are cumulative within each fiscal year.

(e) Any Member shall have the right at all reasonable times during usual business hours to audit, examine and make copies of or extracts from the books of account, accounting data and other records or documents of the Company, including bank reconciliation statements and check registers, all of which records or documents shall be maintained at the principal office of the Company. Each Member shall bear all expense incurred in any examination made for such Member's account.

Section 6.09. Bank Accounts. All funds of the Company shall be deposited in its name in an account or accounts maintained at financial institution or institutions designated by the Managing Member or as required by the Construction Lender or any other lender providing funds to the Company. Checks shall be drawn on the Company account or accounts only for the purposes of

the Company, and shall be signed by the Managing Member, or an agent or agents designated from time to time by the Managing Member.

Section 6.10 Overrun Payments. Except as otherwise provided in Section 3.13, Managing Member shall be responsible for paying net cost overruns (excluding funding operating deficits, interest, taxes, marketing costs, net operating income and loan principal, which shall be borne by the Members to the extent of agreed Additional Capital Contributions). Such cost overrun payments to be made by Managing Member hereunder are referred to collectively as the "*Overrun Payments*". In addition, but subject to approval by Construction Lender and Managing Member:

(a) Contractor may allocate contingency amounts and savings in particular line items of the budget to (i) offset overruns in other line items of the budget; and/or (ii) reimburse Managing Member for Overrun Payments;

(b) Upon Substantial Completion, the Company shall request disbursements from the Construction Lender, to the extent funds remain to be disbursed, for the purpose of reimbursing Managing Member for Overrun Payments; and

(c) If Managing Member or Contractor advances any funds to defray any tentative overruns and such tentative overruns are subsequently offset by cost savings or contingency amounts, the Company will reimburse Managing Member or Contractor for the amounts previously advanced for such tentative overruns from the first funds available from construction loan advances, net operating revenue or proceeds of a sale or refinancing.

ARTICLE VII.
TRANSFERS OF COMPANY INTERESTS

Section 7.01. Prohibition Against Transfers.

(a) Except as otherwise expressly provided in this Article VII or Article XIII hereof, no Member may sell, assign, transfer, encumber or otherwise dispose of any interest in the Company without the prior written consent of all of the other Members, which consent may be granted or withheld in the sole discretion of the other Members. Any prohibited transfer, if made, shall be void and without force or effect.

(b) Notwithstanding the foregoing, but subject to Section 7.03(e), any Member that has completed the payment of its Initial Capital Contribution may sell, transfer, encumber or assign its Company Interest to an Affiliate, except to the extent such action is a violation of the Construction Loan Documents.

(c) Except as otherwise expressly provided in this Article VII, the Managing Member may not sell, assign, transfer, encumber or otherwise dispose of any interest in the Company without the prior written approval of the Investor Members. Any prohibited transfer, if made, shall be void and without force or effect.

(d) Notwithstanding the foregoing, (i) the Managing Member may assign, transfer or sell its interest as a Managing Member or any part thereof to an Affiliate, or (ii) the Company Interest owned by the Managing Member may be assigned to an Affiliate, except to the extent such action is a violation of the Construction Loan Documents.

Section 7.02. Rights of Assignees.

(a) Any transferee or assignee to whom an interest in the Company may be transferred under the terms of this Agreement who is not at the time of such transfer a party to this Agreement shall take such interest subject to all of the terms and conditions of this Agreement, including the provisions of this Article VII. No such transferee or assignee shall be considered to have become a Member of the Company or admitted as a Member until and unless the applicable provisions of this Article VII shall have been satisfied. Until and unless any such transferee or assignee becomes a Member of the Company in the manner herein prescribed, such transferee or assignee shall be entitled only to receive the interest in the profits and distributions of the Company to which the assigning Member would otherwise be entitled and, to the extent provided in the Act, to require reasonable information concerning the transactions of the Company and to make reasonable inspection of the Company books.

(b) In the event that one or more new Members are admitted to the Company, or one or more Members increase their interest in the Company as provided herein while there is an outstanding interest in the Company held by a transferee or assignee who has not been admitted as a Member of the Company, and, as a result of any such transaction, the interests of the remaining Members in the Company are reduced as a group (other than the Members whose interests are being proportionately increased), the interest in the Company and deemed Ownership Percentage held by such transferee or assignee shall be correspondingly reduced. No consent or other action on the part of such transferee or assignee shall be required in order to accomplish such reduction, as long as such transaction also results in a reduction in the interests of the remaining Members in the Company (other than the Members whose interests are being proportionately increased).

(c) The interest in Company profits and distributions and deemed Ownership Percentage held by any transferee or assignee of such interest who has not been admitted as a Member of the Company shall not be considered in any Company voting requirements. Moreover, any transferee or assignee of such interest who has not been admitted as a Member of the Company shall have no rights relative to the operations or management of the Company nor any rights of approval of Major Decisions or other rights of approval or consent as may otherwise be provided in this Agreement.

Section 7.03. Substitute Members. Except as otherwise provided in this Agreement, no transferee or assignee of all or part of the Company Interest of a Member shall have the right to become a substitute Member, unless:

(a) The transferor has stated such intention in the instrument of assignment;

(b) The transferee has executed an instrument reasonably satisfactory to the Managing Member accepting and adopting the terms and provisions of this Agreement and agreeing to be bound by the terms and conditions hereof and expressly assuming the liability of the transferor of such Company Interest to make contributions to the Company as provided herein;

(c) The transferor or transferee has paid any reasonable expenses incurred in connection with the admission of the transferee as a substitute Member, including, without limitation, reasonable attorney's fees and expenses;

(d) In the case of a transferee who is not otherwise a Member or an Affiliate of a Member, the Managing Member has consented to such person's becoming a substitute Member (in its sole discretion); and

(e) The Company has been provided with a legal opinion satisfactory to the Managing Member in its discretion that such assignment will not result in the termination of the Company for federal income tax purposes or produce any adverse income tax consequences to any of the Members, that registration under any applicable securities laws is not required in connection with such assignment and that admitting such transferee as a Member will not violate any loan agreement or other contract with respect to the Project or which is otherwise binding upon the Project or the Company.

