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<u>"It Takes Two" - Selected Topics in Programmatic Joint Ventures</u>

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Programmatic joint ventures (or "PJV's") introduce complex and difficult economic issues that require a deep fundamental understanding of joint venture economics and, often, some creativity. This paper describes the general attributes of PJVs and some unique and specific characteristics often associated with them. Finally, it discusses common economic terms of the PJV, and significant issues that will confront (and perhaps confound) the real estate lawyer when negotiating a PJV.

Essential to a full understanding of the PJV is a recap of basic joint venture concepts and nomenclature. Anyone delving into joint venture practice may be surprised by the number of significant terms that are used to describe and set forth the joint venture relationship; this is particularly true for PJV economic terms. Accordingly, this paper includes a brief explanation of a number of the terms typically used to describe the economic arrangement of a joint venture for those who do not regularly practice in this area of the law.
Attachments:

Exhibit A – Distribution Waterfall Examples
Exhibit B – Sample Investment Guidelines
Exhibit C – Selection Process
Exhibit D – Sample Exclusivity Provision
Exhibit E – Three Strikes and You're Out
Exhibit F – Lookbacks/Clawbacks
Exhibit G – Sample Valuation Process
Exhibit H – Non-Core to Core Conversion
Exhibit I – Predevelopment to Development to Core

TAB 1

"It Takes Two" –
Selected Topics in Programmatic Joint Ventures

Minta E. Kay, Dean C. Pappas and Mark D. Yura

One can have a dream, baby
Two can make a dream so real
One can talk about being in love
Two can see how it really feels

One can wish upon a star
Two can make a wish come true, yeah
One can stand alone in the dark
Two can make a light shine through

It takes two, baby
It takes two, baby,
Me and you
You know it takes two

- It Takes Two
by Marvin Gaye and Kim Weston

Programmatic joint ventures (or "PJV's") introduce complex and difficult issues that require a deep fundamental understanding of joint venture economics and, often, some creativity. This paper describes the general attributes of the PJVs (including common economic terms found in PJVs) and some unique and specific characteristics often associated with such ventures. Finally, this paper discusses common economic terms of the PJV and significant issues that will confront (and perhaps confound) the real estate lawyer when negotiating a PJV.

Essential to a full understanding of the PJV is a recap of basic joint venture concepts and nomenclature. Anyone delving into joint venture practice may be surprised by the number of peculiar terms that are used to describe and set forth the joint venture relationship; this is particularly true for PJV terms. Accordingly, this paper starts with a brief explanation of a number of the terms typically used to describe the economic and other arrangements documented in a joint venture agreement for those who do not regularly practice in this area of the law.

I. Introduction to Joint Venture Economics[1]:

Real estate joint ventures (or, as used in this paper, "ventures") have been around for decades. Historically, they consist of a sponsor or developer (the "sponsor") who is charged with the duty of running the day-to-day operations of the venture, and one or more capital providers (the "investor") who provide(s) all or most of the capital for the venture's operations. Although a venture may have multiple investors and, sometimes, sponsors, for simplicity, this paper addresses the customary two-party joint venture relationship comprised of one sponsor who manages the venture's business and funds 10% of all venture capital and one investor who funds 90% of all venture capital.

In consideration of the sponsor's operational know-how and management of the day-to-day affairs of the venture (often referred to as "sweat equity") and, as often is the case, assumption of risks such as cost overruns and recourse obligations to the venture's lenders and other creditors, the sponsor is typically entitled to a "promote." The "promote" is intended to reward the sponsor for the value created from the sponsor's services (which may include identifying and sourcing the venture's investments) and, if applicable, accepting certain risks as described below. The promote entitles the sponsor to a disproportionate share of cash flow and capital proceeds ("available cash")[2] derived by the venture once the investor has achieved a certain threshold return.

For example, the venture agreement may provide that distributions are made to the members[3] pro rata in the ratio of their respective capital contributions to the venture (which are funded 10% by the sponsor and 90% by the investor for purposes of our assumed venture) until the investor receives an aggregate amount equal to its capital contributions plus a 9% return thereon, whereupon future distributions will be made 25% to the sponsor and 75% to the investor.[4] The

[1] Although this paper touches on a number of the economic issues that a real estate lawyer may encounter when negotiating a PJV and explores certain terms that are often included in such venture arrangements, it is by no means an exhaustive list of issues and terms. The economic terms of the venture will be molded ultimately to accommodate the particular venture's business plan and, as is generally the case in transactional practice, will be driven by the relative negotiating leverage of the parties. However, these venture arrangements also often present legal counsel with the opportunity to identify economic issues that may adversely impact the client and offer creative solutions to mitigate or eliminate such issues.

[2] Occasionally (albeit rarely), a venture might distribute assets to its members in-kind. Absent a modification to the venture agreement to the contrary, such distributions would also be made in accordance with the economic arrangement (i.e., distribution waterfall) set forth in the venture agreement. For the sake of simplicity, this paper assumes that the venture described herein will distribute only cash, whether derived from the operations of the venture or capital proceeds derived from a sale, financing, or other capital event.

[3] In selecting the type of entity to be used for the joint venture, counsel will consider federal tax, state law, and other factors. Ultimately, counsel may decide to utilize a limited liability company, limited partnership, corporation, or another entity type. For purposes of this paper, and for the sake of simplicity and uniformity, the authors have elected to use limited liability company nomenclature.

[4] The methods and priorities by which a venture's available cash is distributed is often referred to as the "distribution waterfall" or the "waterfall."

amount that is distributed to the sponsor in excess of the amount that the sponsor would receive if the sponsor simply received its 10% pro rata share constitutes the "promote," and distributions in respect of such promote are often referred to as "promote distributions."[5]

Often promotes may be tiered so that, as the investor's return on investment increases, the percentage splits to the sponsor are increased. Thus, if the venture in the example above provides for a tiered promote structure, the venture agreement may provide that, after the investor receives its aggregate capital contributions plus a 14% return thereon, future distributions will be made 35% to the sponsor and 65% to the investor until the investor receives its aggregate capital contributions plus an 18% return thereon, whereupon all future distributions will be made 45% to the sponsor and 55% to the investor. For some value-add and development joint ventures wherein the sponsor assumes cost overrun risk, the sponsor may also be permitted to recover all or portions of such cost overruns from available cash after the investor has received a return of and a certain threshold return on its capital.

The threshold amount that the investor must receive before the sponsor is entitled to a promote (or a particular tier of promote) is often referred to as a "hurdle" and may be calculated based on the "preferred return" or "internal rate of return" (also often referred to as an "IRR") received by the investor. A "preferred return" is, in essence, interest on the investor's capital and may be calculated as simple interest or may be compounded daily, monthly, quarterly, annually, or in any other manner determined by the parties. Typically, the investor must recover its capital <u>*and*</u> receive the threshold preferred return before the sponsor is entitled to a promote, although occasionally the sponsor may be entitled to a promote from cash flow (as opposed to capital proceeds) once the investor receives a threshold preferred return on its capital (whether or not the investor's capital has been returned). A sample waterfall using a preferred return construct after the investor has recovered its capital and assuming no dilution rights is set forth as Waterfall I in <u>Exhibit A</u> attached hereto.

Alternatively, the threshold amount that the investor must receive before the sponsor is entitled to a promote (or a particular tier of promote) may be calculated based on the investor's internal rate of return (or IRR). An IRR requires not only the payment of a return (essentially interest) on the investor's capital but also the return of the capital. In other words, an investor will achieve a 9% IRR only when it has received from venture distributions in an amount equal to its aggregate capital contributions made to the venture <u>and</u> a 9% return thereon. IRRs are well-suited for establishing hurdles in multi-tier promote waterfalls, whereby the sponsor's disproportionate share of available cash increases as certain investor return thresholds are exceeded.

To account for the time value of money, the IRR formula will discount all capital contributions made by, and all distributions made to, the members to the date that the first capital contributions were made to the venture using the desired IRR rate (in the example immediately above, 9%). IRRs require complex calculations and, therefore, are typically calculated using computer software (the Microsoft Excel XIRR program being fairly commonplace in commercial real estate joint

[5] Sometimes, the sponsor's capital is *pari passu* to that of the investor and therefore returns stated in this paper as payable to the investor are in fact shared by the sponsor and the investor in the aforesaid 10%/90% proportions. Amounts so received by the sponsor are in addition to its promote.

venture practice). Like a preferred return, IRRs may be calculated using monthly, quarterly, annual, or other discounting periods (essentially adding a compounding feature to the return calculations), although the computer program used to calculate a particular IRR may need to be manipulated to provide for the desired discounting periods.[6] A sample waterfall using multiple IRR hurdles and disproportionate sharing percentages (promotes) assuming no dilution rights is set forth as Waterfall II in Exhibit A attached hereto.

Finally, promote distributions may be based off of "hard hurdles" or "soft hurdles." As described above, the hard hurdle provides that, once the investor achieves a threshold return (and, if applicable, return of capital), the sponsor receives a disproportionate percentage of future distributions in respect of its promote. A soft hurdle construct that is occasionally used in fund and PJV arrangements involves a "catch-up." When using a "catch-up," no promote may be paid to the sponsor until the investor achieves a threshold return (e.g., IRR). Once the investor has achieved the threshold return, then 100% of future distributions may be paid to the sponsor until the sponsor receives its promote based on the total "profits distributions" (distributions after capital is returned) made by the venture to the investor and the sponsor, and thereafter distributions may be made in accordance with the partners' promote splits.[7] An example of a waterfall that incorporates a catch-up is set forth as Waterfall III in Exhibit A attached hereto. Catch-up hurdles may increase the total dollars received by the sponsor in respect of its promote by, among other things, paying the investor's return (which effectively accrues interest at a high rate) faster in the waterfall.[8]

Venture economics can be complex and, if not carefully thought through and meticulously drafted in the venture agreement, may produce unintended results that have significant adverse ramifications to one party or the other. As described in more detail in this paper below, these complexities are accentuated in real estate PJVs that involve the acquisition, financing, and sale of multiple properties with capital contributions and distributions made at various times throughout the life of the venture. Furthermore, PJVs often introduce issues that are unique to such an investment vehicle.

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[6] IRR calculations (including those performed using computer software) have a number of drawbacks and present a number of issues that practitioners should be aware of when working on complex real estate joint ventures and, particularly, PJVs. For an excellent discussion of many of the issues relating to IRR calculations and potential alternative return metrics, see "Real Estate Ventures" – Formulating and Interpreting Promote Hurdles and Distribution Splits by Stevens A. Carey, published by the American Bar Association (2016).

[7] Note that this is a simple example of a soft hurdle. Soft hurdles may be used in more elaborate waterfall structures that include tiered promotes and, potentially, clawbacks (discussed in Part VII below), particularly in connection with PJVs that may involve the purchase, financing and sale of multiple assets over the life of the venture.

[8] For a thorough discussion regarding catch-ups and soft hurdles, see Chapter 3 (Catching Up with Soft Hurdles) of "Real Estate Ventures" – Formulating and Interpreting Promote Hurdles and Distribution Splits by Stevens A. Carey, *supra*.

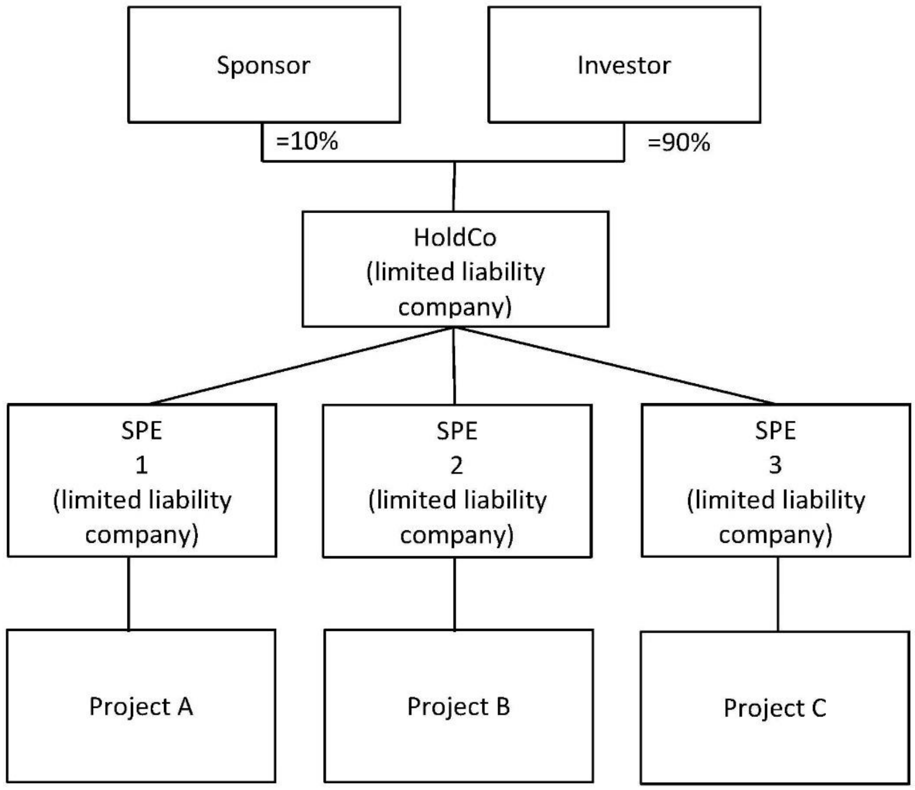
II. The PJV:

In the classic joint venture, the sponsor and the investor combine for a single, i.e., "one off," transaction. If their efforts prove to be successful, they might repeat this investment model on succeeding deals.

With this traditional model, individual transactions involving the same parties or their affiliates, for the most part, are independent of one other. In other words, the parties deem each transaction a success or failure, based on its stand-alone performance, without aggregating amongst deals the conventional measures of profitability (or lack thereof). Accordingly, the venture agreement provides for distributions of cash without regard to the performance of other investments made by the same members. Likewise, the documentation will provide for limited, if any, inter-connectedness between the various transactions. So, "crossing" of such deals for default, removal of the sponsor, exercise of buy/sell rights, subordination of fees, and similar features, is not likely to be of major emphasis.

Contrast this model with the PJV. The term "programmatic joint venture" loosely refers to a structure which is designed to provide a platform for multiple investments involving the same parties. In the real estate context, this translates into structuring the investment vehicle to promote standardization and repetition. The following chart depicts the organizational structure of the PJV in its most basic form, where the parties form a holding company ("HoldCo") and include in its organizational documents, i.e., the venture agreement (i.e., a limited liability company (or operating) agreement)[9], provisions setting forth the essential terms of their relationship:

[9] See Footnote 2, *supra*.



Once the joint venture relationship is documented in the venture agreement for HoldCo[10], the parties shall have concluded much of the hard work. At this point, likely in advance of identifying potential investments (much less investigating their suitability and closing on their acquisition), they shall have agreed on the critical ingredients that will constitute the governing principles for the PJV. These will include over-arching understandings regarding governance, exclusivity, duration, investment parameters, the sharing of pursuit costs, the deal-approval process and, of course, the economics of the joint venture. The individual investments are then made at the property level (by special purpose entities, i.e., the "SPE Owners" on the chart, above) using a simple form of single-member operating agreement.

III. Distinguishing Features of the PJV:

The typical PJV is characterized by several distinguishing features:

A. Narrow Scope of Target Investments: Generally, a PJV will have a focus defined by specific considerations, such as asset class, geography, deal and asset size, investment

[10] Alternatively, the basic framework of the relationship between the sponsor and the investor may be memorialized less formally in a memorandum of understanding or similar instrument.

objectives and investment strategy, to name just a few.[11] These features are described in greater detail, as follows:

1. Asset Class: Multi-family; industrial; hospitality; raw land; office; retail; etc.

2. Geography: Specific markets, e.g., gateway cities; or general characteristics, (e.g., major Northeast urban markets, secondary Midwest markets, etc.), etc.

3. Deal and Asset Size: What is the total amount of capital to be committed by the members over the life of the PJV? How is this broken down per investment? For example, the members may limit the PJV to an aggregate of $200M capital to be invested over a five year period in properties requiring an average equity investment ranging from $10M to $15M.

4. Investment Objectives: What is the targeted economic return? As an example, the parties might be targeting a 15% IRR, with an annual cash on cash return of 8%, over a maximum seven-year holding period and an aggregate return on investment of 1.8x).

5. Investment Strategy: Most investors seek to team up with sponsors who have demonstrated success with one or another strategy, and this then defines the business model which they will pursue together in the PJV. So, what will be the identity of the PJV? Will its assets consist of core, core plus, value-add, opportunistic, etc.? Will the PJV invest in development deals or fully improved properties? If the targeted assets are to be improved properties, will there be a significant lease-up component? If office or industrial properties, will they be subject only to credit tenants with triple-net leases? Will the assets be leveraged or purchased on an all-cash basis? If the former, what will be the agreed-upon amount or percentage of leverage?

