MULTI-PARTY LIMITED LIABILITY COMPANY
OPERATING AGREEMENT

A form of Operating Agreement for use in multi-party limited liability companies annotated to the Delaware Limited Liability Company Act. The form is based upon the accompanying Fact Scenario, and is designed to raise issues and to propose suggested language for a heavily negotiated transaction among theoretical equals, including capital contributions (initial and additional), tax allocations and cash distributions, management, dispute resolution and indemnification.

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LIMITED LIABILITY COMPANY AGREEMENT

This Limited Liability Company Agreement ("***Agreement***"), dated as of _____, is entered into by and between _____, a Delaware limited liability company ("***Member 1***") and _____, a Delaware limited partnership ("***Member 2***").

Statement of Facts

The parties hereto desire, *inter alia*, to provide for the operation, management and governance of that certain limited liability company known as MEGA MALL ASSOCIATES, LLC (the "***Company***"), which has heretofore been formed pursuant to the Delaware Limited Liability Company Act (as amended from time to time, the "***Delaware Act***").

NOW, THEREFORE, in consideration of the respective agreements hereinafter set forth, the parties hereto hereby agree as follows:

ARTICLE 1[1]
DEFINITIONS

1.1 ***Definitions***. In addition to the other terms and phrases defined elsewhere in this Agreement, the following terms and phrases shall have the meanings set forth below when used in this Agreement:

"Additional Capital Contribution"[2] means any Capital Contribution made by a Member other than the Initial Capital Contribution, including any Scheduled Additional Capital Contribution, any Priority Additional Capital Contribution, any Deadlock Additional Capital Contribution and any Shortfall Additional Capital Contribution.

"Acquisition and Financing Costs" is defined in Section 4.1(a).

"***Adjusted Capital Account Balance***" means, with respect to any Member for any period, the balance, if any, in such Member's Capital Account as of the end of such period, after giving effect to the following adjustments:

(a) credit to such Capital Account any amounts that such Member is obligated to restore, or is deemed obligated to restore, as described in Treasury Regulation Sections 1.704-2(g)(1) and 1.704-2(i)(5); and

[1] Some practitioners prefer to place definitions at the end of the limited liability company agreement or in a schedule incorporated by reference. Such choices are a matter of personal preference.

[2] See Section 4.2.

(b) debit to such Capital Account the items described in Treasury Regulations Sections 1.704-1(b)(2)(11)(d)(4), 5 and 6.

"***Adjusted Capital Account Deficit***" means, with respect to any Member for any fiscal year, the deficit balance, if any, in such Member's Capital Account as of the end of such fiscal year, after giving effect to the following adjustments:

(a) credit to such Capital Account any amounts that such Member is obligated to restore, or is deemed obligated to restore, as described in the penultimate sentence of Treasury Regulation Sections 1.704-2(g)(1) and 1.704-2(i)(5); and

(b) debit to such Capital Account the items described in Treasury Regulation Sections 1.704-1(b)(2)(ii)(d)(4), (5) and (6).

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

"Adjusted Net Operating Income" is defined in Section 5.7.

"Adjustment Date" is defined in Section 5.7.

"Administrative Member" is defined in Section 6.11.

"Affiliate" means either[3]:

(a) with respect to an individual:

(i) any other Person directly or indirectly Controlled by such individual;

(ii) any biological, adopted or adoptive parent, grandparent, adult sibling, adult child, or adult grandchild, or the spouse[4], of such individual;

(iii) any trust established for the benefit of such individual, for the benefit of any biological or adopted minor child or minor grandchild of such individual, or for the benefit of any other individual described in subsection (ii) above; or

[3] See definitions of Member 1 Permitted Transferee and Member 2 Permitted Transferee. The term "Affiliate" is used in several contexts in this Agreement. There is an inherent tension with respect to its use. Defined broadly, it allows for an expansive set of permitted transfers of interests. See also Section 6.17 (affiliate transactions).

[4] Consider the consequences of the use of the term "Affiliate" in the various contexts in which it is used.