ARTICLE VIII.
BANKRUPTCY OF A MEMBER

Section 8.01. Effect of Certain Events.

(a) The occurrence of either of the following events with respect to either the Managing Member or any Investor Member shall not constitute an event requiring the winding up of the Company, if and to the extent provided in Section 11.02:

(i) The making of an assignment of all or a substantial part of the assets of the Managing Member or any Investor Member for the benefit of creditors; the filing of a petition, whether voluntary or involuntary, under any section or chapter of the federal Bankruptcy Code, as amended, or under any similar law or statute of the United States of America or any state; or the appointment of a receiver for all or a substantial part of such Member's assets; or

(ii) The winding up and liquidation or reorganization under bankruptcy or insolvency laws of the Managing Member or any Investor Member.

(b) Any other provision of this Article VIII or otherwise in this Agreement to the contrary notwithstanding, in the event that the Managing Member should at any time be prevented from continuing to serve in such capacity by reason of bankruptcy or other insolvency conditions, then the Managing Member shall be solely entitled to name a successor Managing Member that is a newly-organized, single-purpose entity affiliated with the Managing Member

and such successor Managing Member shall succeed to all rights of the Managing Member hereunder for all purposes without any further approval of the Investor Member

Section 8.02. Right of Members to Purchase Other Member's Interest. Upon the occurrence of any event described in Section 8.01 hereof with respect to a Member, the other Members shall thereafter have the right within ninety (90) days from the occurrence of the specific event to purchase the Company Interest of the Member with respect to which the event described therein has occurred for a cash amount equal to the amount that such Member would have received if the Company had sold the Project for an amount equal to its fair market value determined by appraisal, below, less "Imputed Selling Costs" equal to one percent (1%) of such fair market value, and distributed the proceeds of the sale and all other assets of the Company on the last business day prior to such sale, such fair market value of the Project being determined by an M.A.I. Appraisal thereof prepared by an M.A.I. Appraiser mutually and promptly selected by the Members. If the Members are unable to agree on such an appraiser within thirty (30) days from the triggering event, they shall each (within ten [10] days after the thirty [30] period) select an M.A.I. Appraiser who shall thereafter (within ten [10] days from their selection) then select a third M.A.I. Appraiser who shall set the fair market value of the applicable Company Interest as soon as possible thereafter, but, in any event, within twenty (20) days from the date of its selection. The Member wishing to exercise the purchase right granted in this Section 8.02 shall be solely responsible for obtaining approval of the applicable bankruptcy court for the sale transaction contemplated herein and such sale shall be contingent in all respects upon the satisfaction of all requirements of such bankruptcy proceedings.

ARTICLE IX.
TAXES

Section 9.01. Tax Returns. The Managing Member shall cause to be prepared and, upon approval of the Members, not to be unreasonably withheld or delayed, filed all necessary federal and state income tax returns for the Company, including making the elections described in Section 9.02. Each Member shall furnish to the Managing Member all pertinent information in its possession relating to Company operations that is necessary to enable the Company's income tax returns to be prepared and filed. Copies of all tax returns shall be furnished by the Managing Member to all other Members for their approval at least thirty (30) days prior to the statutory date for filing, including any permitted extensions.

Section 9.02. Tax Elections. The Managing Member shall be entitled to make any elections necessary or appropriate, in the Managing Member's sole discretion, that are related to tax matters pertaining to the Company or the Project and that reasonably reflect the purpose and intention of this Agreement, including elections pursuant to Code Section 754.

Section 9.03. Tax Matters Partner. The Managing Member shall be the "tax matters partner" of the Company, pursuant to Section 6231(a)(7) of the Code. The Managing Member shall take such action as may be necessary to cause the Investor Members to become a "notice partners" within the meaning of Section 6223 of the Code. The Managing Member shall inform the Investor Members of all significant matters that may come to its attention in its capacity as tax matters partner by giving notice on or before the fifth (5th) business day after becoming aware of

the matter and, within that time, shall forward to the Investor Members copies of all significant written communications it may receive in that capacity. The Managing Member may take any action contemplated by Sections 6222 through 6232 of the Code without the consent of the Members, but this provision does not authorize the Managing Member to take any action left to the determination of an individual Member under Sections 6222 through 6232 of the Code.

Section 9.04. Tax Status.

(a) No election shall be made by or on behalf of the Company for federal income tax purposes to be classified as an association taxable as a corporation or to be excluded from the application of the provisions of subchapter K of Chapter 1 of the Code.

(b) The Members shall not take any position on their individual income tax returns inconsistent with the reporting of items on the Company's related information tax returns, except as permitted by the Code.

Section 9.05 Tax Sharing Arrangement. If any Member is required under Texas law to include 100% of the Company's revenues in the computation of the Texas margin tax rather than only its allocable share of such revenues, the parties agree that the other Members shall reimburse such Member for their share of such tax. The Members' share of such tax shall be based on the Members' allocable shares of the Company's income under Section 6.03(a)(i) hereof.

Section 9.06 Texas Franchise Tax.

(a) The Managing Member agrees to obtain and provide to the other Members advice from the Company's legal and tax advisors and the Accountant with respect to avoiding the Company being classified as part of a combined group for Texas franchise tax purposes and the Members agree to take such actions as the legal and tax advisors and Accountant reasonably recommend based on published Texas Comptroller authority or policy, including restructuring the membership of the Company, as may be necessary to avoid such classification; provided that no such action or restructuring reduce the ownership or rights or increase the obligations of any Member without its consent.