B. Investment Selection Protocol: Unlike the impromptu nature of the standard joint venture, the PJV is designed as a platform to simplify the investment selection process. The sponsor need not shop for equity *ab initio*; its capital source is identified at the outset of the transaction. The investor generally has approval rights over the targeted assets and the terms of purchase. Accordingly, the venture agreement typically will provide a mechanism whereby the sponsor can move forward with targeting investments, negotiating the terms of purchase, and closing on the acquisition, subject at each step to investor approval.[12] The goal is to establish

[11] See Exhibit B for an example of Sample Investment Guidelines.

[12] Although the investor often has approval rights over all PJV acquisitions, PJV's occasionally grant to the sponsor discretion and authority to acquire assets through the PJV that satisfy certain predetermined parameters, reserving the investor's approval rights in respect of major projects or projects that fall outside those parameters only. See Exhibit C for an example of the operation of these processes.

protocols whereby the sponsor can enter into the purchase and sale contract, waive due diligence and other contingencies, and close on the acquisition of the asset, with predictability, if not necessarily of the desired outcome, than at least of timing.

Among other things, the venture agreement will include a description of the materials which the sponsor shall provide to assist in the investor's consideration of a proposed acquisition, a timeline by which the investor shall approve or disapprove the transaction, the point in time when the sponsor is authorized to execute the purchase agreement, and the juncture at which the investor will begin to share in pursuit costs with the sponsor (commonly on a 50/50 basis, with reconciliation at the time of closing), and the parties' respective roles in the contract negotiation and due diligence processes.

C. First Look and Exclusivity: An investor typically expects that its sponsor partner shall deal with it preferentially, if not exclusively, at least with respect to the subject matter of the PJV. While a sponsor may not like it, the underlying assumption on the part of an investor is that it is setting aside a considerable amount of capital in reliance on the sponsor bringing to it deals that are within the agreed-upon investment class for a "first-look," or even on an exclusive basis, and not shopping them among other investors. What's more, the investor is loath to see its sponsor potentially owning assets which will compete with jointly-owned assets, or which (even if not directly competitive) may distract the sponsor from focusing its attention on PJV activities. As a result, it is quite common in the PJV context to see exclusivity, at least with respect to the sponsor's abilities to invest in certain investment classes or within certain specified geographic regions. Rarely, if ever, will the reciprocal apply – it is simply not the case that the institutional investor will commit to invest solely with a particular sponsor.

For its part, the sponsor will attempt to narrow any restriction on its activities. It certainly will seek to carve out from the scope of the PJV specific areas in which it is already active.[13]

D. Negotiated Termination Rights: An interesting question which the sponsor will usually ask in the PJV negotiation is this: What happens where the investor largely, or even habitually, passes on proposed investments recommended by the sponsor? The sponsor will seek to include in the venture agreement "escape hatches," by which it will have the right to disengage from an unproductive relationship i.e., where the investor is either unwilling or unable to invest.[14] Not surprisingly, the investor, in negotiating these provisions, often will object in concept, anticipating the possibility that the sponsor may "game" the process by submitting for the investor's consideration sub-standard assets which the sponsor knows will not be acceptable to the investor. Hence, the parties often negotiate and agree on parameters for "qualified investments" that may count against the investor if the investor rejects same, while the investor's rejection of any proposed investment that is not a "qualified investment" will not count against the investor.

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[13] See Exhibit D for an example of a provision that obligates the sponsor to first offer acquisition opportunities to the investor, excepting certain carved-out areas, i.e., exceptions, as narrowly and concisely described in the venture agreement by the parties, where the sponsor is currently active.

[14] See Exhibit E for an example of a "three strikes and you're out" concept.

E. Removal Rights: While the sponsor will want the right to escape exclusivity with an investor who declines multiple qualified investments as noted above, the investor similarly will want the right to terminate its relationship with a sponsor that breaches its obligations to the investor or engages in misconduct. This is not unique to the PJV; it is a common feature of all joint venture relationships. The PJV context, however, incorporates sweeping "crossing" elements. As a result, it is common for the parties to negotiate so-called "removal rights" for the benefit of the investor that operate across all of the investments that the PJV may have made. The scope of these rights can range significantly, depending on the requirements of the investor, but it is common to provide that the investor can remove the sponsor for various categories of events, such as fraud, willful misconduct or gross negligence; breach of the terms of the PJV or an affiliate contract remaining uncured after a notice and cure period; bankruptcy or similar event of the sponsor or its control parties; and misappropriation by the sponsor or its employees, with, in the case of employees, cure rights for the benefit of the sponsor that protect its interest if the sponsor removes the applicable employee quickly and makes the venture whole. Following removal, the sponsor will typically cease to have rights to vote on any PJV matter and, in certain instances, may lose or have subordinated all or a portion of its economic interest in the venture.

IV. Advantages and Disadvantages.

The PJV arrangement confers certain advantages and disadvantages, both perceived and real, to both the sponsor and the investor:

A. Advantages to Sponsor:

1. Ease of Use, Replicability, and an Economy of Scale. The sponsor and the investor will likely first agree on investment parameters by class, geography, sizing, sector, investment strategy (e.g., core/core-plus/value-add/development, etc.) and other factors. As part of their conceptual discussions, they will negotiate underwriting standards, property-selection and approval methodology, matters of governance including an identification of which major decisions shall be made jointly and which shall be made solely by the sponsor or the investor, and other central features of their relationship. Counsel for the members will embody these understandings in the omnibus documentation (typically the limited liability company agreement for HoldCo) that will control the overall affairs of the enterprise. They will agree on the scope and scale of the PJV, that is, the total equity to be invested by each of the sponsor and the investor and over what period of time.

As a consequence of this approach, the entire process in introducing, approving, documenting, and closing successive transactions is greatly simplified. Time, effort, and opportunity and real costs (including, notably, the legal fees involved in negotiation of the joint venture documentation) are scaled back. Subsequently, when the individual real estate investments are made, the members have eliminated the necessity of negotiating these details anew. They can focus their sole attention on the particulars of the real estate investment opportunity. As a result, investments in real estate assets which, typically, are anything but a commodity in the commercial setting, become somewhat mechanized.

2. Access to Capital: This is straightforward enough. If the motivation is to enter into repeated transactions with the same equity source, the sponsor stands to do more deals, earn more fees, and achieve greater purchasing power in the market, which in turn leads to ….

3. Branding Advantage: With the heft of its capital source in the background, the sponsor is able to differentiate itself from other prospective purchasers and therefor enjoys a competitive advantage in the marketplace. It can boast to sellers of having plenty of dry powder, and the credit of an institutional investor (frequently this is an insurance company, large pension plan, or other household name) behind it. "Seller, you want certainty of execution, right? With us, you won't have to worry about execution risk. We have arranged our equity. We have a structure in place that will eliminate this as an issue to closing. Choose us, you won't be disappointed."

4. Pricing Advantage. Given that the PJV confers to the investor the benefit of risk-diversification, and the investor likewise often enjoys structural advantages such as cross-default and sponsor removal rights, as well as the economic advantage arising from the pooling of economics (all as discussed below), then it follows that it should accept discounted (which is to say, advantageous to the sponsor) pricing. This may take the form of lower hurdles, higher promote splits, larger fees, or some combination of the three.

B. Advantages to Investor:

1. Ease of Use, Replicability, and an Economy of Scale. Really, this is no different from the discussion in Part A, Paragraph 1 above. What's good for one member should be good for the other member.

2. Access to Deals. Having the sponsor representing its interests permits the investor to achieve greater penetration in the marketplace. "We want you to be our multi-family (or retail, or hotel, or development, etc.) partner to go and do your thing and bring us deals. If we like what we see, we are going to have a lot of fun together, do plenty of deals, and make tons of money. And oh, by the way, since you are going to agree to show all conforming deals first to us (or only to us, once we get around to our little chat about exclusivity[15]), this will really increase the size of our portfolio.

3. Accountability and Diversification of Risk. Assuming that the parties structure the PJV in a fashion such that multiple investments are cross-defaulted, economics are pooled, and transactions are otherwise viewed as aggregated for economic and other purposes, the investor's risk is reduced. One bad deal won't sink the ship, if there are multiple successful deals to buoy up the under-performers. What's more, by including investor-favorable terms, such as "crossing" the deals with respect to default,

[15] See Part III.C., *supra*.

governance, exit scenarios, and other features[16], the investor has greater control and leverage over its relationship with the sponsor.

C. Disadvantages to Sponsor:

1. Pooling of Returns. Just to repeat, the sponsor is eager to reap disproportionate economic returns, i.e., the "promote," when an asset is over-performing. However, many investors insist in the case of PJVs that the promote be calculated based upon the performance of the entire portfolio of joint venture properties, thereby denying the sponsor the impact of the outlying successful "home run."[17] Even if a promote is paid to the sponsor upon the sale or refinancing of an asset on favorable terms, it may be the subject of a "clawback" if the performance of the remainder of the portfolio is insufficient to generate a promote, as calculated on a portfolio-wide basis.[18]

2. Exclusivity. Frequently, the investor expects the sponsor to work with it exclusively, at least as to transactions involving defined parameters.[19] "We are going to give you considerable capital with which to purchase core-plus multi-family properties with 150 or more units (or value-add strip shopping centers, or boutique hotels, etc.) and we don't want you competing with us by purchasing similar properties that might cannibalize our assets. For that matter, we don't even want you expending your time and other resources by looking at other assets, even if we wouldn't be interested in them at any price. And, just to be clear, we have no obligation to invest in the deals you show us, and have no reciprocal exclusivity agreements with you!"

If the sponsor possesses sufficient bargaining power, it may be able to negotiate "first-look" rights as an alternative to exclusions.[20]

3. "Crossing" Risk. The cross-default feature exposes the sponsor to the risk that a single unsuccessful deal may result in adverse consequences across the portfolio. Hence, the sponsor might view its relationship with the investor, incredulously, as follows: "Not only is our ability to earn a promote subject to the under-performance of one or more other assets, but now you're telling us that we can be removed as the managing member in one venture (i.e., "SPE 2" and "SPE 3" – see chart at Part II, *supra*) because of circumstances involving another venture (i.e., "SPE 1")? Okay we get that. Those circumstances may understandably include our bad behavior; at least we can control that. But now you are telling us those removal rights can be triggered even by purely market-

[16] See Part III.E, *supra*.

[17] See Part V, *infra*, for a discussion of crossed promotes.

[18] See Part VII, *infra*.

[19] See Part III.C, *supra*.

[20] See Part III.C, *supra*.

driven factors, i.e., a failure to achieve certain economic milestones after an unanticipated market downturn? Likewise, our rights to exercise buy-sell rights, engage our management company affiliate and other rights are all subject to you, the investor, not pulling the plug on our relationship based on the performance of other investments?"[21]

D. Disadvantages to Investor:

1. Pricing. See Part A, Paragraph 4 above.

2. Accelerated Timeline and Implications for Cost-Sharing. With the members having already agreed upon the protocols for deal approval,[22] then at least in theory the PJV should be nimble in its pursuit of potential acquisitions. That is a good thing. Conversely, there is a greater risk to the investor in the event of aborted deals. Since the members may well agree to split the pre-closing expenses at an earlier juncture than would be the case with the more traditional joint venture, the investor may incur broken-deal expenses which would be the exclusive responsibility of the sponsor in the more traditional joint venture format.

3. Compounding of Mistakes. Concentrating deals with a particular sponsor creates "partner risk." "If we are putting all our eggs in one basket, and sponsor turns out to be a crook, or even just incompetent, then our real losses are magnified as a result of the volume of transactions we may enter together."

4. Opportunity Cost. This item is a variant on Paragraph 3. "We are already allocating twenty percent of our real estate investment capital to this relationship. If it is a dud, then think of all the other opportunities that we will have missed out on."

5. Reputational Injury. Significant involvement of the investor at an early stage exposes the investor to reputational risk. "Sponsor is using our name in its discussions with prospective sellers. Most deals are aborted, if at all, before they are ever put under contract, which is when the sponsor would normally introduce us to the seller in a more traditional joint venture context. So, our reputation stands to be sullied by any choppiness in the selection and negotiation process."

With the above basic overview providing a better understanding of the respective parties' motivations, the remainder of this paper will deal with salient aspects of the PJV itself. To describe them as highly intricate is no exaggeration.

[21] See Part III.E, *supra*.

[22] See Part III.B, *supra*.

V. Asset-Specific vs. Crossed Promotes:

The economic performance of different projects held by a PJV will inevitably vary, and a venture may hold some "winners" and some "losers." The economics of the joint venture and the available cash that each member receives will also vary depending on whether the hurdles and promotes are calculated on an asset-specific vs. aggregate basis. The sponsor will want to distribute available cash and calculate all hurdles and promotes on an asset-by-asset basis so that the sponsor is rewarded for those projects that are successful and is not penalized for projects that are unsuccessful. The investor will want a single distribution waterfall for the distribution of all available cash of the venture so that all hurdles and promotes are calculated on an aggregate basis. This latter approach is also simpler because the revenue and expenses of the venture (including organizational and overhead expenses) need not be allocated to (and separately accounted for in respect of) each project owned by the venture. [23]

To illustrate the different outcomes between an asset-specific and aggregate (crossed) distribution waterfall construct, assume that: (i) a PJV acquires Project A and Project B on the same day; (ii) the sponsor and the investor make the following capital contributions in a 10%/90% ratio, respectively: $10,000,000 in respect of Project A and $30,000,000 in respect of Project B; and (iii) each of Project A and Project B are sold on the first anniversary of their acquisition generating available cash of $15,000,000 in the case of Project A and $29,000,000 in the case of Project B. Assume further that no distributions have been made by the venture and that the venture's distribution waterfall provides for the distribution of available cash to the members in accordance with their relative capital percentages (10% to the sponsor and 90% to the investor) until the investor achieves a 10% IRR (applying annual discounting) on its capital, and thereafter 30% to the sponsor and 70% to the investor.

In the example above, the investor must receive $9,900,000 to achieve a 10% IRR on its $9,000,000 capital contribution made in respect of Project A and $29,700,000 to a achieve a 10% IRR on its $27,000,000 capital contribution made in respect of Project B. In order to achieve a 10% IRR on its aggregate capital to the PJV (for both Project A and Project B collectively), the investor must receive $39,600,000 from the sale of Project A and Project B.

If the venture provides for an asset-specific distribution waterfall, the available cash derived from the sale of Project A would be allocated $2,300,000 to the sponsor and $12,700,000 to the investor[24], and the available cash derived from the sale of Project B would be allocated $2,900,000

[23] In order to calculate promotes on an asset-by-asset basis, the venture would account for all capital funded by the members in respect of a particular asset to that asset alone and allocate capital, if any, funded for general organizational and overhead expenses of the entity among all projects owned by the venture pursuant to an agreed upon methodology (e.g., based on relative project values). The venture would also track all cash, capital proceeds and expenses derived from or incurred in respect of a project specifically to such project, allocate organizational and general overhead expenses of the venture pursuant to the same agreed upon methodology described above, and then distribute all distributable cash derived from that specific project pursuant to the distribution waterfall for that project. Calculating promotes on an asset-by-asset basis requires clear and careful drafting.

[24] The $15,000,000 of distributable cash in respect of Project A would be distributed as follows:

to the sponsor and $26,100,000 to the investor.[25] In this case, the sponsor would receive a promote in the amount of $800,000 in respect of Project A[26] but no promote in respect of Project B. As a result of such sales, the sponsor would receive distributions in the aggregate amount of $5,200,000, while the investor would receive distributions in the aggregate amount of $38,800,000.

If, however, the venture provides for an aggregate (or crossed) distribution waterfall, then as indicated above, the investor must receive $39,600,000 (i.e., $36,000,000 capital funded x 1.10) in order to achieve a 10% IRR on its aggregate capital contributions made in respect of Project A and Project B, collectively. Hence, available cash is distributed in accordance with the members' relative capital contributions (10% to the sponsor and 90% to the investor) until the investor receives $39,600,000, and the sponsor would receive $4,400,000 (return of capital plus 10% IRR) and the investor would receive $39,600,000 (10% IRR) upon the distribution of the aggregate proceeds ($44,000,000) derived from the sale of Project and Project B. Given that the aggregate return of capital plus 10% IRR for both members ($44,000,000) is equal to the total amount of distributable cash from both Project A ($15,000,000) and Project B ($29,000,000), the sponsor would not be owed any promote in this case, because the investor's return hurdle on its aggregate capital to the venture $39,600,000 determined as $36,000,000 aggregate capital contribution x 1.10) is not exceeded. As a result of the crossed distribution waterfall, the sponsor's potential promote resulting from the strong performance of Project A is offset by the shortfall resulting from the poor performance of Project B; the delta between the asset-specific and aggregate (crossed) waterfalls in this example is the $800,000 promote that is paid to the sponsor in respect of Project A pursuant to the asset-specific waterfall that would not be paid to the sponsor pursuant to the aggregate (crossed) waterfall.