(iv) the testamentary estate, executor, executrix, administrator, final representative, heir, or devisee of such individual; and

(b) with respect to any Person that is other than an individual:

(i) any other Person directly or indirectly controlling, controlled by, or under common control with such Person;

(ii) any other Person owning or controlling 10% or more of the outstanding voting interests in such Person;[5]

(iii) any officer, director, general partner, manager, or managing member of such Person;[6] or

(iv) any other Person that is an officer, director, general partner, manager, managing member, or holder of 10% or more of the voting interests of any other Person described in subsections (i) through (iii) above.

"Agreement" means this Limited Liability Company Agreement as it may be amended from time to time in accordance with Section 13.13.[7]

"Arbitration Rules" is defined in Section 13.18.

"Available Funds" is defined in Section 5.7.

"Budget" means, collectively, the Operating Budget and the Capital Budget, as the same are approved by the Executive Committee and in effect from time to time pursuant to Section 8.6.[8]

"Business Day" means, any day other than a Saturday, Sunday, or day on which national banks in Maryland are closed.

"Buy-Sell Offer" *is* defined in Section 7.1.

"Capital Account" *is* defined in Section 4.4.

[5] Is a 10% threshold too low? Should the threshold be expanded to include "economic interests"?

[6] Consider excluding so-called "independent directors".

[7] See DLLCA §18-101(7).

[8] See Sections 6.12, 6.13, 6.14 and 8.6.

"Capital Budget" means the budget covering the Company's anticipated capital expenses, as approved by the Executive Committee and in effect from time to time pursuant to Section 8.6, which budget shall, at a minimum, set forth:

(a) on a reasonably detailed line-item basis all anticipated capital expenses of the Company for the fiscal year in question; and

(b) if so defined by the Executive Committee, the amount(s) and due dates of any Scheduled Additional Capital Contributions required to be made by the Members to the Company during such fiscal year to meet such capital expenses.

"Capital Contribution" means, with respect to any Member, the Initial Capital Contribution and any Additional Capital Contribution required or permitted to be made by such Member to the Company pursuant to this Agreement.[9]

"Certificate of Formation" *is* defined in Section 2.1.

"Closing" means the Company's concurrent closing of:[10]

(a) the acquisition of the Shopping Center; and

(b) the Initial Loan.

"Code" means the Internal Revenue Code of 1986, as amended.

"Company" *is* defined in the Statement of Facts.

"Company Accountant" *is* defined in Section 8.4.

"Company Liability" *is* defined in Section 5.7.

"Company Minimum Gain" is defined in Section 5.7.

"Company Nonrecourse Deduction" *is* defined in Section 5.7.

"Company Nonrecourse Liability" *is* defined in Section 5.7.

"Company Property" means any asset or other property (real, personal or mixed) owned by, or leased to, the Company (including, but not limited to, the Shopping Center) [or a wholly-owed subsidiary of the Company].[11]

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[9] See Article 4.

[10] This Agreement assumes that the Company Property initially acquired by the Company will be acquired concurrently with the disbursement of the loan in question.

[11] Consider whether a more narrowly focused definition is appropriate. See Section 2.6.

"Competing Property" is defined in Section 6.20.

"Confidential Information" is defined in Section 13.16.

"Contributing Member" is defined in Section 4.3.

"Control" (including the terms *"control", "controlling", "controlled by"* and *"under common control with")* means the possession, directly or indirectly, by voting securities, contract or otherwise (including, but not limited to, through an Affiliate), of the power to:

(a) vote ten percent (10%) or more of the outstanding voting securities in a Person; or

(b) otherwise direct management policies of a Person by contract or otherwise.[12]

"Deadlock" *is* defined in Section 6.10.[13]

"Deadlock Additional Capital Contribution" is defined in Section 4.2(c).

"Deadlock Contributing Member" is defined in Section 4.2(c).

"Deadlock Major Decision" [14] shall mean the following matters pertaining to the Company's business (or the business of any of the Company's subsidiaries):[15]

(a) any financing, refinancing or securitization (including, but not limited to, interim and permanent financing) of all or any portion of the Company Property (including, but not limited to, all or any portion of the Shopping Center) and/or of the operations of the Company [and its subsidiaries] (regardless of whether secured or unsecured), the use of any proceeds of any such financing, refinancing, or securitization [unscheduled prepayment or defeasance of any financing,] and the execution and delivery of any documents, agreements or instruments evidencing, securing, governing, amending or otherwise relating to any such financing, refinancing or securitization including, requests for waivers or consents;

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[12] This definition is relevant to the definition of "Affiliate." Consider the appropriateness of the 10% threshold.