(b) In the event that a Texas franchise tax combined group report (other than a combined group report which includes only entities which have as their Members or members any of Managing Member and/or any of its respective Affiliates, on one hand, and Investor Members and/or their Affiliates, on the other) is required to be filed and the report is required to include (i) Managing Member and entities which are Affiliates of Managing Member and (ii) Investor Members and/or Affiliates of each Investor Member, then Managing Member agrees that it will pay or reimburse the reporting entity for the tax or portion thereof attributable to the activities of Managing Member and the activities of the Affiliates of Managing Member included in such combined group and, correspondingly, each of the Investor Members agrees that it will pay or reimburse the reporting entity for the tax or portion thereof attributable to the activities of it and/or its Affiliates included in such combined group report.

ARTICLE X.
NO WITHDRAWAL OF MANAGING MEMBER

Section 10.01. Withdrawal.

(a) No Right. The Managing Member does not have the right to withdraw from the Company as a Managing Member without the unanimous consent of the Members. The Managing Member agrees that it will not voluntarily withdraw from the Company as a Managing Member within the meaning of Section 101.107 of the Act without the unanimous consent of the Members. If the Managing Member does voluntarily withdraw from the Company without the unanimous consent of the Members, any such voluntary withdrawal shall be a violation of this Agreement. If the Managing Member voluntarily withdraws from the Company, whether in violation of this covenant or with the unanimous written consent of the Members, the withdrawal shall not be effective until a new Managing Member, selected by unanimous approval of the Members, has been admitted to the Company or until the ninetieth (90th) day following written notice of the withdrawal to all other Members, whichever is the earlier to occur.

(b) Consequences of Wrongful Withdrawal. If the Managing Member wrongfully withdraws from the Company, including, but not limited to, in violation of Section 10.01(a), but excluding removal under Section 4.13, the Company may (1) recover damages from the withdrawing Managing Member, including, without limitation, the reasonable cost of obtaining replacement of the services that the Managing Member is obligated to perform, (2) pursue any other remedies available under applicable law, (3) effect recovery of damages by offsetting those damages against the amount otherwise distributable to the Managing Member, or (4) take any combination of such actions as it deems appropriate.

(c) Event of Withdrawal. For purposes of this Agreement, "*Event of Withdrawal*" means, with respect to a Managing Member, the occurrence of any of the following events:

(i) the Managing Member gives written notice to the other Members of its withdrawal and it becomes effective under this Section 10.01;

(ii) the Managing Member is removed as a Managing Member in accordance with this Agreement; or

(iii) except as otherwise provided in this Agreement, any other event that is an event of withdrawal with respect to the Managing Member as set forth in Chapter 101 of the Act (unless, to the extent the Act permits the Company agreement to vary such result, the Investor Members agree that such event shall not constitute an Event of Withdrawal).

ARTICLE XI.
WINDING UP AND TERMINATION

Section 11.01. Events Requiring Winding Up. The Company shall be wound up upon the earliest to occur of the following:

(a) December 31, 2065;

(b) Upon the written agreement of all of the Members;

(c) The sale of all the assets of the Company and receipt of all sale proceeds therefor;

(d) The date on which the Company is terminated by operation of law or judicial decree; and

(e) The occurrence of an Event of Withdrawal with respect to the Managing Member.

Section 11.02. Reconstitution. If winding up of the Company is required pursuant to Section 11.01(e), the Company may be reconstituted and its business continued without being wound up if (a) there remains at least one Managing Member and the remaining Managing Member(s) continue to carry on the business of the Company, which such Managing Member(s) are expressly permitted to do, or (b) within ninety (90) days after the occurrence of the event requiring winding up, the Investor Members agree in writing to continue the business of the Company and, to the extent that the Investor Members desire or if there is no remaining Managing Member, agree to the appointment, effective as of the date of an Event of Withdrawal, of one or more new Managing Members. If the Company is reconstituted, an amendment to the Certificate shall be executed and filed of record.

Section 11.03. Interim Manager. If the Company is required to be wound up, the Investor Members may appoint an interim manager of the Company, who shall have and may exercise only the rights, powers, and duties of a Managing Member necessary to preserve the assets, until (a) a new Managing Member, if any, is elected, if the Company is reconstituted, or (b) the Liquidating Trustee is appointed, if the Company is not reconstituted. The interim manager shall not be liable to the Members as a Managing Member. The winding up of the Company shall begin on the day the event occurs giving rise to the winding up, but the Company shall not terminate until the assets have been distributed in accordance with Section 11.06 hereof.

Section 11.04. Winding up Without Reconstitution. In the event that the Company is wound up and not reconstituted, the business of the Company shall be wound up as expeditiously as possible pursuant to the provisions of this Article XI.

Section 11.05. Liquidating Trustee. Upon the occurrence of any event requiring the winding-up of the business of the Company, the Managing Member, or other applicable entity required by the Act (the applicable person conducting the winding-up procedures shall be referred to herein as the "*Liquidating Trustee*"), shall conduct the winding-up of the affairs of the Company.

Section 11.06. Winding-Up Procedures.

(a) Upon the occurrence of any event requiring the winding-up of the Company's affairs, the Liquidating Trustee shall immediately proceed to terminate the business of the Company. Distributions pursuant to Section 11.06(a)(iv), if any, shall be made to the Members in compliance with the timing requirements of Treasury Regulation Section 1.704-1(b)(2)(ii)(b)(2). The Liquidating Trustee shall first secure an independent appraisal of the fair market value of the Company Property and then attempt to sell the Company Property at such prices and on such terms as the Liquidating Trustee, in the exercise of its best business judgment

under the circumstances then presented, deems to be in the best interest of all the Members. The proceeds of any such sale and all Company cash shall be distributed in the following order:

(i) First, there shall be distributed to the Company's creditors (other than the Members) funds, to the extent same are available, sufficient to extinguish current Company liabilities and obligations, including the costs and expenses of winding-up and termination.

(ii) Next, to the establishment of or additional funding of any reserves which the Liquidating Trustee shall deem reasonably necessary for any anticipated, contingent, or unforeseen liabilities or obligations of the Company. At the discretion of the Liquidating Trustee, the reserves may be paid over to an escrow agent selected by the Liquidating Trustee and held by such agent for the payment of any such liabilities, and, at the expiration of such period as the Liquidating Trustee deems advisable, the balance thereof shall be distributed as hereafter provided in this Section 11.06.