In addition to the impact that a crossed waterfall may have on the sponsor's promote, sponsors should note that the income tax laws do not necessarily determine a member's profits for income tax purposes based solely on the cash distributions that such member receives pursuant to the venture's distribution waterfall. As a result of the promote and the deferral of cash distributions in respect of profits due to IRR hurdles or catch-ups (discussed in Part V below), the sponsor may

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	Sponsor	Investor
Return of Capital	$1,000,000	$9,000,000
To a 10% IRR	$100,000	$900,000
Promoted (30/70) Splits	$1,200,000	$2,800,000
TOTAL:	$2,300,000	$12,700,000
	========	=========

[25] Because the investor's 10% IRR hurdle ($29,700,000) is never achieved, a promote is not earned by the sponsor with respect to Project B, and all distributable cash derived from the sale of Project B would be distributed 10% to the sponsor and 90% to the investor.

[26] The promote may be calculated by subtracting from the aggregate amount ($2,300,000) actually distributed to the sponsor in connection with the sale pursuant to the waterfall the aggregate amount ($1,500,000) that would have been distributed to the sponsor if all distributable cash was distributed to the members in accordance with their respective capital interests (10% to the sponsor / 90% to the investor).

be allocated profits for tax purposes when little or no cash is actually distributed to the sponsor in respect of such profits. This allocation of profits may leave the sponsor with a tax obligation but insufficient cash distributions to satisfy such obligation. This issue is magnified when dealing with a crossed distribution waterfall, because tax liabilities may be determined on an asset-by-asset basis when assets are sold, but cash distributions are made (and the sponsor's promote is determined) on a portfolio-wide basis such that cash distributions in respect of the sponsor's promote are deferred until the investor has received the threshold IRR on all of its capital contributions made in respect of the entire portfolio of assets owned by the venture.

In such instances, the sponsor may negotiate for tax distributions in an amount sufficient to provide the sponsor with the cash necessary to satisfy its tax obligation when and as incurred. Such special distributions are typically calculated at the maximum tax rate payable by the sponsor (or its constituents if the sponsor is a pass-through entity such as a disregarded entity or partnership for tax purposes) and function as interest-free loans.[27] Tax distributions are generally repaid by offsetting the outstanding balance of such previously made distributions from later distributions payable to the sponsor (and, therefore, redirecting such sponsor distributions to the investor). Of course, tax distributions present the risk to the investor that subsequent distributions (including liquidating distributions) payable to the sponsor will be insufficient to satisfy the sponsor's tax distribution repayment obligation. As a result, the investor will often require the sponsor to make a true-up payment at venture liquidation to pay the unpaid balance of previous tax distributions and this obligation may be guaranteed by a creditworthy parent or affiliate of the sponsor.[28]

Typically, the investor will prevail and the venture will provide for a distribution waterfall that is calculated on an aggregate (crossed) basis for all projects owned directly or indirectly by the PJV; however, sponsors are occasionally successful in negotiating asset-specific distribution waterfalls or, as discussed below, pooled economics.

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[27] The investor may require the sponsor to pay interest on such tax distributions until they are repaid, but in the authors' experience, interest is not typically charged on such distributions. Note that the tax distributions would have been otherwise paid to the investor and, in that respect, the amount that is not used to return to the investor its capital or pay its return will continue to earn return at the applicable return rates; therefore, the investor is effectively receiving a return on those distributions (and such tax distribution "loans" are not effectively interest-free) to the extent that the tax distributions are recaptured by offsetting later distributions payable to the sponsor. If, however, the sponsor is obligated to repay to the investor the balance of any tax distributions that are not recovered from subsequent venture distributions upon liquidation of the venture, the investor may want to consider also charging interest on such tax distributions.

[28] Tax distribution provisions are typically heavily negotiated. For example, the sponsor may want annual tax distributions that do not take into account distributions previously received by the sponsor (for prior years) and that are not subject to clawback. The investor will resist tax distributions and, if given, will take into account prior distributions made to the sponsor when determining the cash available to the sponsor to pay its taxes, take into account prior losses, and require a full clawback of such tax distributions. Where the parties land on such terms will depend on the relative negotiating leverage of the members.

VI. Pooled Promotes:

Occasionally, a PJV may provide for projects to be segregated into separate pools so that the economics may be determined on a pool-by-pool basis. The pools may be segregated based on asset types (e.g., residential, retail, office, etc.), risk profiles (e.g., core, value add, opportunistic) or investment periods (e.g., projects purchased during the first 24 months following venture formation are held in one pool while projects purchased from month 25 through month 48 are held in a separate pool). A separate distribution waterfall is then used to distribute all available cash for each separate pool of assets held by the PJV so that the sponsor's promote is determined on a pool-by-pool basis.

One rationale for pooling is that the assets in the different pools have different fundamentals or characteristics and, often, justify different hurdles and promote splits; therefore, the pools cannot or should not be crossed for purposes of the venture's economics. For example, the return hurdles and promote percentages for an opportunistic project will (and should) differ from those for a core project. The distribution waterfall for an opportunistic project will typically contemplate higher and multiple IRR hurdles than that for a core project, and given the lower risk profile of a core project, core projects will typically command a lesser promote (i.e., the sponsor's disproportionate percentage of residual available cash is lower).[29] In effect, the risk reward ratio between core and opportunistic real estate investments mandates lower hurdles (return thresholds) and lower promote payments for less risky core projects and higher hurdles (return thresholds) and greater promote payments for more risky opportunistic investments. The same rationale arguably applies for assets across product types so that, for example, a student housing project would not be crossed with an industrial or office project.

Another rationale for pooling (particularly in the case of a long term venture) may relate to the sponsor's desire to realize its promote prior to the ultimate dissolution of the PJV.[30] In such cases, assets acquired by a PJV may be pooled together based on the time period within which such assets are acquired so that the promote may be determined and paid or otherwise realized in respect of such pool separately (whether by the sale of all assets in the pool to a partner or third-parties or a crystallization process as described in this paper below), notwithstanding the continuing

[29] Core distribution waterfalls will often contemplate one or maybe two promote levels with the first promote hurdle being as low as 6% to 8% and the sponsor's additional residual (promote) percentage ranging from 10% to 20%, while an opportunistic waterfall will often contemplate two or more hurdles and promote levels with the first hurdle starting at 10% to 12% and a promote percentage in the range of 20% to 30%, the second hurdle ranging from 14% to 16% and a promote percentage in the range of 30% to 40%, and so forth. Of course, return hurdles are market driven and change as interest rates, cap rates and other market factors impacting real estate investment change from time to time.

[30] The actual operating returns derived from an asset will often be below the IRR hurdles established in the distribution waterfall so that, once the project has been developed or the value add activities have been completed, time will eat away at the promote. For example, a project's annual operating return may be 8%, while the IRR hurdles to be satisfied before the sponsor becomes entitled to various levels of promote are set at 12%, 15% and 18%, so that the investor's accrued return thresholds will exceed the cash distributed to the investor to pay those returns and thereby accumulate over time. As a result, the sponsor will want to trigger a capital event shortly after the value has been created in the asset in order to maximize its promote splits.

acquisition activities and ownership of other assets by the venture. A PJV may also provide for the movement of assets across pools based on risk profiles through a crystallization or other process. Part VIII below contains a more thorough discussion of these processes.

Depending on the nature of the venture's business and the character of its assets, counsel should consider whether pooling assets based on product type, risk profile, or acquisition periods for purposes of determining the sponsor's promote is warranted.

VII. Holdbacks; Lookbacks; Clawbacks:

Whether a venture incorporates a hard hurdle or a soft hurdle in its distribution waterfall, the sponsor may receive promote distributions from a PJV before the venture is dissolved. Such promote distributions may result from the sale or refinancing of assets (and the distribution of the proceeds derived therefrom) before all venture assets are liquidated. Market conditions may subsequently deteriorate or the projects that are retained by the venture may produce subpar returns such that the investor ultimately achieves a subpar return on its investment (e.g., an overall IRR on its investment below a minimum threshold), while the sponsor has received distributions in respect of its promote that were not earned when taking into consideration the overall returns on the investment in the venture. Furthermore, depending on the investor's governance rights through the venture, the sponsor may cherry-pick assets by selling the winners early and liquidating the losers at the end, thereby increasing the potential that the sponsor will receive promote distributions, while the investor ultimately fails to achieve its threshold returns.

The investor may put in place various provisions to protect itself from such a result. For example, the investor may hold back all or a portion (say, 50%) of the sponsor's promote payments prior to the dissolution of the venture. The amount held back may be retained in the venture's bank accounts or placed in an escrow until final liquidating distributions are made and the parties are able to determine whether the promote was ultimately earned.

Although a holdback structure mitigates the risk that the sponsor receives payments in respect of its promote that are not ultimately earned, it is an inefficient solution that will negatively impact the economics for the sponsor because the return on the held back amount is not maximized. The money can be more efficiently used if is reinvested or distributed to the investor to further maximize the investor's returns making it more likely that the investor's return hurdles will be satisfied and the sponsor's promote will be maximized upon liquidation. The sponsor may defer distributions of its promote until liquidation, thereby redirecting such distributions to satisfy the investor's return hurdles; however, this deferral of the reward for successful performance is often unacceptable to the sponsor, particularly in the case of a long-term venture.

Alternatively, the investor may include a lookback test in the venture agreement, whereby if the investor's investment in the venture ultimately fails to achieve a minimum threshold return (say, a 13% IRR),[31] amounts otherwise distributable to or previously distributed to the sponsor are

[31] Note that lookbacks and clawbacks may be included for each separate tier of the waterfall when the venture waterfall contemplates multiple hurdles and residual sharing percentages; however, these provisions and calculations can be complicated.

reallocated or paid to the investor in order to satisfy this minimum threshold return. The sponsor's obligation to pay to the investor its return shortfall may be satisfied solely from the venture's liquidating distributions, from all distributions made (or to be made) to the sponsor in respect of its promote, or from all profits previously received by the sponsor (i.e., any distributions received by the sponsor after the sponsor has received aggregate distributions equal to its capital contributions).[32]

If the obligation to pay the return shortfall is limited to the sponsor's liquidating distributions, then the investor runs the risk that the proceeds from such liquidating distributions are insufficient to pay the entire shortfall, while the sponsor may have received significant distributions in respect of its promote from earlier distributions. The investor may mitigate this risk by prohibiting or limiting capital events prior to liquidation of the venture. For example, the investor may prohibit refinancings that produce excess financing proceeds to be distributed to the members, limit sales of assets prior to dissolution of the venture or require the sale of all venture assets at liquidation via a portfolio sale. Although these controls over capital events may address the investor's shortfall concerns, such limitations may also have an adverse economic effect on the venture and the overall returns achieved by the investor and the sponsor by preventing or restricting capital transactions that would increase overall venture returns.[33]

In order to allow flexibility for the venture to finance and sell assets in a manner that will maximize overall returns while protecting the investor's return thresholds, the members may include a clawback in the venture agreement. Pursuant to the clawback, the sponsor is obligated to pay to the investor any distributions previously received by the sponsor in respect of its promote or, sometimes, all of the sponsor's profits from the venture until the investor's threshold IRR has been achieved. An example of a lookback test and a clawback is set forth in Exhibit F attached hereto.

The risk to the investor in using a clawback is that the sponsor may not have the wherewithal to satisfy the clawback obligation upon dissolution of the venture. As a result, investors often require security or a guaranty from a parent or affiliate of the sponsor in order to provide credit support for the sponsor's clawback obligations.

Holdbacks, lookbacks and clawbacks may provide critical protections to the investor by requiring the sponsor to withhold, return or refund some or all promote distributions otherwise payable or paid to the sponsor during earlier phases of the venture if such amounts would not have been earned given the ultimate performance of the venture's investments. These protections may be structured in a number of ways and may raise credit and tax issues that should be carefully thought

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[32] Although the investor may require the sponsor to apply all distributions made to the sponsor (including distributions that return sponsor's capital) to satisfy the investor's threshold return requirement, such an approach would effectively subordinate the sponsor's capital to the investor's threshold return requirement and is not customary in the authors' experience.

[33] For example, selling assets separately or at different times during the venture's lifecycle may maximize overall returns.

through and negotiated by the parties at the outset and before the venture is formed. Tax lawyers and accountants should be consulted when considering and drafting such mechanisms.

VIII. Project Phasing; Crystallization:

A single PJV may provide different economics and other venture terms for each asset it acquires as such asset's risk profile evolves (e.g., from opportunistic or value-add to core) or, with respect to development projects, as such asset progresses through different phases of the development cycle.[34] Economics may be bifurcated between an asset's opportunistic or value-add phase and its core phase pursuant to a crystallization process, while the venture terms that apply to a development project may be segregated among the project's predevelopment phase (i.e., the period prior to, among other things, issuance of entitlements and other governmental approvals, completion of plans and specifications and commencement of construction for and of the project), development phase (i.e., the period from commencement of construction until completion and sometimes, stabilization of the project), and core phase (i.e., the period from and after completion and, sometimes, stabilization of the project).

Crystallization concepts may be applied to single-asset ventures or PJVs.[35] In the context of a PJV, the promote for a project or pool of projects may be crystallized pursuant to one distribution waterfall and thereafter moved to another, different distribution waterfall pursuant to a hypothetical sale of such project or pool of projects.

For example, the venture may provide for the acquisition of value-add projects subject to value-add economics (which may be determined on a project-specific basis or pool basis for all value-add projects). Once the value-add period for the project or pool of projects, as the case may be, has ended or the value has been created such that the project has become a core project, the promote payable to the sponsor pursuant to the value-add distribution waterfall is determined based on a hypothetical sale of the assets at fair market value[36] and the sponsor's promote is thereby crystallized and paid.

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[34] Although incorporating asset pooling and similar to pooling assets in that different assets in the venture may have different economics, project phasing is different in that the economic and other venture terms that relate to a particular asset actually change over the life of the investment.

[35] For a discussion of crystallization in the context of developer liquidity rights in development joint ventures, see "Finding the Exit or Freezing the Promote," by George Ruhlen and Dean Pappas, ACREL Notes (December 2017).

[36] The fair market value of the asset(s) is typically determined by agreement of the members or, if the members are unable to agree, a baseball valuation process, whereby each member specifies a proposed value (sometimes using an appraiser or broker appointed by such member) and, if the values are within a certain variance tolerance of each other (say 3% or 5%), the average of the two proposed values is used as the fair market value, or if the proposed values are not within the specified variance tolerance, a third appraiser or broker is selected to choose the member's valuation that is closest to the third appraiser's or broker's valuation (whereupon such member's valuation will be used as the fair market value). Note that the parties may provide for a modified baseball valuation process whereby the third appraiser's or broker's valuation is averaged with the member's valuation that is closest to the third appraiser's or broker's valuation, and the third appraiser's or broker's valuation is sometimes ignored if it is higher than the highest or lower than the lowest of the members' valuations, whereupon the average of the members'

In effect, once the fair market value of the asset(s) is determined, the parties determine the capital proceeds that would be generated upon a sale of the asset(s) at such value (after repayment of asset-level debt and, often, hypothetical brokerage commissions, transfer and excise taxes, title insurance premiums, and other closing costs that would be paid by the venture as seller of the asset(s) in connection with such sale), and the amount that each partner would receive upon distribution of those proceeds. The promote, if any, payable to the sponsor is then paid in cash[37] or credited to the sponsor's capital interest in the core assets pool, and the asset(s) is/are thereafter treated as core asset(s) subject to the core assets distribution waterfall. In other words, the asset is treated as having been sold by the venture and the amounts that would be distributed to each partner in connection with such hypothetical sale (*excluding* amounts actually paid to any such partner in cash including any promote received by the sponsor in cash) are then deemed recontributed to the venture as capital contributions made in respect of the core projects pool. Sample provisions converting a value-add project to a core project within a single PJV are attached hereto as Exhibit H.

Occasionally, a venture will acquire projects for development before entitlements have been secured or before final plans and specifications, budgets, schedules, financing, and construction documents have been finalized, agreed upon or executed, as the case may be. Given the elevated risk of predevelopment and the smaller aggregate capital investment required during a project's predevelopment period, the capitalization, distribution, loss sharing, and liquidity terms for predevelopment projects are often different than those for development and stabilized projects.[38]

For example, a predevelopment venture may be capitalized from capital contributions made equally (50/50) by the investor and the sponsor[39] and may not provide for a promote or similar consideration to the sponsor or may calculate the consideration payable to the sponsor using a methodology other than IRR hurdles[40] in the event that the predevelopment project is sold by the venture before development. On the other hand, most (often 90% or more) of the equity capital

valuations may be used as the fair market value. Sample provisions outlining a valuation process are set forth in Exhibit G attached hereto.