[13] If a Deadlock exists, the buy-sell provisions of Section 7.1 may become operative.

[14] DLLCA §18-402 permits the limited liability company agreement to set forth how the members intend to manage the Company.

[15] Note that the greater the number of deadlock items, the greater the number of items that might result in a deadlock that may result in use of the buy-sell provisions of Section 7.1. See Section 6.10.

(b) the approval of any Budget or Operating Plan (as well as any amendments or modifications thereto), the determination at any time that a Shortfall then exists (or will exist in the future) and/or the making of a request to the Members that they make Shortfall Additional Capital Contributions pursuant to Section 4.2(b);

(c) after the first (1st) anniversary of the Closing, any sale, restructuring, transfer or other disposition of all or any portion of the Shopping Center, or of any other material Company Property, as well as any lease of all or substantially all of the Shopping Center,

(d) the making, amendment, modification or termination (other than terminations occasioned by a default by a tenant in the payment of rent not cured prior to the expiration of any applicable grace or curative period) of, the release of any liability of any tenant or guarantor of, or security provided with regard to, a lease, or waiver of any obligations of the tenant under, or with respect to, or the giving or withholding of any consent or approval required to be obtained by any tenant under, any lease of space within the Shopping Center or of any other Company, if the lease in question covers more than 10,000 square feet of rentable space;

(e) the establishment of reserves in excess of those required under the Initial Loan Documents;[16]

(f) the determination of the amount of Available Funds;[17]

(g) the institution of any legal proceedings in the name of the Company [or any subsidiary of the Company], the settlement of any legal proceedings brought by or against the Company and the confession of any judgment against the Company [or any subsidiary of the Company] or against any Company Property, that shall, in respect of any of the foregoing, involve an amount in dispute that is greater than $250,000, other than the institution of any eviction or other proceeding against tenants who are in default under their leases;

(h) either:

(i) the filing of any voluntary petition in bankruptcy on behalf of the Company [or any subsidiary of the Company] or the initiation of any proceeding to have the Company [or any subsidiary of the Company] adjudicated bankrupt or insolvent;

[16] Consider whether this should also include release or use of funds in reserves other than for their initially intended purposes.

[17] See DLLCA §18-607 (Limitations on Distribution). See also footnote 23 on Operating Expenses; Operating Expenses determine Available Funds and such determination is to be made under Section 5.7 by the Company's accountants.

(ii) the giving of consent to the institution of bankruptcy or insolvency proceedings against the Company [or any subsidiary of the Company];

(iii) the filing of any petition seeking, or consenting to, reorganization or relief, with respect to the Company [or any subsidiary of the Company] as a debtor, under any applicable federal or state law relating to bankruptcy, insolvency, or other relief for debtors;

(iv) the seeking, or giving of consent to, the appointment of any trustee, receiver, conservator, assignee, sequestrator, liquidator, or other similar official of the Company [or any subsidiary of the Company] or of all, or any substantial part, of its assets;

(v) the making of any general assignment for the benefit of creditors of the Company [or any subsidiary of the Company];

(vi) the admission in writing of the inability of the Company [or any subsidiary of the Company] to pay its debts generally as they become due;

(vii) the declaration or effecting of a moratorium on any debt of the Company [or any subsidiary of the Company]; or

(viii) the taking of any action by the Company [or any subsidiary of the Company] in furtherance of any action described in this subsection (g); and

(i) the entering into, amendment, termination or renewal of (or the giving or withholding of waivers or required consents), any asset or property management or leasing agency agreement with regard to the Company [or any subsidiary of the Company] or any Company Property.

"Deadlock Meeting" is defined in Section 6.10.

"Deadlock Non-Contributing Member" is defined in Section 4.2(c).

"Debt Service" is defined in Section 5.7.

"Defense Costs" is defined in Section 10.2(b).

"Delaware Act" is defined in the Statement of Facts.

"Demand Notice" is defined in Section 13.18(a).