(iii) Then, to the payment of any debts and liabilities to any Members, including any loans to the Company pursuant to Section 3.06 hereof.

(iv) Thereafter, any further amounts shall be distributed to the Members and transferees or assignees of interests in the Company pro rata in accordance with their respective positive capital account balances, as adjusted for any amounts distributed pursuant to the preceding provisions of this Section 11.06.

Notwithstanding anything contained in the Agreement to the contrary, in connection with the winding up of the Company, to the extent that the allocation of Net Income or Net Loss would not result in the Members having capital account balances equal to the amounts that they would receive if the liquidation proceeds of the Company were distributed in accordance with Section 6.07 (the "*Target Final Balances*"), then the Members agree, to the extent necessary, to allocate Company items of Income and Loss for the taxable year in which winding up occurs, or for any fiscal year that remains open and for which a return has not yet been filed, to produce such Target Final Balances.

(b) If a disposition of any Company Property has been made on terms that produce a note or contract receivable to the Company, the dollar value attributable to each interest in such note or contract receivable distributed pursuant to this Section 11.06 shall be, as to any distributee thereof, such distributee's pro rata portion of the face amount thereof, and liquidating distributions shall be made in a fashion such that each Member is distributed a ratable share of cash items and a ratable share of receivables according to such Member's respective total rights to liquidating distributions.

(c) Notwithstanding anything to the contrary set forth hereinabove, if after the payment of current Company liabilities and obligations to the extent of the funds and/or properties available for such purpose, either any portion of a Company borrowing remains unpaid or it is determined that additional funds will be required to meet Company costs and expenses theretofore incurred or for which the Company may become responsible, then such

required amounts shall be retained, if available (or as and when they become available) before any Company cash or property is distributed to any Member.

Section 11.07. Obligations Not Relieved. The winding up of the Company shall not release or relieve any of the parties hereto of their contractual obligations under this Agreement.

ARTICLE XII.
REPRESENTATIONS AND WARRANTIES

Section 12.01. Warranties of the Owner Investor Member. The Owner Investor Member hereby represents and warrants to the Company and the other Members as follows:

(a) Upon the conveyance of the Property to the Company, the Company will own fee simple title to the Property, subject to no liens, charges, encumbrances or exceptions actually known to Owner Investor Member other than exceptions as shown on a policy of title insurance for the benefit of the Company;

(b) Owner Investor Member is a _____, duly organized and validly existing under the laws of the State of _____, and has full power and authority to conduct its business as presently conducted, including the power to acquire and own its Company Interest in accordance with the terms of this Agreement;

(c) This Agreement has been duly and validly executed and delivered by Owner Investor Member and constitutes its valid and binding obligation, enforceable in accordance with its terms;

(d) The execution of this Agreement and the performance by Owner Investor Member, or any officer or director of Owner Investor Member, of the obligations set forth herein, have been duly authorized by all necessary entity action and will not violate any provisions of law or any order of any court binding on Owner Investor Member, or any provision of any indenture, agreement, or any instrument to which Owner Investor Member is a party or by which Owner Investor Member is affected, or be in conflict with, result in a breach of or constitute a default under any such indenture, agreement or other instrument or result in the creation or imposition of any lien, charge or encumbrance of any nature whatsoever upon the Property, other than exceptions as shown on a policy of title insurance for the benefit of the Company;

(e) There is no default under any agreement, contract, commitment or other instrument to which Owner Investor Member is a party, or is otherwise bound, and Owner Investor Member has no actual knowledge of any claim, demand, litigation, proceedings or governmental investigation pending or threatened against or related to the business or assets of Owner Investor Member, which default, claim, demand, litigation, proceeding or governmental investigation could result in any judgment, decree or settlement that would materially and adversely affect the business or assets of Owner Investor Member;

(f) Neither Owner Investor Member nor any Affiliate thereof has any interest in any entity receiving a brokerage or other commission in connection with the acquisition of the Property by the Company;

(g) Each of Owner Investor Member and its members meets the definition of "accredited investor" as such term is defined in Regulation D promulgated under the Securities Act of 1933, as amended (the "*Securities Act*");

(h) The Owner Investor Member's Company Interest is being purchased for the account of Owner Investor Member for investment purposes only and not for the account of any other person, and not with a view to distribution, assignment or resale to others or to fractionalization in whole or in part;

(i) Owner Investor Member has the legal capacity to enter into this Agreement and perform such Member's obligations hereunder;

(j) Owner Investor Member understands that the Company Interests have not been registered under the Securities Act, the securities laws of any state or the securities laws of any other jurisdiction, nor is such registration contemplated;

(k) Owner Investor Member understands and agrees further that, subject to the limited rights set forth in this Agreement, its Company Interest in the Company must be held indefinitely unless such Company Interest is subsequently registered under the Securities Act, the securities laws of any state and the securities laws of any other jurisdiction or an exemption from registration under the Securities Act and these laws covering the sale of such Company Interests is available; that even if such an exemption is available, the assignability and transferability of its Company Interests in the Company will be governed by this Agreement, which imposes substantial restrictions on transfer; that legends stating that its Company Interests in the Company have not been registered under the Securities Act and these laws and setting out or referring to the restrictions on the transferability and resale of the Company Interests will be placed on all documents evidencing such Company Interests, if any;

(l) Owner Investor Member has such knowledge and experience in financial and business matters as to be capable of evaluating the merits and risks of acquisition of a Company Interest in the Company and understands the risks of, and other considerations relating to, an acquisition of a Company Interest in the Company;

(m) Owner Investor Member's overall commitment to the Company and other investments which are not readily marketable is not disproportionate to such Member's net worth and such Member has no need for immediate liquidity in such Member's investment in its Company Interest in the Company, and such Member has the ability to bear the economic risk of an investment in the Company; and

(n) Owner Investor Member has carefully read this Agreement and, to the full satisfaction of such Member, such Member has been furnished any materials such Member has requested relating to the Company and the acquisition of a Company Interest in the Company,

has consulted to the extent deemed appropriate by such Member with such Member's own advisors as to the financial, tax, legal and related matters concerning an acquisition of a Company Interest in the Company and such Member has been afforded the opportunity to ask questions of representatives of the Company concerning the terms and conditions of the acquisition of a Company Interest in the Company and to obtain any additional information necessary to verify the accuracy of any representations or information provided to such Member and to make an informed decision with respect to an acquisition of a Company Interest in the Company.