[37] Any cash payment of the promote may be funded from a financing or refinancing of the subject asset(s) or capital contributions funded by the investor. If the investor funds the cash payment, then the amount funded is credited as a "core assets capital contribution" made by the investor in respect of the core assets pool.

[38] As used herein, the term "predevelopment project" means a project that has not yet commenced construction, while the term "development project" means a project that is ready to commence or has commenced construction.

[39] Sometimes, the investor will fund more than 50% of the capital for a predevelopment project (e.g., 70% or 80%), but the parties will agree to share losses if the project is abandoned prior to commencement of construction equally so that liquidating distributions from an abandoned predevelopment project are paid first to the investor until its unreturned capital equals the sponsor's capital and, if necessary, the sponsor is obligated to make a true-up payment to the investor so that the losses are ultimately borne equally by the members.

[40] For example, the sponsor may receive a fixed fee or a percentage of the value created (sometimes subject to a cap) if the sponsor successfully secures legal entitlements for the project.

required by a development venture to actually construct a development project is typically funded by the investor, and the sponsor is almost always entitled to earn a promote based on the economic success of the project.

The PJV may contain different venture terms for a project while it is in its (i) predevelopment phase, (ii) development phase and (iii) core phase. Essentially, the project is governed by three separate venture arrangements in a single venture.

The venture's predevelopment terms will include the members' unique capital funding obligations and distribution rights in respect of a project during its predevelopment phase. Moreover, given the uncertainty of success and the multiple elements of a predevelopment project that must be satisfied and agreed upon by the members in order to effectuate the project,[41] the venture agreement must provide an abandonment mechanism that allows the members (or a member) to liquidate the investment if the development conditions have not been satisfied and construction of such project has not commenced by a specified outside date.[42]

If and when the conditions precedent to commencing construction of the project have been satisfied and the members have agreed to proceed, the "predevelopment project" may be converted to a "development project" that is governed by the venture's development terms. Upon conversion, the interests of the members in the project are credited as "development contributions" by either crediting the predevelopment capital previously funded by each member on a dollar-for-dollar basis or applying a crystallization methodology (i.e., assuming a sale of the project at its then fair market value as described in this Part VIII above and crediting to each member as its initial "development contributions" the amount that such member would receive pursuant to the predevelopment distribution waterfall in connection with such a hypothetical sale). The sponsor is likely to argue for a crystallization process so that it may capture the value added by the satisfaction of the development conditions (including issuance of entitlements), while the investor will want to credit capital to the "development project" on a dollar-for-dollar basis for the reasons described above (including deferring any promote or success fee to the sponsor until the investor's overall return thresholds for the project have been satisfied). In the latter case, the sponsor may argue for a richer promote once the project is sold or converted to a "core project."

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[41] These elements include, among other things, receipt of entitlements and other governmental and third-party approvals required to develop the project, completion and member approval of project plans and specifications, member approval and the funding of construction financing, and member approval of a development budget, construction schedule and construction contracts for the construction of the project. Note also that market conditions and construction costs may change during the predevelopment phase of a project, thereby positively or negatively impacting the feasibility of the project.

[42] Such abandonment may be effectuated by a traditional buy/sell process, the right to force a sale of the predevelopment project at or above a specified price (or threshold thereof) subject to a right of first offer in favor of the other member or the right to call a member's interest at a price based on the then fair market value of the real property determined pursuant to the agreement of the members or a valuation process such as the one set forth in Exhibit G attached hereto.

After the project has been converted to a "development project," the "development contributions" are ultimately trued-up to the funding percentages contemplated by the development terms by virtue of one member funding 100% of the venture's capital needs until the ratio of the members' respective development contributions are in the funding ratios contemplated by the development terms (typically 5% or 10% for the sponsor and 95% or 90% for the investor).[43] The members' rights to distributions from the venture are thereafter governed by the development waterfall that will typically include multiple IRR hurdles and promote percentage splits. Following stabilization of the project or a stated date after completion of construction (e.g., the second anniversary after substantial completion of the project), the sponsor may have a liquidity right that includes crystallization so that the project may enter its third phase, the "core project" phase.

Sample provisions providing for the conversion of a single project from its predevelopment phase to its development phase and through crystallization to its core phase are attached hereto as Exhibit I. Such ventures segregate economics among different assets and effectively function as multiple ventures within a single entity. As a result, these ventures may raise critical tax issues for the members; hence, tax counsel and the client's tax accountants should be consulted when drafting these complex terms.

VIII. Liquidity/Exit Rights:

It is common in "one-off" joint ventures (i.e. joint ventures that own one real estate asset) for the members in the joint venture to have certain rights to exit the joint venture and harvest the increased value of their investment - or cut their losses if a property has under-performed. These rights include a right on the part of a member to sell its interest in the venture to a third party (usually subject to a right of first refusal on the part of the other member to purchase the selling member's interest), a right to trigger a buy/sell, and, in certain circumstances generally after a period during which sale is blocked, a right to force a sale of the underlying real estate asset itself. These rights are understood in the market and they are comparatively simple as they apply to a single real estate asset.

These liquidity - or "exit" – rights, however, become more complex with PJVs that own multiple real estate assets. In PJVs, the parties must carefully analyze the manner in which they wish their exit rights to work. They must consider questions such as the following: Should the members only have the right to exit the venture in its entirety, by selling their entire interests or triggering a sale of the entire portfolio of assets owned by the venture? Alternatively, should the members have rights to cause a sale of portions of the underlying portfolio, perhaps at different times, taking into account the timing of property acquisitions, tax effects, and/or specific market conditions? Should the members' rights be the same, or should the rights of the sponsor be more limited than the rights of the investor[44] Are the sponsor's and the investor's anticipated "hold" periods (or

[43] See Exhibit I attached hereto for this funding mechanism.

[44] Recall for purposes of this paper, it is assumed that the sponsor holds a significantly smaller economic interest in the venture than the investor, i.e., a 10% interest. Where the sponsor's and the investor's interest approach greater equivalency, their rights, including to trigger liquidity, can become more reciprocal.

periods within which they wish to own the assets prior to sale) the same, such that they at least are initially aligned on a mutually acceptable business plan? If there is cross-collateralized asset level debt, what will it allow in terms of direct and indirect transfer and change in control rights of the venture and its respective members?

It is incumbent upon the attorneys working on PJVs to understand the dynamics of the particular program under negotiation, as well as the parties' respective investment horizons, return expectations, general business goals, and investment management styles. It is often at the point of potential liquidity where the members' interests diverge, leading lawyers to play an important role in interpreting the applicable exit provisions - that it is worth noting they may or may not have drafted - at a time of potential dispute during which the relative parties will undoubtedly have their own preferred interpretations. These provisions most often come into play when things have not gone according to plan.

The members' respective rights to achieve liquidity around their investments are often dealt with in PJVs, and this paper highlights certain provisions to which particular care should be applied, all as discussed below. It is important to note that PJVs may contain all or fewer than all of the below exit rights, depending on business terms that are negotiated based on the parties' particular issues and goals.[45]

A. Fundamental Liquidity Rights:

1. Triggers for Liquidity, Generally: As noted above, this paper describes various member exit rights commonly seen in PJV transactions. However, in order to provide the reader greater context for the exercise of any of these rights, this paper will first highlight an overriding issue applicable to all of them – and that is whether and when a particular member can trigger an exit right.

There is a significant range in the way parties negotiate these opportunities. On one end of the spectrum, a venture agreement can allow each member to trigger any exit mechanism at any time. This is rare. On the other hand, a venture agreement can provide for no divorce or exit mechanisms without the consent of all members. This is equally rare. Much more customarily, triggering some or all of these rights is often blocked for a negotiated period of time called a "lockout period." Lockout periods are intended to allow for projects under construction or repositioning to reach stabilization before being valued in connection with sale of an interest or to accommodate tax issues of the members, such as the need for a member that has a real estate investment trust ("REIT") in its structure to avoid a sale decision before expiration of the applicable Internal Revenue Code "safe harbor" for sales by REIT's.[46] Also, deadlock over a decision requiring unanimous consent of the venture members or a prohibited change in control of a member can also open up a window to one or more exit rights. Parties worry about minimizing the chance for a counterparty to manufacture a dispute over a unanimous decision in order to obtain

[45] Exit provisions can also include so-called "put/call" rights and "drag/tag" rights, but they are beyond the scope of this paper.

[46] The tax issues faced by members that have REIT's in their structure are beyond the scope of this paper.

liquidity, so deadlock is often a trigger for opening up only Buy/Sell rights as described below, the concept being that a triggering party will not know when it triggers whether it will be the buyer or seller of an interest, so it will be more likely to state a fair value for the assets of the venture that will establish pricing. Some parties prefer to go further and allow a deadlock to open up a Buy/Sell right only after there have occurred a certain number of deadlocks that resulted in single asset sales. There is no one "flavor-fits-all" in this realm. Most investors have preferred approaches to these rights, and these rights can be the subject of significant negotiation.

2. Member's Right to Sell Its Interest in the Venture: PJVs can include a right on the part of each member to market its interest in the venture for sale to a bona fide third party. These rights are often triggered by the party desiring to sell (the "Interest Sale Noticing Member") delivering to the other party (the "Interest Sale Receiving Member") a copy of an offer from a bona fide third party to purchase the interest of the Interest Sale Noticing Member. Following receipt of such offer, the Interest Sale Receiving Member typically has a period of 30-60 days to decide to allow the sale to the identified third party to proceed, or to elect to buy the venture interest of the Interest Sale Noticing Member. If the Interest Sale Receiving Member elects to buy the venture interest of the Interest Sale Noticing Member, the procedures described below under "Buy/Sell Rights" commonly apply.

This interest sale right requires the Interest Sale Noticing Member to have marketed the sale of its interest and received an offer to buy, subject to the rights of the other member to purchase the interest of the Interest Sale Noticing Member out from under the third party who has made an offer. Parties handle this process differently, but the fact that the Interest Sale Receiving Member has the right to buy the interest in question can often chill a third party sale by eroding a potential purchaser's interest in incurring costs necessary to do some level of due diligence so as to identify a reasonably certain price. Further, venture agreements often limit the Interest Sale Noticing Member's ability to sell to the third party at a lower price or after a certain period of time without going back to the Interest Sale Receiving Member to offer its interest again for sale.

This type of structural impediment can be deemed by sophisticated parties to diminish the value of this particular exit right. As a result, they often focus on the rights discussed below.

3. Buy/Sell Rights: In its simplest sense, the oft-heard term "Buy/Sell" refers to a process often contained in venture agreements by which a member in the venture can deliver a notice (the "Buy/Sell Noticing Member") that commences a process wherein one member ends up acquiring the venture interest of the other. Customarily, a member who wishes to sell its interest is required to deliver written notice of such desire to the other member (the "Buy/Sell Receiving Member") and, in such notice, to offer to buy the Buy/Sell Receiving Member's interest or sell its own interest to the Buy/Sell Receiving Member. This notice is typically required to contain a value for all assets of the venture

determined by the Buy/Sell Noticing Member.[47] That value is treated as a hypothetical sales price for the venture assets, and the price for each member's interest in the venture is equal to the amount it would have received under the distribution waterfall set forth in the venture agreement if the assets of the venture had been sold for a price equal to that value.[48]

Following receipt of the triggering notice, the Buy/Sell Receiving Member typically has a period of 30 – 60 days to decide whether to buy the Buy/Sell Noticing Member's interest or sell its own, or whether simply to approve the sale of the Buy/Sell Noticing Member's interest to a third party.[49] This decision-making period affords the Buy/Sell Receiving Member time to determine if it wishes to purchase and if it can raise the capital necessary to do so; this time period is often of concern to the sponsor who may need time to raise the capital necessary to close the acquisition, having less access to capital than the investor. If an election is made to buy, a 5 – 10% deposit is customarily required to be placed into an escrow account to serve as security for the buyer's obligation to close. If an interest of one member is going to be sold to the other as a result of this process, then closing is generally required to occur within an additional period of 30 – 60 days. As a condition of closing of the sale, the purchasing member is usually required to obtain releases of the selling member from liability under any guaranties it may have given to any lender that arise on account of events occurring post-closing. Alternatively, the purchasing member often has the right to provide an indemnity from a creditworthy entity for such liability. If a sale to a third party of the Buy/Sell Noticing Member's interest is going to occur, there are common restrictions around the time period in which that must occur so as to ensure the value that served as the basis for pricing the interests originally does not get stale, thereby prejudicing the Buy/Sell Receiving Member.

These interest sale rights are often very similar to the analogous rights seen in single asset joint ventures. Parties to PJV arrangements often discuss the option of crafting a right to implement partial joint venture interest sales, but the complexities attendant to that right, more often than not, lead to rejection of the concept. For example, it can be a challenge to agree upon whether the partial interest to be sold is 100% of a member's interest in certain assets or a pro rata interest of the member in all assets of the venture. This challenge

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[47] The parties should be aware that agreeing that such value shall be as reasonably determined by them, or as consisting of their determination of the fair market value of the assets of the venture, can lead to dispute about determination of value. This kind of dispute can present the opportunity for the party receiving notice to attack the exercise of the Buy-Sell as improper and, thus, ineffective, leading the parties to be forced to negotiate a settled value or proceed into dispute resolution.

[48] Some parties prefer to deduct from gross proceeds hypothetical closing costs in order to most closely mimic a sale. However, others' practice is to calculate price without doing so. Ultimately, the party setting the price can take the applicable provisions of the particular venture agreement into account (i.e. deductions or no deductions) in setting the value of the assets of the Company.

[49] Sometimes, there are parameters included around who the transferee can be, including by way of the concept of a "Qualified Transferee." This is more commonly the case where the Interest Sale Notice can be delivered without the actual bona fide third party purchaser having been determined, the goal being to afford the Buy/Sell Receiving Member some say over who its co-member may be.

becomes amplified in the situation where all assets are subject to a cross-promote, as described in Part V above, with the result being that a true cross-promote, as originally intended by the members, is not achieved out of cash flow but only in reliance on parties to perform obligations to return cash they previously received and may well have distributed out to their own investors.

4. Rights to Force a Sale of the Underlying Assets: Investors often have the right to force a sale of one or more underlying assets of a PJV. Under certain limited circumstances, investors will grant sponsors a window within which to do the same, but that is not preferred by the investor community. If a sponsor possesses this right, it is exercisable by delivery of written notice after the occurrence of a triggering event, as described above. Often the non-triggering member will have a right to buy the triggering member's interest based on what it would have received in the distribution waterfall had the applicable property been sold at the triggering member's stated value. Should it elect not to do so, the triggering member then usually has the right to conduct the marketing and sale of the applicable property within a specified time period and at not less than a price equal to a negotiated percentage of that presented to the non-triggering member.[50]

In the context of a PJV, this right to force a sale of one or more assets is the cleanest way for members to monetize their investments. The complexities one must confront with trying to sell partial interests do not arise. To the extent the program assets are to be fully cross-promoted, that can be achieved through so called "claw backs" guaranteed by creditworthy entities affiliated with the original members, as more fully discussed in Part VII above.

B. Exit Related Issues Posed by Multi-Tiered Joint Ventures: The structure of joint venture programs often requires the use of multi-tiered joint ventures. In its basic form, a multi-tiered joint venture consists of a property ownership structure in which a property is owned by a base joint venture (the "Lower Tier JV")[51] between two members, one or more of which is itself a separate joint venture (the "Upper Tier JV") between additional parties and some of the same, but likely not all of the same, members as comprise the Lower Tier JV. This often arises in PJVs because capital needed to pursue a large program successfully can exceed two parties' total resources or their desired capital allocations to a particular asset class or geography, for example. With programs that include these multi-tiered joint ventures, counsel must take care to make sure that the rights to exercise exit rights in each joint venture flow sequentially and do not conflict. Failing that, they will have denied to their clients the liquidity rights the clients thought they bargained for. This may lead to conflict and undesirable results if all parties do not agree upon a course of action with respect to PJV assets.

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[50] This percentage gets negotiated on a deal specific basis and most often can range from 95-97% depending on the value of the property.

[51] The PJV may own assets through a single purpose entity (see the chart at Part II, *supra*), but that is not material for purposes of this discussion.

An Upper Tier JV can include exit rights that mirror those in the Lower Tier JV, but at times the exit rights in the two tiers are not identical. What is critical is that whatever the triggers and processes are in the Upper Tier JV, they have sufficient time to run to final resolution before the rights can be triggered within the Lower Tier JV. By the time a trigger is to be made, or a response given, under the Lower Tier JV, there must be clarity around who is in control of the exercise or response in the Lower Tier JV. For example, if there are Buy/Sell provisions in both the Lower Tier JV and in the Upper Tier JV, before a member with the multi-tiered joint venture structure can trigger the Buy/Sell within the Lower Tier JV, all rights of its counterparties in the Upper Tier JV must have been finally exhausted. In addition, counsel must carefully consider the various processes which might occur if a counterparty triggers an exit right in the Lower Tier JV. For example, counsel must provide for sufficient time for determination of response in the Lower Tier JV in order to allow for the applicable decision to be made at the Upper Tier JV level.