"Distribution" is defined in Section 5.7.

"Election" is defined in Section 7.1(c).

"Event of Default" is defined in Section 12.1.

"Executive Committee" is defined in Section 6.1.

"First Deadlock Notice" is defined in Section 6.10.

"GAAP" means generally accepted accounting principles consistently applied in the United States of America.

"Gross Asset Value" is defined in Section 5.7.

"Indemnitee" is defined in Section 10.1.

"Initial Buy-Sell Date" is defined in Section 7.1.

"Initial Capital Contributions" means, with respect to any Member, any capital contribution made by such Member pursuant to Section 4.1.

"Initial Lender" means the initial holder and any successor holder of the Initial Loan.

"Initial Loan" means a loan in the amount of $_____ to be made by the Initial Lender to the Company, which loan shall be secured by, among other things, the Shopping Center.

"Initial Loan Documents" means all notes, deeds of trust, assignments, certificates, agreements and other documents, instruments and writings evidencing or securing, or otherwise executed and delivered by the Company with respect to, the Initial Loan.

"Interest"[18] means, with respect to any Member at any time, the interest of such Member in the Company at such time, including, but not limited to:

(a) the right of such Member to any and all of the benefits to which such Member may be entitled as provided in this Agreement; and

(b) the obligations of such Member to comply with all of the terms and provisions of this Agreement.

"Liquidating Member" means the Member designated as such by the Executive Committee, ***provided, however,*** that any Member that causes the dissolution of the Company under Section 12.1 (e) or whose action gives rise to the dissolution of the Company pursuant to Section 11.1(e), shall not serve as the Liquidating Member.[19]

[18] See DLLCA §18-101(8).

[19] See DLLCA §18-803 and 18-804.

"Major Decision" means any material matter pertaining to the Company's business, including, without limitation, the following matters:[20]

(a) any Deadlock Major Decision; and

(b) to the extent not subsumed within the definition of Deadlock Major Decision:

(i) any sale, restructuring, transfer, or other disposition of all or any portion of the Shopping Center or of any other material Company Property, as well as any lease of all or substantially all of the Shopping Center;

(ii) the making of any expenditure (including, but not limited to, any expenditure for any improvement, rehabilitation, alteration, repair, or completion of construction of the Shopping Center, of any portion thereof, or of any other Company Property) that either is not of a nature contemplated by a line item in the then existing Budget or, if such expenditure is of a nature contemplated by such a line item, is of an amount that either.

(1) is in excess of the then remaining balance of the line item amount for expenditures of such nature set forth in the then existing Budget by at least the lesser of:

(x) Twenty-Five Thousand ($25,000) Dollars; or

(y) the greater of Five Thousand ($5,000) Dollars or fifteen percent (15%) of such line item amount; or

(2) results, when taken together with all prior variances from the then existing Budget during such budget year under this subsection (b)(iv) and with all variances from the same for which the Company has become obligated pursuant to subsection (b)(v) below, in an increase in the total Budget for such budget year of fifteen percent (15%) or more,

provided, however, that, notwithstanding anything to the contrary in this subsection (b)(ii), any expenditures for tenant improvements or leasing commissions that are in excess of the then remaining balance of the line item amounts for expenditures of such nature set forth in the then existing Budget shall constitute a Major Decision, except if, and to the extent that, such expenditures are required to fulfill obligations specifically imposed upon the Company pursuant to the terms of leases or brokerage agreements (as the case may be)

[20] See Section 6.1.

approved by the Executive Committee pursuant to the applicable provisions of this Agreement;

(iii) the execution of any contract, instrument, or other document by, or on behalf of, the Company, any other incurrence of an obligation by, or on behalf of, the same and/or any amendment or modification of any then existing contract, instrument, document, or obligation (including, but not limited to, the execution, incurrence, amendment and/or modification of any contract, instrument, document and/or obligation for any improvement, rehabilitation, alteration, repair, or completion of construction of the Shopping Center, of any portion thereof, or of any other Company Property) that either:

(1) obligates the Company to make any expenditure that is not of a nature contemplated by a line item in the then existing Budget;

(2) obligates the Company to make any expenditure, or any series of expenditures, in connection with the transaction in question or any series of related transactions that, when *taken together with all related* expenditures made or obligated to be made during the fiscal year in question, would constitute a Major Decision pursuant to subsection (b)(ii)(1) above if such expenditure, or series of expenditures, were to be made on the date upon which such contract, instrument, document and/or obligation were executed, incurred, amended, or modified (as the case may be).