Section 12.02. Warranties of the Co-Investor Member. The Co-Investor Member hereby represents and warrants to the Company, the Owner Investor Member and the Managing Member as follows:

(a) Co-Investor Member is a _____, duly organized and validly existing under the laws of the State of _____, and has full power and authority to conduct its business as presently conducted, including the power to acquire and own its Company Interest in accordance with the terms of this Agreement;

(b) This Agreement has been duly and validly executed and delivered by Co-Investor Member and constitutes its valid and binding obligation, enforceable in accordance with its terms;

(c) The execution of this Agreement and the performance by Co-Investor Member, or any general partner, manager, member, officer or director of Co-Investor Member, of the obligations set forth herein, have been duly authorized by all necessary entity action and will not violate any provisions of law or any order of any court binding on Co-Investor Member, or any provision of any indenture, agreement, or any instrument to which Co-Investor Member is a party or by which Co-Investor Member is affected;

(d) There is no default under any agreement, contract, commitment or other instrument to which Co-Investor Member is a party, or is otherwise bound, and Co-Investor Member has no actual knowledge of any claim, demand, litigation, proceedings or governmental investigation pending or threatened against or related to the business or assets of Co-Investor Member, which default, claim, demand, litigation, proceeding or governmental investigation could result in any judgment, decree or settlement that would materially and adversely affect the business or assets of Co-Investor Member;

(e) Each of Co-Investor Member and its members meets the definition of “accredited investor” as such term is defined in Regulation D promulgated under the Securities Act of 1933, as amended (the "*Securities Act*");

(f) The Co-Investor Member’s Company Interest is being purchased for the account of Co-Investor Member for investment purposes only and not for the account of any other person, and not with a view to distribution, assignment or resale to others or to fractionalization in whole or in part;

(g) Co-Investor Member has the legal capacity to enter into this Agreement and perform such Member's obligations hereunder;

(h) Co-Investor Member understands that the Company Interests have not been registered under the Securities Act, the securities laws of any state thereof or the securities laws of any other jurisdiction, nor is such registration contemplated;

(i) Co-Investor Member understands and agrees further that, subject to the limited rights set forth in this Agreement, its Company Interest in the Company must be held indefinitely unless such Company Interest is subsequently registered under the Securities Act, the securities laws of any state and the securities laws of any other jurisdiction or an exemption from registration under the Securities Act and these laws covering the sale of such Company Interests is available; that even if such an exemption is available, the assignability and transferability of its Company Interests in the Company will be governed by this Agreement, which imposes substantial restrictions on transfer; that legends stating that its Company Interests in the Company have not been registered under the Securities Act and these laws and setting out or referring to the restrictions on the transferability and resale of the Company Interests will be placed on all documents evidencing such Company Interests, if any;

(j) Co-Investor Member has such knowledge and experience in financial and business matters as to be capable of evaluating the merits and risks of acquisition of a Company Interest in the Company and understands the risks of, and other considerations relating to, an acquisition of a Company Interest in the Company;

(k) Co-Investor Member's overall commitment to the Company and other investments which are not readily marketable is not disproportionate to such Member's net worth and such Member has no need for immediate liquidity in such Member's investment in its Company Interest in the Company, and such Member has the ability to bear the economic risk of an investment in the Company; and

(l) Co-Investor Member has carefully read this Agreement and, to the full satisfaction of such Member, such Member has been furnished any materials such Member has requested relating to the Company and the acquisition of a Company Interest in the Company, has consulted to the extent deemed appropriate by such Member with such Member's own advisors as to the financial, tax, legal and related matters concerning an acquisition of a Company Interest in the Company and such Member has been afforded the opportunity to ask questions of representatives of the Company concerning the terms and conditions of the acquisition of a Company Interest in the Company and to obtain any additional information necessary to verify the accuracy of any representations or information provided to such Member and to make an informed decision with respect to an acquisition of a Company Interest in the Company.

Section 12.03. Warranties of the Managing Member. The Managing Member hereby represents and warrants to the Company and the Investor Members as follows:

(a) Managing Member is a _____, duly organized and validly existing under the laws of the State of _____, and has full power and authority to conduct its business as presently conducted, including the power to acquire and own its Company Interest in accordance with the terms of this Agreement;

(b) This Agreement has been duly and validly executed and delivered by Managing Member and constitutes its valid and binding obligation, enforceable in accordance with its terms;

(c) The execution of this Agreement and the performance by Managing Member, or any general partner, manager, member, officer or director of Managing Member, of the obligations set forth herein, have been duly authorized by all necessary entity action and will not violate any provisions of law or any order of any court binding on Managing Member, or any provision of any indenture, agreement, or any instrument to which Managing Member is a party or by which Managing Member is affected; and

(d) There is no default under any agreement, contract, commitment or other instrument to which Managing Member is a party, or is otherwise bound, and Managing Member has no actual knowledge of any claim, demand, litigation, proceedings or governmental investigation pending or threatened against or related to the business or assets of Managing Member, which default, claim, demand, litigation, proceeding or governmental investigation could result in any judgment, decree or settlement that would materially and adversely affect the business or assets of Managing Member.

Section 12.04. Indemnification. Each Member agrees to indemnify, defend and hold the Company and the other Members harmless from and against any loss, damage, cost, expense, claim or liability to the extent arising out of or attributable to the failure of any representation or warranty in this Agreement by the indemnifying Member to be true and correct in all material respects when made.