C. Access to Information: It should be recognized that as parties craft exit provisions, sponsors often possess more detailed information about assets than do investors.[52] This imbalance can be exacerbated if investors focus on joint venture programs at the portfolio, rather than the asset, level. As such, investors should require strong, current reporting and have rights to access information from property operators and managers. At the same time, counsel for investors should consider including in PJV documents obligations on the part of sponsors to provide detailed information requested by investors in conjunction with exit triggers, so that decisions as to asset value are reasonably well-informed.

IX. Summary: Knowledgeable counsel are essential to the proper structuring, drafting, negotiation and implementation of the unique provisions featured in PJVs, especially in order to anticipate and satisfy the business requirements and goals of their clients. Of course, a basic understanding of joint ventures is necessary as a foundation in representation of parties to PJVs, but it is fair to say that the peculiar features associated with PJVs necessitate an even greater thoughtfulness in considering the long term implications of the relevant documentation. PJVs may not go as planned, and counsel may be asked to advise on the interpretation of provisions years after they were created with decision makers at counterparties having changed. As a result, it is particularly important that these provisions be drafted by counsel with heightened care to business and legal issues in order to assure that their clients have available to them the very important rights that are likely to be exercised when there is some stress in the PJV relationship.

[52] For a very thorough discussion of the dynamics of the imbalance between joint venture members in their access to critical market and property data, see "Beginning With the End in Mind" by Joan N. Hayden, Alvin Katz and John L. Sullivan, The ACREL Papers (Spring 2017).

EXHIBIT A

Distribution Waterfall Examples

Certain Defined Terms:

"**Available Cash**" shall mean, for any fiscal period, the gross cash proceeds received by the Company from any source whatsoever and available for distribution as determined in Managing Member's reasonable discretion.

"**Capital Proceeds**" shall mean proceeds derived by the Company from any sale, financing, casualty or condemnation of or involving any assets of the Company, less reasonable reserves established by the Managing Member in its reasonable discretion.

"**IRR**" shall mean the annualized discount rate at which the net present value, as of the date Investor makes each Capital Contribution to the Company pursuant to this Agreement, of the sum of all future distributions of Available Cash to Investor pursuant to this Agreement equals the amount of such Capital Contributions. Investor shall be deemed to have received a specified IRR with respect to its aggregate Capital Contributions made to the Company upon Investor's receipt of a cumulative amount of distributions pursuant to this Agreement that causes (1) the net present value of the aggregate of all such distributions received by Investor, discounted at the specified IRR, from the date of each such distribution back to the date of this Agreement, to equal (2) the net present value of the aggregate sum of Investor's Capital Contributions, discounted at the specified IRR, from the date that each such Capital Contribution was made by Investor back to the date of this Agreement. IRR calculations shall be made and determined using the XIRR function of the most current version of Microsoft Excel or its successor as of the date of determination, or if the Microsoft Excel XIRR function or its successor, as applicable, is no longer available or in usage at the time that an IRR calculation is required under this Agreement, such other program that calculates internal rates of return in a manner similar to the then most current version of the XIRR function of Microsoft Excel at the time, as determined by Investor in its reasonable discretion.

"**Percentage Interest**" shall mean (i) with respect to Investor, ninety percent (90%), and (ii) with respect to Sponsor, ten percent (10%). The "Percentage Interest" of a Member (including any new Member admitted to the Company in accordance with this Agreement) shall be adjusted by the Managing Member as appropriate to reflect the Transfer by, or the Transfer to, such Member of a Membership Interest (or portion thereof) made in accordance with this Agreement.

"**Preferred Return**" shall mean an amount equal to a cumulative return on a Member's Capital Contributions from the date that each such Capital Contribution is made and to the extent that such Capital Contributions have not been returned or refunded to such Member pursuant to Clause 2 below computed at an annual percentage rate of 9% (the "**Preferred Return Rate**"), compounded monthly on the tenth day of each calendar month, over the period of time such computation is being made.

Assume all Capital Contributions are funded 90% by Investor and 10% by Sponsor.

Waterfall I: Preferred Return Waterfall.

The Company shall distribute Available Cash during the term of the Company not less frequently than quarterly or, in the case of Capital Proceeds, within ten (10) days after the Company's receipt of such Capital Proceeds, in the following order of priority:

(1) First, pro rata to the Members in accordance with the then outstanding balances of their respective accrued and unpaid Preferred Returns to be applied against (and toward the reduction of) the outstanding balance of each such Member's accrued and unpaid Preferred Return, until the outstanding balance of each such Member's Preferred Return has been paid in full;

(2) Second, pro rata to the Members in accordance with the then outstanding balances of their respective unreturned Capital Contributions, to return to each Member its unrecovered Capital Contributions, until each such Member's Capital Contributions have been returned in full; and

(3) Thereafter, twenty percent (20%) to Sponsor and eighty percent (80%) to the Members in accordance with their respective Percentage Interests.

Waterfall II: Multiple Hurdle IRR Waterfall.

The Company shall distribute Available Cash during the term of the Company not less frequently than quarterly or, in the case of Capital Proceeds, within ten (10) days after the Company's receipt of such Capital Proceeds, in the following order of priority:

(1) First, to the Members in accordance with their Percentage Interests until Investor has achieved an IRR equal to 10%;

(2) Second, seventy-five percent (75%) to Investor and twenty-five percent (25%) to Sponsor until Investor has achieved an IRR equal to 15%;

(3) Third, sixty-five percent (65%) to Investor and thirty-five percent (35%) to Sponsor until Investor has achieved an IRR equal to 20%; and

(4) Thereafter, fifty percent (50%) to Investor and fifty percent (50%) to Sponsor.

Waterfall III: Catch-Up Hurdle IRR Waterfall

The Company shall distribute Available Cash during the term of the Company not less frequently than quarterly or, in the case of Capital Proceeds, within ten (10) days after the Company's receipt of such Capital Proceeds, in the following order of priority:

(1) First, pro rata to the Members in accordance with the then outstanding balances of their respective unreturned Capital Contributions, to return to each Member its unrecovered Capital Contributions, until each such Member's Capital Contributions have been returned in full;

(2) Second, to the Members in accordance with their Percentage Interests until Investor has achieved an IRR equal to 12%;

(3) Third, to Sponsor until the total distributions made to Sponsor pursuant to clause (2) above and this clause (3) equals twenty-five percent (25%) of the total distributions made to the Members pursuant to clause (2) above and this clause (3); and

(4) Thereafter, seventy-five percent (75%) to Investor and twenty-five percent (25%) to Sponsor.

EXHIBIT B

Sample Investment Guidelines

These Investment Guidelines have been established by the unanimous written consent of the Members to serve as guidelines for the Manager in evaluating and pursuing opportunities for Real Estate Investments on behalf of the Company. The Company and the Manager acknowledge and agree that these Investment Guidelines reflect the Company's intentions for the call and investment of Capital Contributions as of the date of the Agreement, and as such, the Investment Guidelines may be changed or modified from time to time by the prior unanimous written consent of the Members. If the Members agree to make a Real Estate Investment that does not conform to these Investment Guidelines, these Investment Guidelines shall be deemed to have been modified to include any such inconsistencies for that particular Real Estate Investment only.

All capitalized terms used herein and not otherwise defined shall have the meanings ascribed thereto in the Agreement.

1. Types of Real Estate. The Company intends to invest in (i) multi-family residential real estate property (which may include leasehold interests therein) within the United States (and primarily in major U.S. markets, being those Metropolitan Statistical Areas with a population of one million or more (the "Target Markets")) comprised of over 75 units and which may contain a parking facility, retail and/or commercial space on the ground and first floors, and (ii) mortgage or mezzanine debt secured by multifamily residential real estate property, with the intent to acquire the underlying real estate property by means of foreclosure, deed-in-lieu of foreclosure, or otherwise, within a reasonable period of time thereafter, which underlying real estate property shall have the parameters set forth in clause (i) of this sentence (collectively, "Real Estate Investments"). Real Estate Investments shall exclude Excluded Assets.

2. Special Purpose Entity. Each Real Estate Investment that the Company is authorized to make in accordance with the terms of the Agreement shall be made through a separate wholly-owned SPE.

3. Holding Period. It is the intent of the Company to hold the Real Estate Investments for a period of two to seven years. However, depending upon returns, market trends, interest rates, refinancing and reinvestment opportunities, or capital requirements, the holding period may be shortened or extended with the prior unanimous written consent of the Members, subject to the provisions on Deadlock set forth in Section ____ of the Agreement.

4. Leverage Limitation. The aggregate amount of indebtedness encumbering any Real Estate Investment may not exceed 75% of cost. Such indebtedness may be increased to 75% percent of fair market value or higher, as reasonably determined in good faith by the Manager at the date of incurrence of such indebtedness, with the prior unanimous written consent of the Members.

5. Non-Recourse Loans. Loans obtained in connection with a Real Estate Investment shall be the debt of the particular SPE only and shall not impose any personal liability on the Company, the Manager or any Member or any of their respective equity holders, members,

managers, partners, principals, officers, employees, or affiliates and shall not provide for any recourse to any such party's assets for liability to a lender (other than the Real Estate Investment which is being encumbered by the applicable loan); provided that to the extent that any lender requires any guarantees or indemnities (including any construction completion guaranty, any non-recourse carve out guarantees or any environmental indemnities) such will be provided by the Manager or credit worthy Affiliates thereof acceptable to the lender (with no back-up indemnity or the like to be provided by any other Member or any Affiliate thereof, but with indemnification by the Company being available pursuant to Section _____ of the Agreement except (A) as set forth therein and (B) in the case of a breach by the Manager or its Affiliate of any nonrecourse carve-out or other obligation or restriction contained in any guaranty or indemnity or related document and which is personal to the Manager or its Affiliate and applicable to it in its individual capacity). For the avoidance of doubt, the Investor Member and its Affiliates shall have no obligation to provide any such guarantees or indemnities. In addition, indebtedness encumbering any Real Estate Investment shall not be cross collateralized with indebtedness encumbering other Real Estate Investments.

6. Asset Management. The Manager shall manage Real Estate Investments made on behalf of the Company, in such a way as to endeavor to maximize the value of such investments. Such asset management should also take into account the financing structure of each such Real Estate Investment.

7. Target Returns. The Target Returns for Real Estate Investments shall be a minimum of a 15% IRR and 1.5x equity multiple, net to the Members.

8. Exceptions. Proposed Real Estate Investments which do not conform with the guidelines set forth herein but which the Manager believes otherwise meet the investment objectives of the Company may be brought to the attention of the Members for consideration of an exemption from, or amendment to, these Investment Guidelines.

EXHIBIT C

<u>Selection Process</u>

4.2 <u>Approval Procedures For Real Estate Investments</u>.

(a) *Transaction Proposals*. On the basis of the Manager's analysis of a proposed Real Estate Investment as described in this Section 4.2(a) and subject to the Investment Guidelines, the Manager, from time to time during the Investment Period, will submit to the Members proposals for Real Estate Investments for their consideration together with the preliminary recommendations of the Manager (each, a "<u>Real Estate Investment Proposal</u>"). Each Real Estate Investment Proposal (which shall be prepared, in all respects, in good faith by the Manager and shall be subject to supplement by the Manager to update information previously provided or to complete such submission) shall provide an analysis of the real estate market for the location and property type of the proposed Real Estate Investment, a written description and summary of the proposed Real Estate Investment, including an evaluation of the demographic and economic factors pertaining to the real estate market in which the proposed Real Estate Investment is located, a description of the property, maps showing the location of the Real Estate Investment in the context of other significant locations in the surrounding area and photos of the Real Estate Investment, a description of particular features of the proposed Real Estate Investment, including the investment thesis and business plan with respect thereto, a comparison of the anticipated acquisition cost to the acquisition cost of comparable properties, a comparison of the anticipated rents for units in the Real Estate Investment to rents of comparable properties, project-specific risks relating to the Real Estate Investment, financial data, estimated projections, replacement cost analysis, proposed capital structure, estimated internal rate of return (on both a leveraged and unleveraged basis), estimated capital expenditures, estimated closing costs, estimated cash-on-cash returns, estimated third-party expenses, estimated timing of the transaction, including the anticipated dates of execution of the Purchase Contract, termination of the due diligence period and closing, and those additional factors which the Manager reasonably believes should be considered by the Members in making their decision with respect to the proposed Real Estate Investment.

(b) *Preliminary Transaction Approval*. Within ten (10) Business Days following the Members' receipt of a Real Estate Investment Proposal from the Manager, the Company shall give either written (via electronic mail) notice to the Manager as to whether the Company, in its sole discretion (as determined by the prior unanimous written consent of the Members), desires to (x) proceed to the next stage of the transaction for the proposed Real Estate Investment and (y) to authorize the Manager to continue the process to the next stage of the transaction, which shall include, without limitation, performing, at the Company's sole cost and expense with respect to any out-of-pocket expenses incurred in accordance with a budget included in the Real Estate Investment Proposal), all actions with respect to the proposed Real Estate Investment as may be necessary or desirable, in the Manager's reasonable discretion and in accordance with the Real Estate Investment Proposal, to proceed to the next stage of the transaction for the proposed Real Estate Investment, including, without limitation, (i) engaging attorneys, engineers, environmental consultants, title insurance companies, surveyors, and such other third parties as the Manager reasonably deems appropriate, (ii) performing all due diligence that the Manager deems to be reasonable and prudent for the applicable transaction, (iii) negotiating the appropriate structure, terms and conditions of the proposed Real Estate Investment, and (iv) executing, delivering, and filing any and all documentation on behalf of the SPE formed for the purpose of owning the applicable Real Estate Investment which the Manager deems necessary or advisable for the applicable transaction (all of which shall contain such terms and conditions as the Manager in its reasonable discretion shall deem to be necessary or advisable for the applicable transaction and in accordance with the Real Estate Investment Proposal), including, but not limited to, an access agreement and Purchase Contract; provided, however, that any Purchase Contract shall permit the Company or the applicable SPE to terminate the Purchase Contract during the due diligence period provided for therein, so that if the Company fails to deliver to the Manager the Final Transaction Approval Notice as provided for in Section 4.2(c) hereof, the Purchase Contract for the proposed Real Estate Investment may be terminated without loss of the Company's deposit thereunder. If the Company gives either written (via electronic mail) notice within such ten (10) Business Day period that the Company elects to proceed to the next stage of the transaction for the proposed Real Estate Investment (the "Preliminary Transaction Approval Notice"), then the Preliminary Transaction Approval Notice shall be deemed (x) to approve the preliminary terms of the transaction for the proposed Real Estate Investment, as set forth in the Real Estate Investment Proposal, including, without limitation, to the extent included in the Real Estate Investment Proposal, the proposed purchase price and the earnest money due under the proposed contract of sale for the proposed Real Estate Investment, if available at such time (the "Purchase Contract"), it being understood and agreed that the Company's final approval to consummate the proposed transaction will remain subject to the Manager's completion of due diligence on behalf of the Company, the Manager's delivery of the Manager's Final Transaction Recommendation, and the Company's delivery of the Final Transaction Approval Notice (as such terms are defined in Section 4.2(c) hereof), and (y) to authorize the Manager to continue the process to the next stage of the transaction, which shall include, without limitation (and to the extent not previously authorized or undertaken, performing, at the Company's sole cost and expense with respect to any out-of-pocket expenses incurred in accordance with a budget included in the Real Estate Investment Proposal, all actions with respect to the proposed Real Estate Investment as may be necessary or desirable, in the Manager's reasonable discretion and in accordance with the Real Estate Investment Proposal, to proceed to the next stage of the transaction for the proposed Real Estate Investment, including, without limitation, (i) engaging attorneys, engineers, environmental consultants, title insurance companies, surveyors, and such other third parties as the Manager reasonably deems appropriate, (ii) performing all due diligence that the Manager deems to be reasonable and prudent for the applicable transaction, (iii) negotiating the appropriate structure, terms and conditions of the proposed Real Estate Investment, and (iv) executing, delivering, and filing any and all documentation on behalf of the SPE formed for the purpose of owning the applicable Real Estate Investment which the Manager deems necessary or advisable for the applicable transaction (all of which shall contain such terms and conditions as the Manager in its reasonable discretion shall deem to be necessary or advisable for the applicable transaction and in accordance with the Real Estate Investment Proposal), including, but not limited to, an access agreement and Purchase Contract; provided, however, that any Purchase Contract shall permit the Company or the applicable SPE to terminate the Purchase Contract during the due diligence period provided for therein, so that if the Company fails to deliver to the Manager the Final Transaction Approval Notice as provided for in Section 4.2(c) hereof, the Purchase Contract for the proposed Real Estate Investment may be terminated without loss of the Company's deposit thereunder.