(3) is of a nature, or contains any term, that either is not of a nature contemplated by the then existing Operating Plan or materially conflicts with the applicable guidelines contained in the same; or

(4) is not terminable (without penalty) by the Company on thirty (30) calendar days or less written notice to the other party or parties (unless such longer notice period has been previously approved by the Executive Committee);

(iv) the making, amendment, modification, or termination of any lease of space within the Shopping Center or of any other Company Property that is not in accordance with the applicable leasing guidelines constituting a portion of the then existing Operating Plan (regardless of the amount of square feet of rentable space covered thereby);

(v) the establishment of reserves (regardless of whether in excess of those amounts required under the Initial Loan Documents);

(vi) the institution of any legal proceedings in the name of the Company, the settlement of any legal proceedings brought by or against the

Company and the confession of any judgment against the Company or any property of the Company (regardless of the amount in dispute), other than:

(1) the institution of any eviction or similar proceedings against tenants who are in default under their leases;

(2) the institution of legal proceedings of an immaterial nature and size against any contractors) or vendors) to the Company;

(3) the settlement of legal proceedings of an immaterial nature and size brought by any contractors) or vendors) against the Company; or

(4) other proceedings contemplated or provided for in the then existing Operating Plan;

(vii) the possession of any Company Property, or the assignment of any rights in the same, other than for the purposes of the Company;

(viii) the engagement of any sales, leasing, or placement agent, or broker, not specifically permitted hereunder, for the acquisition, disposition, financing, refinancing or leasing of the Shopping Center and/or any other Company Property; and

(ix) the entering into, or consummation of, any transaction or arrangement with any Member or any Affiliate of any Member, or any other transaction involving an actual or potential conflict of interest;

(x) any approval, determination, or other action expressly reserved to the Executive Committee under this Agreement (including, but not limited to, any modification, amendment, or renewal of any matter previously requiring the approval of the Executive Committee or the Members);

(xi) any act that would make it impossible to carry on the ordinary business of the Company, except as specifically otherwise provided in this Agreement and

(xii) any act that is in contravention of any of the provisions of this Agreement.

"Management Agreement" means, for any period, the property management agreement then in effect pursuant to which the then Property Manager shall manage, lease and/or otherwise operate the Company Property (including, but not limited to, the Shopping Center) on a day-to-day basis as the property manager and/or leasing agent for the Company.

"Mandatory Additional Capital Contribution" means any Scheduled Additional Capital Contribution or Shortfall Additional Capital Contribution.

"Member" means Member 1, Member 2, or any other Person admitted as a member of the Company in accordance with this Agreement in such Person's capacity as a Member of the Company within the meaning of the Delaware Act.[21]

"Member Minimum Gain" is defined in Section 5.7.

"Member Nonrecourse Liability" is defined in Section 5.7.

"Member Nonrecourse Deductions" is defined in Section 5.7.

"Member 1" means _____, a Delaware limited liability company.

"Member 1 Permitted Transferee" means any Affiliate of Member 1 with respect to which _____ and _____ (or a replacement or replacements thereof reasonably satisfactory to Member 2) jointly constitute the senior management or otherwise are jointly vested, directly or indirectly, with the authority and responsibility to make the day-to-day decisions concerning the operation and management thereof.

"Membership Interest" or ***"Member's Interest"*** *is* defined in Section 5.7.

"Member 2" means _____, a Delaware limited partnership.

"Member 2 Permitted Transferee" means any Affiliate of Member 2.[22]

"Net Cash Flow" is defined in Section 5.7.

"Net Loss" is defined in Section 5.7.

"Net Profit" is defined in Section 5.7.

"Net Operating Income" is defined in Section 5.7.

"Nonrecourse Deductions" is defined in Section 5.7.

"Non-Contributing Member" located in Section 4.3.

"Notices" is defined in Section 13.3.

[21] See DLLCA §18-101(11).