ARTICLE XIII.
MARKETING; BUY SELL

Section 13.01. Marketing Rights and Obligations. Except as provided in this Article XIII, the Company shall not list or advertise the Project as being for sale, make or accept any offer to sell the Project, enter into any purchase agreement, grant any option or right of refusal or otherwise market or sell the Project or any interest therein without the prior approval of Managing Member and the Investor Members. Notwithstanding the foregoing:

(a) Initiated by Managing Member. Following Stabilized Occupancy, Managing Member shall have the right to trigger a marketing or buy-out procedure pursuant to this Article XIII (the "*Marketing/Buy-Out Procedure*") by written notice (the "*Marketing Notice*") to the Investor Members.

(b) Initiated by Investor Member. At any time after the fifth anniversary of the Effective Date, either of the Investor Members shall also have the right to initiate the

Marketing/Buy-Out Procedure by giving a Marketing Notice to Managing Member and the other Investor Member.

Section 13.02. Determining Sale Value. In the event that the Marketing/Buy-Out Procedure is initiated by Managing Member or by one of the Investor Members pursuant to Section 13.01, the parties will attempt to set the value of the Project by negotiation for twenty (20) days before obtaining opinions of the value of the Project if marketed in accordance with Section 13.05 from two real estate brokers with substantial experience listing and selling properties similar to the Project in the San Antonio, Texas, metropolitan area. Whichever of Managing Member or one of the Investor Members initiated the Marketing/Buy-Out Procedure (as applicable, whether one or more, the "*Initiating Member*") shall designate one such broker in its Marketing Notice and the other Member or Members (as applicable, whether one or more, the "*Responding Member*") shall designate the other broker in a written response (the "*Response Notice*") to the Initiating Member within five (5) days after receipt of the Marketing Notice. If the Responding Member does not provide a Response Notice designating the other broker within such five-day period, the Initiating Member will be entitled to name the second broker by written notice (the "*Default Appointment Notice*") to the Responding Member within three days after such five-day period expires.

Section 13.03. Marketing/Buyout Election. No sooner than ten nor later than fifteen days after the broker opinions of value have been provided to Managing Member and the Investor Members as provided in Section 13.02, the Initiating Member shall give notice (an "*Election Notice*") to the Responding Member whether the Initiating Member will require the Responding Member to make an election pursuant to this Section 13.03. Such Election Notice shall set forth the price at or above which the Initiating Member would be willing to offer the Project for sale (the "*Sale Value*"), which shall be either (i) the cash purchase price offered for the Project by an unaffiliated third party which the Initiating Member has received and desires to accept; or (ii) a price at or above the average point of the combined ranges of values in the two brokers' opinions. If the Initiating Member fails to provide an Election Notice within such period of time, it shall be deemed not to require the Responding Member to make an election pursuant to this Section. Within thirty days after receiving an Election Notice, the Responding Member shall notify the Initiating Member that it elects either (a) to consent to marketing the Property for a price at or above its Sale Value in accordance with Section 13.05 or (b) to purchase the entire Membership Interest of the Initiating Member. If the Responding Member fails to make an election within such thirty day period, the Responding Member shall be deemed to have elected alternative (a).

Section 13.04. Purchase Price of Membership Interest(s). Unless Managing Member and the Investor Members agree otherwise, the purchase price for any Membership Interest being sold pursuant to Section 13.03 shall equal the amount that the selling Member would receive if the Company (a) sold the Project (1) for the Sale Value, if alternative (b) is selected pursuant to Section 13.03, or (2) the Reduced Value, if alternative (b) is selected pursuant to Section 13.06, (b) sold all other assets of the Company for their then book values, and (c) liquidated pursuant to Section 11.06. The purchase price shall be determined by the Accountant as of two Business Days prior to closing, which shall occur in accordance with the provisions of Section 13.07.

Section 13.05. Marketing Procedure. If the Responding Member elects or is deemed to elect to market the Property, Managing Member shall as expeditiously as possible offer the Project for sale using a broker jointly selected by Managing Member and the Investor Members (or, if such Members fail to agree on a broker within ten days, using a broker appointed by two brokers one of which is chosen by each of Managing Member and the Investor Members). Unless otherwise agreed by Managing Member and the Investor Members, the Project shall be marketed for a period (the "*Marketing Period*") ending one hundred eighty days after the date on which the Responding Member made its election pursuant to Section 13.03 (or is deemed to have made such election in accordance with the last sentence of Section 13.03). Managing Member shall cause the appointed broker to use commercially reasonable efforts to obtain a written offer or offers during the Marketing Period from an unaffiliated third party to purchase the Project for a purchase price, which shall be payable fully in cash at closing, equal to or greater than the Sale Value and otherwise on commercially reasonable and customary terms and conditions (the "*Mandatory Sale Conditions*"). If the Company receives an offer during the Marketing Period which meets the Mandatory Sale Conditions and which the Initiating Member desires to accept, the Company shall endeavor in good faith for a reasonable period (which may extend past the end of the Marketing Period) to negotiate and enter into a purchase and sale agreement for such price and on such terms and other commercially reasonable and customary terms and conditions reasonably acceptable to Managing Member and the Investor Members. If an agreement to sell the Project is entered into under this Section 13.05 or Section 13.06 as a result of an offer received during the Marketing Period, such agreement shall not be amended and no provisions thereof shall be waived without the approval of Managing Member and the Investor Members, and the Company shall endeavor in good faith to close the sale of the Project in accordance with such agreement. If an agreement to sell the Project is not entered into as a result of an offer received during the Marketing Period, the Members must again follow the procedures set forth in Sections 13.02 and 13.03 before marketing the Project, unless otherwise agreed by Managing Member and the Investor Members.