Any Preliminary Transaction Approval Notice given to the Manager for a proposed Real Estate Investment (i) that does not conform to the Investment Guidelines shall be deemed to supersede the Investment Guidelines, to the extent that there are any inconsistencies with the Investment Guidelines, and the Investment Guidelines, for purposes of the proposed Real Estate Investment, shall be deemed to have been modified to include any such inconsistencies but only with respect to that particular Real Estate Investment, and (ii) shall be deemed to supersede any inconsistent terms for the applicable transaction that were in the Real Estate Investment Proposal with respect to which the Preliminary Transaction Approval Notice was given.

If the Company fails to deliver the Preliminary Transaction Approval Notice by the end of the period specified in this Section 4.2(b), it shall be deemed to have declined the proposed Real Estate Investment.

(c) *Final Transaction Approval*. Following the Manager's substantial completion of physical and financial due diligence for a proposed Real Estate Investment on behalf of the Company, the Manager shall submit a recommendation (the "Manager's Final Transaction Recommendation") to the Members as to whether and on what terms to consummate the transaction for the proposed Real Estate Investment. The Manager's Final Transaction Recommendation shall include a budget of the amounts determined by the Manager to be reasonably necessary or desirable to be advanced by the Company prior to or in connection with the acquisition of the applicable Real Estate Investment that are reasonably expected by the Manager to be incurred in connection with the closing of the transaction for the proposed Real Estate Investment, including, without limitation, the balance of the purchase price therefor, organizational costs (including, without limitation, the costs of forming and qualifying the applicable SPE), acquisition costs (including, without limitation, reasonable travel costs (coach air travel on domestic commercial carriers and other reasonable expenses) and fees for appraisers, accountants, attorneys, engineers, title insurance companies, surveyors, environmental firms, construction and other consultants, and other third parties engaged by the Manager for the proposed transaction), and initial costs for the management and operation of the proposed Real Estate Investment (including, without limitation, real estate taxes, working capital, operating expenses, reserves, debt service payments, capital improvements, and professional services (including, without limitation, accounting and legal services)) (collectively, as the same may be modified from time to time, the "Estimated Real Estate Investment Closing Expenses"). Within four (4) Business Days of the Company's receipt of the Manager's Final Transaction Recommendation, the Company shall advise the Manager in a written (via electronic mail) notice as to whether the Company, in its sole discretion (as determined by the prior unanimous written consent of the Members), elects to proceed with consummating the transaction for the proposed Real Estate Investment on the terms set forth in the Manager's Final Transaction Recommendation. If the Company delivers to the Manager such written notice (the "Final Transaction Approval Notice") electing to proceed with consummating the transaction for the proposed Real Estate Investment, then the Final Transaction Approval Notice shall (whether or not stated therein) be deemed to (i) authorize the Manager to perform all actions on behalf of the Company as may be necessary or advisable, in the Manager's reasonable discretion and in accordance with the Manager's Final Transaction Recommendation, to consummate the applicable transaction, (ii) authorize the Manager to execute, deliver and file any and all documentation on behalf of the applicable SPE which the Manager deems necessary or advisable for the applicable transaction (all of which shall contain such terms and conditions as the Manager in its reasonable discretion shall deem to be necessary or advisable for the applicable transaction and in accordance with the Manager's Final Transaction Recommendation), (iii) supersede the Investment Guidelines, to the extent that there are any inconsistencies with the Investment Guidelines, and the Investment Guidelines, for purposes of the proposed Real Estate Investment, shall be deemed to have been modified to include any such inconsistencies but only with respect to that particular Real Estate Investment, and (iv) supersede any inconsistent terms for the applicable transaction that were in the Real Estate Investment Proposal and Preliminary Transaction Approval Notice with respect to which the Final Transaction Approval Notice was given.

If the Company fails to deliver the Final Transaction Approval Notice by the end of the period specified in this Section 4.2(c), it shall be deemed to have declined the proposed Real Estate Investment.

EXHIBIT D

<u>Sample Exclusivity Provision</u>

During the Investment Period, none of the Manager, any Key Principal, or any Affiliate of any of them, shall acquire, directly or indirectly, an interest in any value-add or opportunistic multi-family property which meets the Investment Guidelines, without first offering such investment opportunity to the Company through the provisions of Section ____ of the Agreement and otherwise complying with the provisions of Section ____ of the Agreement; provided that (i) the Company shall have no further rights with respect to such property from and after such time as the Company declines (or is deemed to have declined, as set forth in this Agreement, which, for the avoidance of doubt, shall not include any proposed Real Estate Investment as to which the Investor Member gives its written consent for the Company to participate in) the applicable investment opportunity and (ii) the requirement to offer investment opportunities to the Company (as set forth in this sentence) shall not apply with respect to any investment opportunity in which the only direct or indirect interest that the Manager, any Key Principal and/or their respective Affiliates have or will have is (x) held through a "blind" pool or fund, in which the Manager, Key Principal or Affiliate does not have Control over the investment opportunity and does not control or otherwise influence the selection of investments by such pool or fund, (y) held through a company listed on a national securities exchange or which is a non-exchange traded real estate investment trust under Section 856 of the Code, in either case the shares or other interests in which company are not owned two percent (2%) or more by the Manager, Key Principal or Affiliate, as the case may be, and of which none of them is a director, officer or employee, or (z) a management fee or other similar fee received solely for services provided with respect to such investment opportunity. Notwithstanding the foregoing, any investment opportunity which is described in the first sentence of this section shall not be required to be offered to the Company if such investment opportunity is an "Excluded Asset," namely: (i) an urban retail and/or multifamily property which the Manager in good faith determines must be offered to _______________ Fund, LP (so long as an Affiliate of the Manager is a partner therein), it being understood that the _________________ Fund, LP's investment criteria references (but should not be construed as being limited to) target investments of buildings generally including between one to six stories and between 10 to 70 units, (ii) a LIHTC (Low Income Housing Tax Credit) property and is required to be offered to ________________ Housing Fund, LP (so long as an Affiliate of the Manager is a partner therein), (iii) an urban multi-family property in Miami, Florida with between 10 to 75 units, inclusive, and is required to be offered to Miami ___________ Partners (so long as an Affiliate of the Manager is a partner or member therein), (iv) an urban multi-family property in Washington, D.C. or surrounding areas with between 10 to 75 units, inclusive, and is required to be offered to Washington ____________ Partners (so long as an Affiliate of the Manager is a partner or member therein), (v) a multi-family property with between 10 to 75 units, inclusive, that is 85% or more rent-controlled in certain areas of Los Angeles, California and is required to be offered to Los Angeles _____________ Partners and Los Angeles _____________ Ventures I & II (so long as an Affiliate of the Manager is a partner or member therein), (vi) a multi-family property with between 10 to 75 units, inclusive, that are rent-controlled in certain areas of San Francisco, California and is required to be offered to SF _____________ I LP, a Delaware limited partnership (so long as an Affiliate of the Manager is a partner therein), or (vii) first introduced to the Manager, Key Principal or Affiliate by Affiliates of ________________ Estate Funds or _____________ Ventures and is not previously known by the Manager, Key Principal or Affiliate to be available as an investment opportunity, provided that the Manager shall be required to notify the Investor Member of any investment by the Manager, Key Principal or Affiliate in an investment opportunity described in this clause (vii) within five (5) days following the closing of such investment; provided, in the case of each of clauses (i) through (vii) above, that such investment opportunity shall be required to be offered to the Company in accordance with the first sentence of this section if the investment opportunity meets the Investment Guidelines and the applicable fund or partner referenced in clauses (i) through (vii), as applicable, determines not to participate in such investment opportunity and the Manager, any Key Principal or any Affiliate of any of them has the opportunity to, and determines that it will, participate in such investment opportunity.

EXHIBIT E

"<u>Three Strikes and You're Out</u>"

Sponsor shall use diligent and commercially reasonable efforts to identify investment opportunities that are consistent with the investment parameters set forth on Exhibit __ hereto (collectively, the "Program Investment Parameters"). In connection with each such investment Sponsor wishes to be acquired by the JV or its subsidiary (a "Proposed Investment"), Sponsor shall provide Investor with all of the following in one (1) submission (collectively, the "Preliminary Investment Materials"): [NOTE: THESE MATERIALS SHOULD BE TAILORED FOR THE SPECIFIC REQUIREMENTS OF AN INVESTOR.] a description of the Proposed Investment, including location and market, a detailed analysis of such market explaining Sponsor's support for the Proposed Investment, a project pro forma, a description of the proposed capital requirements for the acquisition, operation and, if applicable, the construction or renovation of the Proposed Investment, including debt, initial capital and anticipated additional capital needs, and a business plan for the Proposed Investment, describing projected hold period, lease-up projections, potential financing sources and terms and other material matters that a prudent institutional investor would need to evaluate an investment. Within __ days following receipt of the Preliminary Investment Materials, Investor shall notify Sponsor as to whether it declines to participate in the Proposed Investment on the terms proposed in the Preliminary Investment Materials or whether it wishes Sponsor to continue to pursue the Proposed Investment for the benefit of the Venture. If Investor elects the latter, then Sponsor shall continue to further develop a business plan for the Proposed Investment and shall perform customary due diligence thereon, including to the extent applicable title and survey review, permitting and land use review, lease review, contract review and environmental review, shall pursue negotiation of any applicable construction contracts and subcontracts and shall pursue bids for applicable financing. When reasonably appropriate, Sponsor shall present Investor with the results of its ongoing pursuit of the Proposed Investment and all of the above review, contracts, subcontracts and bids, more developed underwriting of the Proposed Investment, a draft purchase and sale agreement, financing bids and such additional information about the Proposed Investment as Investor may request (collectively, the "Approval Investment Materials"). Within __ days following receipt of the Approval Investment Materials, Investor shall notify Sponsor as to whether it declines to participate in the Proposed Investment on the terms proposed in the Approval Investment Materials or whether it has obtained all internal approvals necessary to proceed with acquisition of the Proposed Investment.

If Investor declines to proceed with a Proposed Investment that is consistent with the Program Parameters based on the Preliminary Investment Materials, or Investor declines to proceed with a Proposed Investment that is consistent with the Program Parameters based on the Approval Investment Materials, the applicable Proposed Investment shall be deemed a rejected Proposed Investment (each, a "Rejected Proposed Investment"). Sponsor shall thereafter be free to pursue the Rejected Proposed Investment for its own account without involvement on the part of Investor as long as such pursuit and the ultimate investment are on terms substantially the same as those described in the Preliminary Investment Materials or Approval Investment Materials, as applicable. If there exist three (3) or more Rejected Proposed Investments within a ______ month period [NOTE: THIS PERIOD WILL BE IMPACTED BY ANTICIPATED TRANSACTION PIPELINE AND NATURE.], then Sponsor shall have the right at its sole option to terminate the terms of Section __ of this Agreement [NOTE: EXCLUSIVITY SECTION.]. Following any such termination, this Agreement shall remain in full force and effect other than with respect to such terminated Section. [NOTE: THE PRECEDING SENTENCE SHOULD BE CONSIDERED IN THE CONTEXT OF ANY COST SHARING THE PARTIES MAY HAVE AGREED TO DURING THE INVESTMENT PURSUIT PERIOD. IT MAY BE THAT INVESTOR ALSO WISHES TO TERMINATE ITS OBLIGATION TO CONSIDER INVESTMENTS AND SHARE COSTS GOING FORWARD.]

EXHIBIT F

Lookbacks/Clawbacks[53]

Lookback Obligation:

Subject to the last paragraph below, Available Cash shall be distributed monthly as follows:

(i) First, pro rata to the Members in accordance with the then outstanding balances of their respective unreturned Capital Contributions, to return to each Member its unreturned Capital Contributions, until each such Member's Capital Contributions have been returned in full;

(ii) Second, to Investor and Sponsor in accordance with their respective Percentage Interests until Investor has achieved an IRR equal to 10%;

(iii) Third, (a) 20% to Sponsor and (b) 80% to Investor and Sponsor in accordance with their respective Percentage Interests, until Investor has achieved an IRR equal to 15%;

(iv) Fourth, (a) 30% to Sponsor and (b) 70% to Investor and Sponsor in accordance with their respective Percentage Interests, until Investor has achieved an IRR equal to 20%; and

(v) Thereafter, (a) 40% to Sponsor and (b) 60% to Investor and Sponsor in accordance with their respective Percentage Interests.

Notwithstanding the foregoing, in connection with any distribution of Liquidating Proceeds (as defined below), the members will first determine the amount that each of Investor ("**Investor Allocated Amount**") and Sponsor ("**Sponsor Allocated Amount**") would receive if such Liquidating Proceeds were allocated and distributed pursuant to the distribution waterfall set forth above. If, following the allocation of such amounts to Investor and Sponsor (and assuming that the Investor Allocated Amount was distributed to Investor), Investor would not achieve at least a 13% IRR, then Liquidating Proceeds will be reallocated from the Sponsor Allocated Amount and distributed instead to Investor until Investor has received an amount equal to the lesser of (x) the sum of the aggregate amount of Liquidating Distributions allocated to Sponsor pursuant to clause (iii)(a) above *plus* the aggregate amount of distributions previously received by Sponsor pursuant to clauses (iii)(a), (iv)(a) and (v)(a) above (such sum, the "**Promote Clawback Amount**") and (y) an amount sufficient to provide Investor a 13% IRR. The remaining balance, if any, of the Sponsor Allocated Amount, after making the reallocation to Investor described in the immediately preceding sentence, will be distributed to Sponsor. "**Liquidating Proceeds**" means proceeds distributable to the members upon the sale or other disposition of the final Project(s) owned by the venture (including through the sale of the members' interests in the venture or interests in the venture's subsidiaries).

[53] Initially capitalized terms used in this Exhibit F have the meanings given such terms in Exhibit A.

Clawback Obligation

If, following the reallocation (and distribution) of the entire Sponsor Allocated Amount to Investor, Investor's IRR is less than 13% (the amount that Investor would need to receive to achieve a 13% IRR being referred to herein as the "**Shortfall Amount**") and the Promote Clawback Amount exceeds the Sponsor Allocated Amount (the difference between the Promote Clawback Amount and Sponsor Allocated Amount being referred to herein as the "**Remaining Clawback Amount**"), then within ten (10) business days after Sponsor receives notice of the Shortfall Amount, Sponsor will pay directly to Investor in cash the lesser of (i) the Shortfall Amount and (ii) the Remaining Clawback Amount. Sponsor's payment obligation pursuant to the immediately preceding sentence is guaranteed by Sponsor Guarantor pursuant to the Sponsor Guaranty.

EXHIBIT G

Sample Valuation Process

The "**Market Value**" of a Project shall equal its FMV (as defined below) and shall be determined pursuant to the valuation process set forth below. For purposes of this Agreement, the "**FMV**" of a Project shall mean the fair market value price at which a Third Party purchaser would be reasonably willing to purchase the Project without compulsion on the part of the seller to sell or buyer to buy as of the date of delivery of the Crystallization Notice.

During the ten (10) Business Day period after the delivery of a Crystallization Notice in respect of a Non-Core Project by Sponsor to Investor, Investor and Sponsor shall negotiate in an effort to agree upon the Market Value. If the Members agree, in writing and in their sole and absolute discretion, upon the Market Value during such ten (10) Business Day period, then the Market Value will equal the amount so agreed upon by the Members. If the Members are unable to agree upon the Market Value for the Non-Core Project within such ten (10) Business Day period, then within fourteen (14) days after the expiration of such ten (10) Business Day period (such day period, the "**Engagement Period**"), Investor and Sponsor will each engage (and notify the other Member of) a Qualified Appraiser (as defined below) to determine the Market Value of the subject Non-Core Project pursuant to the following procedure:

Each Qualified Appraiser shall complete its appraisal and determine the FMV of the subject Non-Core Project and deliver to each of the Members written notice of his or her FMV determination with a copy of her or his appraisal, within thirty (30) days after the expiration of the Engagement Period. If the FMV determinations of the two (2) Qualified Appraisers differ by an amount equal to or less than five percent (5%) of the lower FMV, then the Market Value shall equal the arithmetic average of the two FMV determinations (which Market Value shall be binding on the Company, Sponsor and Investor). If a Qualified Appraiser fails to deliver to the Members notice of his or her FMV determination and his or her appraisal during the afore-said 30-day period, then either Member may deliver to such Qualified Appraiser notice of such failure, and if the Qualified Appraiser fails to deliver to the Members notice his or her FMV determination and a copy of his or her appraisal within five (5) Business Days after receipt of such notice from a Member, then notwithstanding anything to the contrary stated or implied in this Agreement, the FMV determined by the other Qualified Appraiser will constitute the Market Value, and such Market Value determination will be binding on the Company and the Members.