[22] See Section 10.2.

"Offeree" is defined in Section 7.1.

"Offeree Value" is defined in Section 7.1(b).

"Offeror" is defined in Section 7.1.

"Offeror Value" is defined in Section 7.1(b).

"Offsettable Decrease" is defined in Section 5.7.

"Operating Budget" means the budget covering the Company's anticipated operations, as approved by the Executive Committee and in effect from time to time pursuant to Section 9.6, which budget shall, at a minimum, set forth:

(a) on a reasonably detailed line-item basis all anticipated income and all anticipated non-capital costs and expenses of the Company for the fiscal year in question; and

(b) if so determined by the Executive Committee, the amounts and due dates of any Scheduled Additional Capital Contributions required to be made by the Members to the Company during such fiscal year to meet such non-capital costs and expenses.

"Operating Expenses" is defined in Section 5.7.[23]

"Operating Plan" means the strategic and comprehensive operating plan designed to maximize the Company's returns from the Shopping Center, as approved by the Executive Committee and in effect from time to time pursuant to Section 9.6, which operating plan shall contain, at a minimum:

(a) an overview of the status of the Company Property as of the date of such operating plan;

(b) a schedule of existing leases affecting the Shopping Center as of the date of such operating plan, including and specifying those leases that are scheduled to expire during the upcoming fiscal year and those that the Administrative Member would propose not to renew or to seek cancellation of, and the proposed cost of any cancellation program;

[23] Section 5.7 sets forth the definition of Operating Expenses as determined by the Company's certified public accountants. The parties may wish to deal with the possibility that the Company's certified public accountants may not necessarily determine Operating Expenses as of the end of each period as to which distributions are to be determined. Further, the definition of Operating Expenses in Section 5.7 ties into customary accounting principles as opposed to generally accepted accounting principles and references the Uniform System of Accounts (which may not be appropriate for non-lodging properties).

(c) leasing guidelines for identifying those leases, and amendments and modifications of leases, that the Executive Committee would consider for approval, including, but not limited to:

(i) a standard form or forms of lease to be offered to prospective tenants, to the extent that the same shall differ from the form or forms of lease then in use in connection with the Shopping Center;

(ii) a rent schedule setting forth proposed rentals for each floor (and, if applicable, portions thereof for the upcoming fiscal year, and

(iii) a description of any tenant inducements, concessions, improvements, or allowances to be offered prove tenants;

(d) recommended strategies for enhancing the value or repositioning of the Shopping Center, including, but not limited to, plans for the renovation or rehabilitation of the same, the marketing of the Shopping Center for leasing and the preparation and release of promotional and advertising material relating to the same or concerning the Company;

(e) to the extent that the Administrative Member or the Executive Committee considers the same to then be appropriate, recommendations regarding:

(i) the amendment, modification, alteration, change, cancellation, or prepayment of any indebtedness evidenced by any mortgage or other loan presently or hereafter affecting any Company Property;

(ii) the sale or other disposition of any or all of the Company Property;

(iii) the procurement of title insurance and other insurance for the Company; and/or

(iv) the increase or decrease of the insurance carried by, or on behalf of, the Company;

(f) recommendations concerning the selection of legal counsel, accountants, structural and environmental engineers, appraisers, real estate brokers, leasing agents and other professionals for the Company in order to efficiently implement the operating plan; and

(g) a 5-year pro forma budget for the Company Property.

"Overall Purchase Price" is defined in Section 7.1(a)(ii).

"Percentage Interest" means:

(a) with respect to Member 1, twenty-five percent (25%); and

(b) with respect to Member 2, seventy-five percent (75%);

as either of the foregoing may be adjusted pursuant to the terms of this Agreement.[24]

"Person" means any individual, partnership, corporation, limited liability company, trust or other entity.

"Prevailing Party" is defined in Section 13.5.

"Priority Additional Capital Contribution" is defined in Section 4.3(a).

"Project Lender" means the Initial Lender and any other lender from time to time providing financing to the Company [or any subsidiary of the Company] secured by a lien on Company Property.

"Property Manager" means, for any period, the property manager under the Management Agreement then in effect.

"Qualified Individual" *is* defined in Section 13.18(b).