Section 13.06. Reduced Value Procedure. If during the Marketing Period the Company receives an offer that meets all of the Mandatory Sale Conditions except that the price is less than the Sale Value, and the Initiating Member gives notice (a "*Reduced Value Election Notice*") to the Responding Member at any time during the Marketing Period that the Initiating Member desires to sell the Project for such lower price (the "*Reduced Value*"), the Responding Member must elect by giving written notice to the Initiating Member within fifteen days after receiving such Reduced Value Election Notice either (a) to sell the Project for the Reduced Value (in which event the applicable provisions of Section 13.05 shall apply with respect to negotiating and entering into a purchase and sale agreement and closing the sale of the Project pursuant thereto) or (b) to purchase the entire Membership Interest of the Initiating Member based on the Reduced Value.

Section 13.07. Closing.

(a) Costs. Each Member will be responsible for all legal, accounting and similar fees incurred by it in connection with any transfer of a Membership Interest pursuant to this Article XIII. All transfer taxes and recording fees in connection with any transfer of a Membership

Interest pursuant to this Article XIII will be shared equally by the transferor Member and transferee Member.

(b) Title to Transferred Membership Interest. A Membership Interest transferred pursuant to this Article XIII must be free of encumbrances and adverse claims at the time of its transfer. A transferor will be in breach of its obligation under this Article XIII if its Membership Interest is subject to any encumbrance or adverse claim at the time of transfer.

(c) Designees. The right of a Member to purchase a Membership Interest pursuant to this Article XIII may be assigned, in whole or part, to one or more of its Affiliates, but any such assignment by a Member will not relieve the Member from liability for performance of obligations for which it otherwise would be responsible under this Article XIII or from providing indemnity as contemplated by Section 13.07(d).

(d) Indemnity and Release for Transferor. In connection with the transfer of a Membership Interest under this Article XIII, the transferee, to the extent (except as provided in the last sentence of this Section 13.07(d)) of Company (but not personal) assets, must agree to indemnify, defend and hold harmless the transferor, each person who holds a direct or indirect ownership interest in the transferor and the respective officers, directors, trustees, agents, employees, affiliates and professional or other advisors of the transferor and such owners against claim, suit, action or other proceeding and all related loss, damages, judgments, settlements, obligations, liabilities, debts, damages and costs and expenses (including fees and disbursements of attorneys and other professionals and court costs) incurred by the transferor on account of liabilities or obligations of the Company, except (i) Company liabilities or obligations created by the transferor under circumstances that exceeded the transferor's authority or constituted a breach by the transferor under the terms of this Agreement or any related agreement or for which the transferor is responsible and (ii) if the transferor is Managing Member, the amount of any unpaid Overrun Payments that are the responsibility of Managing Member under Section 6.10. Upon the transfer of a Membership Interest in accordance with this Article XIII, the transferor will be released of all obligations to the Company and the other Members under this Agreement to the extent performable after the date of the transfer. In no event shall Managing Member be obligated to sell its Membership Interests under the foregoing provisions until and unless Managing Member and all of its Affiliates shall have been unconditionally released from all liability under guaranties of the Construction Loan or any replacement loan, subject to clauses (i) and (ii) above, or indemnified against such liability as hereinafter provided. If the Investor Members elect to purchase the Membership Interest of Managing Member pursuant to the foregoing provisions, the Investor Members will be obligated to either (1) keep the Construction Loan or replacement loan in place and obtain a release of Managing Member and its Affiliates from liability under any guaranties thereof or otherwise, subject to clauses (i) and (ii) above, (2) pay the Construction Loan or replacement loan in full at the time of closing the purchase of such Membership Interest, with or without refinancing, or (3) obtain an agreement from an indemnitor satisfactory to Managing Member in its sole discretion in form satisfactory to Managing Member to indemnify Managing Member and its Affiliates from and against any liability under the Construction Loan or replacement loan, subject to clauses (i) and (ii) above. In no event may the Project be sold subject to the Construction Loan or replacement loan unless either condition (1)

or (3) of the preceding sentence is satisfied. The Company shall not be considered an affiliate of Managing Member for purposes of this Section.

(e) Date and Location. Unless otherwise provided herein or agreed to by all the Members, the closing of the transfer of a Membership Interest pursuant to this Article XIII shall occur as soon as practicable after the election is made pursuant to Section 13.03 or 13.06, as applicable, but in any event not more than thirty days after such election under Section 13.03 or forty-five days under Section 13.06; provided, however, that the Investor Members may elect to extend the closing date for up to an additional thirty days if the Investor Members obtain an agreement from an Affiliate of an Investor Member which satisfies the financial requirements applicable to the Developer Guarantor, as set forth in the Lender Guaranty, in form reasonably satisfactory to Managing Member to indemnify Managing Member and its affiliates from and against any loss, cost or liability arising during such thirty day extension period, subject to clauses (i) and (ii) of Section 13.07(d). Upon the closing of such purchase and payment of the purchase price, the transferor Member shall be deemed to have withdrawn from the Company and shall have no further rights to receive compensation, distributions of cash or property or other benefits from the Company. The closing of the transfer of a Membership Interest pursuant to this Article XIII will be held at the location designated by the transferee.

(f) Termination of Purchase. The purchasing Member may terminate its obligation to purchase the Membership Interest pursuant to this Section if (i) after the purchase price has been determined, there occurs any fire or other casualty loss to the Project that causes damage to the Project in excess of $300,000 that is not insured, or (ii) after the purchase price has been determined, an eminent domain proceeding is commenced or threatened for taking of the Project or any portion of the Project or interest in the Project. The purchasing Member may exercise its right to terminate under this Section 13.07(e) by giving notice to the selling Member(s) within twenty (20) days after the purchasing Member learns of the event giving rise to the termination right.

Section 13.08. Enforcement. It is expressly agreed that the remedy at law for breach of the obligations of the Members set forth in this Article XIII is inadequate in view of (a) the complexities and uncertainties in measuring the actual damage to be sustained by reason of the failure of a Member to comply fully with such obligations, and (b) the uniqueness of the Company business and the Members' relationship. Accordingly, the Members upon advice of their respective legal counsel hereby stipulate and agree that each of such obligations shall be enforceable by specific performance in a court of competent jurisdiction.