If the FMV determinations of the two (2) Qualified Appraisers differ by an amount that is more than 5% of the lower FMV, then the two (2) Qualified Appraisers shall attempt to agree upon a third Qualified Appraiser (the "**Third Appraiser**") and, if they cannot agree on the Third Appraiser within five (5) Business Days after the submission of the last determination of FMV (and appraisal) to be submitted by the two (2) Qualified Appraisers, then either Member may apply to the JAMS office located in **[the city where the Project is located]** to appoint the Third Appraiser; provided that, if JAMS does not then have an office in **[the city where the Project is located]**, then either Member may apply to the American Arbitration Association Office located in **[the city where the Project is located]** to appoint the Third Appraiser, and if the American

Arbitration Association does not then have an office in **[the city where the Project is located]**, either Member may apply to any superior court in **[the city where the Project is located]** to appoint the Third Appraiser.

Once the Third Appraiser has been appointed, the Qualified Appraisers appointed by the Members shall share the appraisals prepared by the Qualified Appraisers appointed by the Members with such Third Appraiser and request that the Third Appraiser determine the FMV of the subject Project within twenty-one (21) days after the engagement of such Third Appraiser. After the Third Appraiser has completed her or his valuation, the Market Value shall be the arithmetic average of the two fair market value determinations (i.e., appraised values) that are closest together; <u>provided that</u>, (i) if the FMV determined by the Third Appraiser is higher than the highest or lower than the lowest FMV determined by the Qualified Appraisers appointed by the Members, then the Third Appraiser's FMV will be ignored and the Market Value will equal the arithmetic average of the FMVs determined by the Qualified Appraisers appointed by the Members, and (ii) if the Third Appraiser's FMV is equidistant to the FMVs determined by the Qualified Appraisers appointed by the Members, then the Third Appraiser's FMV shall constitute the Market Value of the subject Project for purposes of this Agreement. The Market Value determined in accordance with the procedure described in this paragraph shall be binding on the Company and the Members.

If either Member fails to appoint a Qualified Appraiser within the Engagement Period, then the Qualified Appraiser appointed by the other Member will determine the Market Value and such Market Value will be binding on the Company and the Members.

The costs of the Qualified Appraiser appointed by each Member shall be borne by the Member who appointed such Qualified Appraiser, and the costs of the Third Appraiser, if any, shall be shared equally by the Members.

For purposes of this Agreement, the term "**<u>Qualified Appraiser</u>**" shall mean an appraiser that: (i) is disinterested and impartial, is not an Affiliate of any Member and does not have a pre-existing relationship with Investor or Sponsor; (ii) has at least fifteen (15) years' experience as a real estate appraiser appraising and valuing commercial real property (including **[*insert use as appropriate* - multi-family residential/ retail/office/industrial/etc.]** property); (iii) is familiar with real property located in **[*insert location of subject Project*]** and has at least ten (10) years' experience as a real estate appraiser appraising and valuing **[*insert use as appropriate* -multi-family residential/ retail/office/industrial/etc.]** projects in the greater **[*insert location of subject Project*]** metropolitan area; and (iv) is a member of, and designated an MAI appraiser by, the Appraisal Institute or a successor or similar organization of recognized national standing.

EXHIBIT H

Non-Core to Core Conversions

1. **Conversion From Non-Core to Core**(a) Sponsor may, within one hundred and eighty (180) days after the stabilization date (i.e., the date that at least 92% of the residential units are leased for three (3) consecutive months) for a Non-Core Project, deliver written notice to Investor that Sponsor desires to convert such Non-Core Project to a Core Project. Within thirty (30) days of Investor's receipt of such notice, Investor may provide written notice to Sponsor (i) consenting to such conversion, in which event such Non-Core Project shall be valued and converted to a Core Project pursuant to this Section, or (ii) rejecting such request for conversion, in which event such Non-Core Project shall be sold by the Company. Investor shall be deemed to have elected clause (ii) of this Section 1(a) should Investor fail to provide notice under the preceding sentence within the thirty (30) day period provided therefor. If Investor elects or is deemed to have elected clause (ii) of this Section 1(a), Investor and Sponsor shall cooperate in good faith to market the Non-Core Project for sale with the goal of achieving a fair value for that Project. No further distributions of available cash derived from such Non-Core Project shall be made from and after its Conversion Date until the earlier of (1) the Investor's election, or deemed election, pursuant to clause (ii) of this Section 1(a), in which case such retained available cash shall be promptly distributed pursuant to the distribution waterfall set forth in this Agreement that applies to Non-Core Projects; or (2) the completion and Member approval of the calculations in Section 1(c), in which case such retained available cash shall be prorated and distributed pursuant to Section 1(f) below. As used herein, "**Conversion Date**" means, for each Non-Core Project, the date of delivery of the notice delivered by Sponsor to Investor expressing Sponsor's desire to convert such Non-Core Project pursuant to the first sentence of this Section 1(a).

(b) If clause (i) of Section 1(a) is operative and, within thirty (30) days following Investor's consent under that clause, the Members are not able to agree upon a fair market value for the applicable Non-Core Project, the fair market value of the applicable Non-Core Project shall be determined by Baseball Arbitration[54] as of the Conversion Date for such Non-Core Project. Such fair market value as agreed upon by the Members or determined by Baseball Arbitration, as applicable, shall be that Non-Core Project's "**Conversion Value**."

(c) The Manager shall cause the Company's accountants to calculate and submit to the Members the following hypothetical amounts:

(i) The net amount that would be distributed to each of the Members if such Non-Core Project were sold for cash for its Conversion Value and from the proceeds of such hypothetical sale: (1) normal selling costs (including, without limitation, brokerage commissions, title, recording and escrow fees, and transfer taxes, to the extent applicable) customarily paid by a seller were paid; (2) the remaining liabilities of the Company to creditors (including Members) properly allocated to such Non-Core Project were paid; and

[54] See Exhibit G for sample modified baseball appraisal process.

(3) the Company distributed any remaining amounts to the Members in accordance with the distribution waterfall set forth in this Agreement that applies to Non-Core Projects.

(ii) The Capital Contributions that would need to be made by each of the Members if such Non-Core Project were purchased by the Company as a Core Project in cash for an amount equal to its Conversion Value plus the actual costs incurred in connection with the conversion of that Project (*excluding*, *however*, any such actual costs that would be customarily paid by the seller and that are deducted from the Conversion Value pursuant to Section 1(c)(i) above), net of any liabilities of the Company to creditors (including Members) properly allocated to such Non-Core Project that will remain following the conversion.

(iii) The determination by the Company's accountants of such amounts, including all components thereof, shall be subject to review and unanimous approval by the Members, but shall be approved by each Member absent any manifest error.

(d) Promptly following the completion and Member approval of the calculations in Section 1(c), either (i) the Investor shall pay to the Sponsor the amount by which the hypothetical distribution to the Sponsor pursuant to Section 1(c)(i) exceeds the hypothetical Capital Contribution required by the Sponsor pursuant to Section 1(c)(ii); or (ii) the Sponsor shall pay to the Investor the amount by which hypothetical distribution to the Investor pursuant to Section 1(c)(i) exceeds the hypothetical Capital Contribution required by the Investor pursuant to Section 1(c)(ii).

(e) On and after its Conversion Date, a Non-Core Project converted to a Core Project pursuant to this Section shall, for all purposes, be deemed a Core Project; provided, however, that (i) for the purposes of the distribution provisions applicable to Non-Core Projects, the Company shall be deemed to have sold such Project as a Non-Core Project on its Conversion Date, and each of the Members shall be deemed to have received distributions with respect to such Non-Core Project on its Conversion Date equal to such Member's hypothetical distributions calculated pursuant to Section 1(c)(i), and (ii) for the purposes of the distribution waterfall and other distribution provisions relating to Core Projects, the Company shall be deemed to have acquired such Project as a Core Project on its Conversion Date, and each of the Members shall be deemed to have made a Capital Contribution with respect to such Core Project on its Conversion Date equal to such Member's hypothetical Capital Contribution calculated pursuant to Section 1(c)(ii), as adjusted for any cash payments made pursuant to Section 1(d) above.

(f) In applying the principles of this Section, Available Cash (including all revenues and expenses such as real estate taxes, management fees, utilities expenses, etc.), or any component thereof, attributable to a Non-Core Project that is converted to a Core Project that is not distributed prior to the Conversion Date shall be prorated to the Conversion Date in a manner that is customary for real property sales of this type in the city and county where the applicable Project is located, and all available cash attributable to that Project accruing for the period prior to the Conversion Date shall be distributed to the Members as Non-Core Project distributable cash pursuant to the distribution waterfall that applies to Non-Core Projects, and all available cash accruing for the period commencing on and after the Conversion Date shall be distributed to the Members as Core Project available cash pursuant to the distribution waterfall that applies to Core Projects

EXHIBIT I

Predevelopment to Development to Core[55]

PREDEVELOPMENT PROVISIONS

The terms and provisions below shall apply solely to a Project after it has been acquired by the Company and prior to the date that construction of such Project commences.

1.1 Project-Specific Costs. From and after the date that a Project has been approved for acquisition by the Company and until the earliest to occur of (a) that date that such acquisition is abandoned, (b) the Company's disposition of such Project or (c) the conversion of such Project to a Development Project (the "**Predevelopment Period**"), any Approved Predevelopment Costs (as defined below) will be reimbursed to the Members by the Company or paid directly by the Company, in each case from Project-Specific Contributions (as defined below) made by the Members to the Company. Any Predevelopment Costs and other amounts incurred in respect of a Project during the Predevelopment Period that are not Approved Predevelopment Costs ("**Unpermitted Predevelopment Costs**") shall be borne and paid directly by the Member that incurred the same without credit to its Capital Account in, or Capital Contributions to, the Company and without any right to reimbursement or repayment of any kind or nature. If a Member fails to timely pay any Unpermitted Predevelopment Costs incurred by such Member, then the other Member may exercise any remedy available to such Member pursuant to Section 1.3 below. For purposes of this Agreement, (i) "**Predevelopment Costs**" means, for a particular Project, the fees, costs, expenses, and other amounts incurred by the Company or any Member in connection with the specific Project during the Predevelopment Period for such Project, including, without limitation, pre-acquisition and acquisition costs and the purchase price paid for the real property that constitutes a part of the Project, property taxes and real property operating costs, all fees, costs and expenses incurred in obtaining Entitlements and other necessary governmental approvals for the Project, preparing plans and specifications for the Project, preparing development budgets and schedules for the Project, sourcing and negotiating construction financing for the Project, and negotiating architect, engineer and other design and consultant agreements and construction contracts in respect of the construction of the Project); and (ii) "**Approved Predevelopment Costs**" means Predevelopment Costs that are contemplated by, and when taken together with all other Approved Predevelopment Costs do not exceed the amount of, the Predevelopment Budget approved by the Members for such Project in connection with the Members' approval of such Project for acquisition.

1.2 Project-Specific Contributions. After a Project has been approved for acquisition, Managing Member may, from time to time, call for capital to pay Approved Predevelopment Costs incurred in respect of such Project, and within ten (10) days after delivery of such capital call to the Members, each Member shall contribute to the Company (a "**Project-Specific Contribution**") an amount equal to 50% of the Approved Predevelopment Costs set forth in such capital call. All Project-Specific Contributions will accrue a return at the rate of ten percent

[55] The provisions below set forth only the essential economic terms that apply to each phase of a Project owned by the venture. The venture agreement will include other terms (many of which will apply uniformly to each phase of the Project) that apply to the Project as it moves through its phases of development.

(10%) per annum from the date funded until the Project is converted to a Development Project. The Company shall account for all Project-Specific Contributions made by the Members with respect to an individual Project before such Project becomes a Development Project separately so that the Company and its Members can track such Capital Contributions made by each Member with respect to each such Project separately.

1.3 Failure to Make Project-Specific Contributions. If a Member fails to make a Project-Specific Contribution when required pursuant to Section 1.2 above or to timely pay Unpermitted Predevelopment Costs incurred by such Member pursuant to Section 1.1 above, then the other Member (the "**Nonfailing Member**") may exercise any of the remedies set forth in this Section 1.3 below.

(a) Default Loan. The Nonfailing Member may advance to the Company an amount equal to the amount of the Project-Specific Contribution or Unpermitted Predevelopment Costs that the other Member (the "**Failing Member**") failed to contribute or pay, as applicable. The Members acknowledge and agree that any advance made by a Nonfailing Member on behalf of a Failing Member shall be deemed to be a loan from the Nonfailing Member to the Failing Member (a "**Default Loan**"). Any such Default Loan will be a recourse obligation of the Failing Member, will bear interest at the Applicable Rate, and will require mandatory payments out of any and all distributions to which the Failing Member would otherwise be entitled from the Company until all accrued interest and outstanding principal on such Default Loan has been paid in full (any such distributions applied to the repayment of the Default Loan shall be treated as having been distributed to the Failing Member for all purposes of this Agreement and then used by the Failing Member to repay the Default Loan). The principal amount of any Default Loan made in respect of a Failing Member's failure to fund a Project-Specific Contribution shall be credited as a Project-Specific Contribution made by such Failing Member from proceeds of a loan made by the Nonfailing Member to such Failing Member; provided that, any Default Loan made by a Member in respect of the other Member's failure to pay any Unpermitted Predevelopment Costs shall not be treated as a Project-Specific Contribution or otherwise treated as a capital contribution by the Failing Member to the Company. For purposes of this Agreement, the term "**Applicable Rate**" means the greater of: (A) seven percent (7%) per annum above the Prime Rate quoted in the Wall Street Journal from time to time (as adjusted from time to time) and (B) fifteen percent (15%) per annum, in either case, compounded monthly; provided that, in no event shall the Applicable Rate exceed the highest rate permitted to be charged by applicable law by the Nonfailing Member which, if exceeded, could subject the Nonfailing Member to penalties or forfeiture of all or any part of the interest or principal; such rate of interest on a Default Loan shall automatically be reduced to the highest rate permitted without violating any such law.

(b) Control of Project. If Investor is the Nonfailing Member or Sponsor fails to timely fund a Project-Specific Contribution or pay any Unpermitted Predevelopment Costs, then Investor by written notice to Sponsor shall be entitled to terminate the Predevelopment Agreement with Sponsor or its Affiliate for the applicable Project (and, consequently, Sponsor's rights and authority to manage the predevelopment and development of such Project), and Investor or its designee shall assume sole authority for the management of the applicable Project (it being acknowledged and agreed that, in such instance, Investor may cause the Company to enter into any agreements, including another predevelopment agreement, with Third Parties pertaining to the predevelopment of such Project in Investor's sole and absolute discretion without any further consent or approval by Sponsor or any other Person).

1.4 Predevelopment Distributions. Except as otherwise provided by the next sentence below, available cash (including capital proceeds) derived from a Project during the Predevelopment Period for such Project (including from the sale or other disposition of the Project) shall be distributed within thirty (30) days after the Company's receipt thereof 50% to Investor and 50% to Sponsor. Notwithstanding the foregoing to the contrary, if any Default Loan remains outstanding and unpaid as of the date that any distribution is to be made above, then any amounts otherwise distributable to a Failing Member pursuant to this Section 1.4 will be distributed instead to the Nonfailing Member until such Nonfailing Member's Default Loan(s) (including, without limitation, all accrued and unpaid interest thereon) has/have been paid to such Nonfailing Member in full. Amounts distributed to a Nonfailing Member in respect of its Default Loan pursuant to this paragraph shall, nonetheless, constitute a distribution to the Failing Member (and not the Nonfailing Member) for purposes of this Agreement.

1.5 Abandonment. If a Project has not been converted to a Development Project in accordance with this Agreement prior to the first (1st) anniversary of its acquisition by the Company, then at any time from and after such date and prior to the date that the Project is converted to a Development Project, Investor may cause the Company to elect to abandon ("**Abandon**") the Project by delivering to Sponsor written notice (the "**Abandonment Notice**") setting forth the proposed sale price (the "**Proposed Price**") for the sale of the Land and the other Company assets pertaining specifically to such Project (collectively, the "**Project Assets**") and naming a national title insurance company ("**Escrow Agent**") to act as escrow agent in connection with the potential sale of the Project Assets to Sponsor. Sponsor may elect, within thirty (30) days after the delivery of the Abandonment Notice, to acquire the Project Assets at the Proposed Price by delivering to Investor written notice (the "**Acquisition Notice**") of such election and making a non-refundable earnest money deposit with Escrow Agent in an amount equal to five percent (5%) of the Proposed Price ("**Abandonment Deposit**"). If Sponsor fails to timely deliver an Acquisition Notice or the Abandonment Deposit, Sponsor will be deemed to have unconditionally and irrevocably elected to waive its right to purchase the Project Assets pursuant to this Section 1.5.