"Reasonable Period" means, with respect to any defaulting Member, a period of thirty (30) calendar days after such defaulting Member receives written notice of its default from a non-defaulting Member, *provided, however,* that, if such breach is susceptible of cure, but cannot reasonably be cured within such 30 day period, then such period shall continue for a maximum of up to ninety (90) calendar days from the defaulting Member's receipt of such notice of default, so long as such defaulting Member commences to cure the breach within such 30-day period and continues diligently to prosecute the cure to completion. However, the term "Reasonable Period" shall not be applicable to, and shall not be construed or implied to apply to, any default relating to a Member's failure to make Mandatory Capital Contributions pursuant to Section 4.2.[25]

"Regulations" is defined in Section 5.7.

"Related Person" is defined in Section 5.7.

"Requesting Party" is defined in Section 13.18(a).

[24] See Section 4.3.

[25] See Section 12.1.

"Responding Party" is defined in Section 13.18(b).

"Section 5.4(a) Amount" means, with respect to any Member at any time, the maximum amount that such Member could receive at that time under Section 5.4(a), reduced by amounts of return specified in clause (ii) of Section 5.4(a) that have not been paid as of the time the Section 5.4(a) Amount is computed.

"Section 5.4(b) Amount" means, with respect to any Member at any time, the maximum amount that such Member could receive at that time under Sections 5.4(a) and 5.4(b), reduced by amounts of return specified in clause (ii) of such Sections that have not been paid as of the time the Section 5.4(b) Amount is computed.

"Scheduled Additional Capital Contribution" is defined in Section 4.2(a)(ii).

"Second Deadlock Notice" is defined in Section 6.10.

"Securities Act" is defined in Section 13.1(g).

"Shopping Center" means the land, buildings, other improvements and all appurtenances thereto comprising that certain regional mall located on

"Shortfall" is defined in Section 4.2(b)(ii).

"Shortfall Additional Capital Contribution" is defined in Section 4.2(b)(ii).

"Taxing Jurisdiction" is defined in Section 5.7.

"Taxable Year" is defined in Section 5.7.

"Third Arbitrator" is defined in Section 13.18(b).

"Transfer" is defined in Section 9.1.

Any definition of a term contained in this Agreement (including, but not limited to, in this Section 1.1) shall have applicability throughout this Agreement, irrespective of whether *the term so* defined is used before or after the location of such definition in the text hereof.

1.2 ***Use of Accounting Terms.*** Each accounting term used, but not defined, in this Agreement shall have the meaning ascribed to it in accordance with GAAP.

1.3 ***Exhibits, Etc.*** References to an ***"Exhibit"*** are, unless otherwise specified, to one of the Exhibits attached to this Agreement, and references to an ***"Article"*** or a ***"Section"*** are, unless otherwise specified, to one of the Articles or Sections of this Agreement. Each Exhibit attached hereto and referred to in this Agreement is hereby incorporated herein by reference.

ARTICLE 2
ORGANIZATION

2.1 ***Formation.*** The Company has heretofore been formed by the filing of a certificate of formation of the Company (as such certificate of formation may be amended from time to time, the "***Certificate of Formation***"),[26] in the office of the Secretary of State of the State of Delaware, and has been duly qualified to conduct business in the State of Maryland.[27] The parties hereby ratify and adopt, in all respects, the execution and filing of the Certificate of Formation by an authorized person and the Company's application for qualification to conduct business in the State of Maryland.[28] Upon the filing of the Certificate of Formation with the Delaware Secretary of State, _____'s powers as authorized person shall cease, and the Administrative Member is hereby further authorized to file, or cause to be filed, and record, or cause to be recorded, any amendments to the Certificate of Formation, as well as such other documents as may be required or appropriate under the Delaware Act or the laws of any other jurisdiction in which the Company may conduct business or own property, so long as such amendments or documents are consistent with the terms of this Agreement and, unless approved by the Members, do not materially and adversely affect the rights or obligations of the Members.[29]