ARTICLE XIV.
MISCELLANEOUS PROVISIONS

Section 14.01. Amendments. This Agreement may be modified only by the written agreement of all of the Members.

Section 14.02. Waivers. No waiver of this Agreement or any part hereof, shall be binding unless made in writing and signed by the party claimed to have made such waiver. No waiver of any

breach or condition of this Agreement shall be deemed to be a waiver of any other conditions or subsequent breach whether of like or different nature.

Section 14.03. CONTROLLING LAW; WAIVER OF JURY TRIAL. THIS AGREEMENT IS ENTERED INTO PURSUANT TO AND SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF TEXAS. THIS AGREEMENT IS TO BE PERFORMED IN BEXAR COUNTY, TEXAS. EACH PARTY HEREBY WAIVES ITS RIGHT TO A TRIAL BY JURY WITH RESPECT TO ANY MATTER ARISING UNDER THIS AGREEMENT.

Section 14.04. Binding Effect. This Agreement shall be binding upon and shall inure to the benefit of the parties hereto, and their respective heirs, executors, administrators, legal representatives, successors and assigns, when permitted by this Agreement.

Section 14.05. Notices. Except as expressly provided to the contrary in this Agreement, whenever any notice, consent or approval is required or permitted to be given under any provision of this Agreement, such notice, consent or approval shall, in order to be effective, be in writing, signed by or on behalf of the person giving the notice, and shall be deemed to have been given when delivered by personal delivery or the earlier of actual receipt or three (3) business days after the same is mailed in accordance with this Section 14.05 or upon confirmation of receipt, if delivered by facsimile transmission or electronic (email) transmission. All notices, consents and approvals shall be sent by United States certified or registered mail, postage prepaid, return receipt requested or by confirmed facsimile transmission or electronic (email) transmission with receipt acknowledgement, and addressed to the person or persons to whom such notice is to be given at the addresses set forth in Article II of this Agreement (or at such other address as shall be stated in notice similarly given). Any notice received on a day that is not a Business Day or after 4:00 p.m. Central Time on a Business Day shall be deemed to have been received on the next Business Day.

Section 14.06. Other Instruments. The parties hereto covenant and agree that they will execute such other and further instruments and documents as are or may become necessary or convenient to effectuate and carry out the purposes of the Company created by this Agreement.

Section 14.07. Headings. The headings used in this Agreement are used for administrative purposes only and do not constitute substantive matter to be considered in construing the terms of the Agreement.

Section 14.08. Severability. If any one or more of the provisions contained in this Agreement for any reason are held to be invalid, illegal, or unenforceable in any respect, such invalidity, illegality, or unenforceability shall not affect any other provision hereof and this Agreement shall be construed as if such invalid, illegal, or unenforceable provisions had never been contained herein.

Section 14.09. Number and Gender. Where appropriate, all references to the singular shall include the plural and vice versa and all references to any gender shall include the other gender.

Section 14.10. Cumulative Remedies. All rights, privileges and remedies afforded the parties by this Agreement shall be deemed cumulative and not exclusive, and the exercise of any one or more of such remedies shall not be deemed to be a waiver of any other right, remedy or privilege provided for herein or available at law or in equity.

Section 14.11. Counterparts. This Agreement may be executed in multiple counterparts, each of which shall be deemed an original, and all of which, taken together, shall constitute but one and the same instrument, which may be sufficiently evidenced by one counterpart.

Section 14.12. Certain Terminology. All references to "applicable law" or "at law" or similar terminology used in this Agreement shall include both legal and equitable principles. The word "including" shall mean including without limitation.

Section 14.13. Waiver of Certain Rights. Each Member irrevocably waives any right it may have to maintain any action for dissolution of the Company or for partition of the Company Property.

Section 14.14. Attorneys' Fees. If the Company or any Member brings any legal action to enforce or interpret the provisions of this Agreement, the prevailing party shall be entitled to recover reasonable attorneys' fees, costs, and expenses, in addition to any other relief to which such party may be entitled.

Section 14.15. Entire Agreement. This Agreement, the Project Documents and the provisions of the Formation Agreement which survive closing set forth the entire Agreement among the parties hereto with respect to the subject matter hereof and supersede all prior agreements and understandings, if any, related thereto. In the event of any conflict between the provisions of this Agreement and the Formation Agreement, the provisions of this Agreement shall control.

Section 14.16. Construction. The parties hereto acknowledge that each party and its counsel have reviewed and revised this Agreement and that the normal rule of construction to the effect that any ambiguities are to be resolved against the drafting party shall not be employed in the interpretation of this Agreement or any amendments or exhibits hereto.

IN WITNESS WHEREOF, the parties hereto have executed this Amended and Restated Company Agreement to be effective as of the Effective Date set forth above.

[COUNTERPART SIGNATURE PAGES FOLLOW]

COUNTERPART SIGNATURE PAGE TO
AMENDED AND RESTATED
COMPANY AGREEMENT
OF
XXXXXX APARTMENTS, LLC

MANAGING MEMBER:

_____,
a Texas limited partnership

By: _____,
a Texas limited liability company,
its general partner

By: _____
Name: _____
Title: _____

[SIGNATURES CONTINUE ON NEXT PAGE]

COUNTERPART SIGNATURE PAGE TO
AMENDED AND RESTATED
COMPANY AGREEMENT
OF
XXXXXX APARTMENTS, LLC

OWNER INVESTOR MEMBER:

_____, LLC,
a _____ limited liability company

By: _____
Name: _____
Title: _____

COUNTERPART SIGNATURE PAGE TO
AMENDED AND RESTATED
COMPANY AGREEMENT
OF
XXXXXX APARTMENTS, LLC

CO-INVESTOR MEMBER:

_____, ___,
a _____

By: _____
Name: _____
Title: _____

EXHIBIT A

PROPERTY DESCRIPTION

[see attached]

EXHIBIT B

DEVELOPMENT BUDGET

[see attached]