(a) If Sponsor timely delivers an Acquisition Notice to Investor and the Abandonment Deposit to the Escrow Agent, the closing of the purchase and sale of Project Assets will occur within forty-five (45) days after delivery of the Acquisition Notice. The purchase and sale of the Project Assets pursuant to this Section 1.5 will be consummated in accordance with the terms and provisions of this Agreement relating to the sale of real property between Members. If the closing of Sponsor's acquisition of the Project Assets shall fail to occur because of a default by Sponsor, then in addition to the right to thereafter sell such Project Assets without further consent or approval of Sponsor, Investor shall have the right to cause the Company, as its exclusive monetary remedy, to retain the Abandonment Deposit as liquidated damages (it being agreed that in such instance the Company's and Investor's monetary damages would be difficult, if not impossible, to ascertain).

(b) If Sponsor elects or is deemed to elect not to exercise its right to purchase the Project Assets pursuant to this Section 1.5, Investor will be free to cause the Company to market the Project Assets and sell such Project Assets to a Third Party in good faith at any price that equals or exceeds 90% of the Proposed Price, as long as a binding contract to purchase the Project Assets is executed with 6 months subsequent to Sponsor declining (or being deemed to decline) to purchase same, in accordance with the procedures described in Section 1.5(c) below. If Sponsor timely delivers the Acquisition Notice and Abandonment Deposit but fails to timely close the acquisition of the Project Assets in accordance with Section 1.5(a), then Investor may cause the Company to market the Project Assets and sell same to a Third Party at any price and on any terms determined in good faith by Investor.

(c) If Investor is entitled to cause the Company to sell the Project Assets pursuant to this Section 1.5, then Investor shall have the right to immediately commence and control the marketing and sale of the Project Assets on behalf of the Company, and Sponsor shall co-operate in connection with such marketing and sale efforts. So long as Investor has the right to cause the Company to sell the Project Assets pursuant to this Section 1.5, Investor is hereby authorized to unilaterally execute, acknowledge and deliver on behalf of the Company any and all documentation (including, without limitation, a deed) reasonably required or deemed desirable to effectuate the sale of the Project Assets, and the unilateral signature of Investor in such circumstances shall constitute the valid, binding and enforceable act of the Company. Notwithstanding the authority of Investor set forth above, upon Investor's request to Sponsor, Sponsor will execute, acknowledge and deliver, as a member of the Company, any such instruments and documents as may be necessary or desirable, in the Investor's discretion, in order to consummate the sale. The proceeds of the sale of the Project Assets will be distributed to the Members pursuant to Section 1.4.

(d) If a Project is abandoned by the Company at the direction of Investor pursuant to the terms of this Section 1.5, the Members' funding obligations in respect of such Project will cease as of the day the Abandonment Notice is delivered (although either party may elect to continue to fund Predevelopment Costs for such Project in its sole discretion, which such fundings shall not be treated as Capital Contributions hereunder).

DEVELOPMENT TERMS

The terms and provisions below shall apply solely to a Project after it has been converted to a Development Project and before it becomes a Core Project (if applicable).

2.1 Conversion to Development Project. A Project will be converted to a Development Project upon satisfaction or waiver by the Members of all Development Conditions in respect of such Project. The "Development Conditions" for a Project shall mean all of the following conditions precedent to commencement of construction of the Project: (a) the Company shall have obtained all final and unappealable governmental entitlements, design review and other governmental approvals for the Project (subject only to issuance of building permits upon payment of customary building permit fees); (b) the Members have approved the final plans and specifications for the Project; (c) all architects' and engineers' agreements and construction contracts required for the design, engineering, development and construction of the Project have been executed and delivered in the forms approved by the Members; (d) the Members have agreed upon a final development budget for the Project; (e) Investor's Investment Committee has approved, in its sole and absolute discretion, the Project and commencement of construction of the

Project (including the development budget, plans and specifications, design and construction documents, and construction financing for the Project); and (f) the Company has obtained a construction loan for the construction of the Project in an amount and containing terms, covenants and conditions acceptable to the Members.

2.2 **Development Contributions.** Upon conversion of a Project to a Development Project, the outstanding balance of all Project-Specific Contributions made by the Members in respect of such Project and all accrued and unpaid Operating Return thereon (after taking into account any distributions received by the Members during the Predevelopment Period in respect of such Project) will be converted to, and will be thereafter treated as, Development Contributions (as defined below). Thereafter, within ten (10) days after delivery to the Members of a capital call notice, Investor shall fund all Development Contributions required by the Company in connection with the construction of the Project until the balance of Investor's and Sponsor's respective outstanding Development Contributions are in the ratio of their respective Development Funding Percentages (as defined below), and once the Members' outstanding Development Contributions are in the ratio of their Development Funding Percentages, Development Contributions required by the Company shall be made in accordance with the Members' respective Development Funding Percentages and pursuant to (and subject to the conditions of) the capital funding provisions of this Agreement.[56] For avoidance of doubt, following the conversion of a Project to a Development Project and the conversion of the Members' Project-Specific Contributions and accrued and unpaid Operating Return thereon to Development Contributions, the Project-Specific Contributions made by the Members (and all Operating Return thereon) in respect of such Project shall be deemed paid to the Members and thereby reduced to zero. All Development Contributions made by a Member will earn and accrue a return ("**Development Contribution Return**") at the rate of ten percent (10%) per annum, compounded monthly, from the date credited as Development Contributions or made to the Company, as the case may be, until returned to the Member pursuant to Section 2.3 below. As used herein, "**Development Contributions**" shall mean all Capital Contributions made by the Members to the Company other than Predevelopment Contributions and Core Project Contributions, and "**Development Funding Percentages**" means ninety percent (90%) in the case of Investor and ten percent (10%) in the case of Sponsor.

2.3 **Distributions - Development Projects**. All operating cash flow and capital proceeds derived by the Company from Development Projects shall be aggregated and distributed on a monthly basis within ten (10) days after the end of each calendar month or, in the case of capital proceeds, within ten (10) days after the Company's receipt thereof, in each case to the Members in the following order of priority:

(a) First, pro rata to the Members in accordance with the accrued but unpaid Development Contribution Return owing to each Member, to be applied against and to pay such

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[56] Among other remedies, a Member may fund a Default Loan (having the terms described in Section 1.3(a) above) to the other Member in the event that such other Member fails to fund its required Development Contribution(s). Also, the Agreement may require the Sponsor to fund cost overruns, and if so provided, a Default Loan may be made by Investor to Sponsor upon the failure by Sponsor to satisfy such obligation; provided that, the proceeds of any such Default Loan made in respect of Sponsor's failure to fund cost overruns would not be credited as a Development Contribution or Capital Contribution to the Company unless and except to the extent that Sponsor would receive Development Contribution and/or Capital Contribution credit for such cost overruns pursuant to the terms of the Agreement.

accrued and unpaid Development Contribution Return, until all accrued and unpaid Development Contribution Return has been paid in full to each Member;

(b) Second, pro rata to the Members in accordance with the outstanding balance of each Member's Development Contributions, to be applied against and to return such Development Contributions, until all Development Contributions have been returned in full;

(c) Third, seventy percent (70%) to Investor and thirty percent (30%) to Sponsor until Investor has achieved an IRR equal to 14%;

(d) Fourth, sixty percent (60%) to Investor and forty percent (40%) to Sponsor until Investor has achieved an IRR equal to 18%; and

(e) Thereafter, fifty percent (50%) to each of Investor and Sponsor.

Notwithstanding the foregoing to the contrary, if any Default Loan remains outstanding and unpaid as of the date that any distribution is to be made above, then any amounts otherwise distributable to a Failing Member pursuant to this Section 2.3 will be distributed instead to the Nonfailing Member until such Nonfailing Member's Default Loan(s) (including, without limitation, all accrued and unpaid interest thereon) has/have been paid to such Nonfailing Member in full. Amounts distributed to a Nonfailing Member in respect of its Default Loan pursuant to this paragraph shall, nonetheless, constitute a distribution to the Failing Member (and not the Nonfailing Member) for purposes of this Agreement.

2.4 Developer's Liquidity Option Right.[57]

(a) Provided that neither it nor any of its Affiliates are in default under this Agreement or any other instruments or agreements entered into by Sponsor or its Affiliate pursuant to this Agreement or the Projects, at any time during the six (6) month period commencing on the second (2nd) anniversary of Substantial Completion of a Development Project, Sponsor shall have the option (the "**Liquidity Option**") to exercise the liquidity rights set forth in this Section 2.4 with respect to such Development Project.

(b) Sponsor may exercise the Liquidity Option by timely delivering a written exercise notice to Investor (the "**Liquidity Exercise Notice**") identifying the applicable Development Project. Upon delivery of a Liquidity Exercise Notice for a Development Project, the Members shall proceed to determine the Market Value of such Development Project pursuant to the modified baseball valuation process set forth in this Agreement.[58]

[57] Note that the Agreement will typically include other exit rights in favor of the Members including, potentially, buy/sell rights and the right of Investor to force a sale of Projects subject to a right of first offer in favor of Sponsor.

[58] See Exhibit G for a sample valuation process.

(c) Within thirty (30) days after the Market Value of the Development Project is determined and communicated to both Members (the "**Election Period**"), Investor shall notify (the "**Election Notice**") Sponsor of its election to:

(1) purchase the Development Project for a price equal to the Market Value within thirty (30) days after the expiration of the Election Period and in accordance with the terms and provisions of Section [__][59];

(2) convert the Development Project to a Core Project;[60] or

(3) permit the sale of the Development Project to a Third Party for a cash price not less than ninety-seven percent (97%) of the Market Value (in such event Investor's election to permit such sale shall be binding upon Investor for six (6) months after Sponsor's receipt of Investor's election and the Managing Member shall cause the Company to hire a Third Party broker that is reasonably acceptable to Investor and Sponsor to list and market the Development Project for sale and make every reasonable effort to effect and close a sale to a Third Party at a price not less than ninety-seven percent (97%) of the Market Value during such 6-month period.

If Investor fails to make an election during the Election Period, then Investor shall be deemed to have elected to permit the sale of the Development Project pursuant to Section 2.4(c)(3).

(d) If Investor makes the election described in Section 2.4(c)(2) with respect to a Project, then (i) such Project shall become a Core Project and shall cease to be a Development Project for purposes of this Agreement as of the date (the "**Conversion Date**") that the Election Notice is delivered, (ii) the Hypothetical Liquidation Proceeds (as defined below) that a Member would receive pursuant to the distribution waterfall set forth in Section 2.3 shall constitute such Member's initial Core Contributions in respect of such Core Project, and (iii) all future contributions to, and distributions by, the Company in respect of such Project shall be made in accordance with, and pursuant to, the Core Terms set forth below. As used herein, the "**Hypothetical Liquidation Proceeds**" shall mean the net amount that the Company would receive upon the sale of the Development Project at the Market Value, after deducting the outstanding balance of all indebtedness secured by such Project and the brokerage commissions, documentary transfer and/or excise taxes, title insurance premiums, escrow fees, and other amounts that would be incurred by the Company upon the sale of the Project at the Market Value to a Third Party (as determined by the Company's Accountants), and after making the customary proration adjustments described in Section [__] hereof.[61]

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[59] The Agreement will include a section setting forth standard purchase and sale terms (including prorations adjustments, closing documents, remedies, etc.) that apply to the sale of Projects to a Member or the sale of interests in the Company between Members.

[60] See Exhibit H for a sample conversion provision.

[61] The Agreement will include a section setting forth standard purchase and sale terms (including prorations adjustments) that apply to the sale of Projects to a Member or the sale of interests in the Company between Members.

(e) If Investor makes (or is deemed to make) the election described in Section 2.4(c)(3) with respect to a Development Project and such Project is not sold for a cash price equal to or greater than ninety-seven percent (97%) of the Market Value within the 6-month period described therein, then Sponsor's liquidity rights hereunder in respect of such Project shall terminate and be of no further force or effect.

CORE TERMS

The following terms and provisions shall apply to each Project, severally, that is converted to a Core Project pursuant to Section 2.4(c)(2) from and after the after the Conversion Date for each such Project. For the avoidance of doubt, in the event of a conflict between the terms and provisions below and any other terms or provisions of this Agreement, the terms and provisions below will govern and apply to a Core Project.

3.1 Core Contributions. On and as of the Conversion Date for a Core Project, the Members shall be deemed to have funded the initial Core Contributions in respect of such Core Project as provided by Section 2.3(d) above, and thereafter the Managing Member may call, and the Members shall make, additional Core Contributions in respect of such Core Project as provided below. Within ten (10) days following the delivery of a capital call to the Members calling capital in respect of a Core Project, each Member shall contribute to the Company the amount specified in the capital call *multiplied by* such Member's Core Percentage Interest in respect of such Core Project. As used herein, "**Core Contributions**" shall mean, for a Member as of any given date and in respect of a Core Project, the aggregate capital contributions made or deemed made by such Member as of such date in respect of such Core Project, and a Member's "**Core Percentage Interest**" in respect of a Core Project shall equal, as of a particular date, the quotient stated as a percentage equal to (x) the aggregate Core Contributions made (and/or deemed made) by such Member in respect of such Core Project as of such date *divided by* (y) the aggregate Core Contributions made (and/or deemed made) by all Members in respect of such Core Project as of such date, as such Core Percentage Interests may be adjusted from time to time pursuant to Section 3.2(c) below.

3.2 Failure to Make Core Contributions. With respect to any Core Contributions required to be made by the Members in respect of a Core Project pursuant to this Agreement, if (i) a Member (the "**Failing Member**") fails to contribute an amount equal to the entire amount required to be contributed by it pursuant to, and within the applicable time period provided in, Section 3.1 above (the amount not contributed the "**Default Amount**"), and if the other Member (the "**Nonfailing Member**") has made its entire corresponding contribution, then the Nonfailing Member may, but need not, elect to exercise one of the following rights and remedies.

(a) Withdrawal of Contribution. The Nonfailing Member shall have the right to withdraw from the Company its corresponding Core Contribution made pursuant to Section 3.1.

(b) Making of Core Priority Contribution. The Nonfailing Member shall have the right to make a separate capital contribution to the Company (a "**Core Priority Contribution**") in an amount not to exceed the sum of (i) the Default Amount, plus (ii) one hundred percent (100%) of the corresponding Core Contribution made (and required to be made) by the Nonfailing Member pursuant to Section 3.1 (in which case such corresponding Core Contribution made (and required to be made) by the Nonfailing Member pursuant to Section 3.1 will be deemed instead to be part of the funds advanced in connection with the making of the Core Priority Contribution and not a Core Contribution). Each Core Priority Contribution shall earn and accrue a preferred return (the "**Core Priority Return**") at the Applicable Rate so long as such Core Priority Contribution remains outstanding.

(c) Making of Core Default Contribution. The Nonfailing Member shall have the right to make a separate capital contribution to the Company (a "**Core Default Contribution**") in an amount not to exceed the Default Amount, whereupon the Core Percentage Interests of the Members shall be adjusted immediately upon the making of such Core Default Contribution as provided in this Section 3.2(c) below. For purposes of determining the Core Percentage Interests of the Members hereunder, the Nonfailing Member who made such Core Default Contribution will be deemed to have made a Core Contribution to the Company equal to one and one-half times (i.e., 150% of) the Default Amount, and the aggregate Core Contributions of the Failing Member will be reduced by an amount equal to fifty percent (50%) of the Default Amount but not below $0.00, and the Core Percentage Interests of the Members shall be thereafter recalculated pursuant to the definition of "Core Percentage Interests" in Section 3.1 hereof. The adjustment of the Core Percentage Interests and the Core Contributions of the Members hereunder shall constitute satisfaction of the Default Amount and shall cure the Failing Member's default hereunder.

3.3 Core Project Distributions. The Company shall distribute operating cash flow and capital proceeds derived by the Company from a Core Project on a monthly basis within ten (10) days after the end of each calendar month or, in the case of capital proceeds, within ten (10) days after the Company's receipt thereof, in each case to the Members in the following order of priority:

(a) First, pro rata to the Members in accordance with the accrued but unpaid Core Priority Return, if any, in respect of such Core Project owing to each Member, to be applied against and to pay such accrued and unpaid Core Priority Return, until all such accrued and unpaid Core Priority Return has been paid in full to each Member;

(b) Second, pro rata to the Members in accordance with the outstanding balance of each Member's Core Priority Contributions, if any, made in respect of such Core Project, to be applied against and to return such Core Priority Contributions, until all such Core Priority Contributions have been returned in full; and

(c) Thereafter, to the Members in accordance with their respective Core Percentage Interests for such Core Project.

Notwithstanding the provisions of this Section 3.3 above, if any Default Loan(s) remain(s) outstanding and unpaid as of the date that any distribution is to be made in respect of a Core Project pursuant to this Section 3.3, then any amounts otherwise distributable to a Failing Member pursuant to this Section 3.3 in respect of such Core Project will be distributed instead to the Nonfailing Member in repayment of such Default Loans(s) until such Nonfailing Member's Default Loan(s) (including, without limitation, all accrued and unpaid interest thereon) has/have been paid to such Nonfailing Member in full.