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[26] A Delaware limited liability company is, except as noted below, formed by filing the initial Certificate of Formation executed by one or more authorized persons with the Delaware Secretary of State. DLLCA §18-201(a)-(b). The certificate of formation must include the name of the limited liability company and the address of the registered office in Delaware and name and address of the registered agent in Delaware for service of process. DLLCA §18-201(a). The certificate of formation may include such other information as the members in the limited liability company may determine. DLLCA §18-201(a). See DLCCA §18-103 for requirements for registered office and registered agent. The limited liability company is formed at the time of the filing of the certificate of formation with the Delaware Secretary of State, but may be formed at a later date specified in the certificate of formation. DLLCA §18-201(b). The limited liability company agreement may be entered into before or after the filing of the certificate of formation, but may be made effective after the filing of the certificate of formation. DLLCA §18-201(d). The information to be specified in the certificate of formation is minimal. This should be contrasted with applicable requirements in other jurisdictions. For example, under DLLCA §18-203 of the Uniform Limited Liability Company Act ("ULLCA"), the articles of organization (the document analogous to the certificate of formation) requires the following information: (a) the name of the limited liability company, (b) the address of the initial designated office, (c) the name and street address of the initial agent for service of process, (d) whether the limited liability company has a term for its existence and, if applicable, the term of its existence, (e) whether the limited liability company is manager-managed, and, if so, the name and address of each initial manager and (f) whether any members are liable for the debts and obligations of the limited liability company. A ULLCA limited liability company's articles of organization may also include additional information. See ULLCA §203(b). Because the minimal information to be specified in a Delaware limited liability company certificate of formation, practitioners should strongly consider using a written limited liability company agreement in order to provide third parties and possible successors of the initial members with written readily determinable standards for the governance of the limited liability company. cf. DLLCA §18-101(7) (oral agreements permitted). To the extent that the members wish to limit or expand apparent authority, the members might consider a statement of member or manager authority in the certificate of formation.

The authority to execute a certificate of formation need not be in writing, but, if in writing, should be filed with the limited liability company. DLLCA §18-204. Practitioners should consider the advisability of obtaining a written record of any authorization, although such authorization is often implied by execution of the limited liability company agreement ratifying or authorizing the filing.

Note that penalties for perjury apply in connection with filing false certificates. DLLCA §18-204(c).

2.2 ***Name.*** The name of the Company is Mega Mall Associates, LLC.[30] The Executive Committee may change the name of the Company, or adopt such trade or fictitious names for use by the Company, as the Executive Committee may from time to time determine.[31] All business of the Company shall be conducted under such name(s), and title to all Company Property shall be held in such name(s) or in the name of a nominee approved by the Executive Committee.[32]

2.3 ***Principal Place of Business.*** The principal place of business and office of the Company shall be located at _____, or at such other place or places as the Executive Committee may from time to time designate.[33]

Facsimile signatures on the certificate of formation are permitted. DLLCA §18-206(a).

[27] This is not a requirement of the DLLCA. The limited liability company will need to determine whether qualification in a jurisdiction is necessary or desirable. Qualification is necessary in many jurisdictions in order to utilize the civil courts of that jurisdiction.

[28] Because all members or managers may not have participated in the execution and filing of the certificate of formation and qualifications it may be desirable to obtain their ratification of such action. The parties will need to address the extent to which the members will be required to reimburse the party having prepared and filed the certificate of formation for its expenses in connection with such preparation and filing.

[29] Amendments to the certificate of formation are required under DLLCA §18-202 when the manager or, if no manager, any member becomes aware that a statement in the certificate of formation was false when made or that factual matters described in the certificate of formation have changed so that the certificate of formation is false in any material respect.

[30] The name of the limited liability company must be distinguishable from the name of any other corporation, partnership, limited liability company, limited partnership or business trust organized under Delaware law or qualified or registered in Delaware. DLLCA §18-102. If not distinguishable, permission may be obtained to use the name in question. See DLLCA §18-102. The name must include the words "Limited Liability Company", the initials "L.L.C." or the designation "LLC" and may include the name of a member or manager. DLLCA §18-102(1). DLLCA §18-103 provides a procedure for reserving a name. The company name may include the words "Company", "Association", "Club", "Foundation", "Fund", "Institute", "Society", "Union", "Syndicate", "Limited", "Trust" or words of similar import. DLLCA §18-102(4). Note that issues may be presented when qualifying in another jurisdiction as to use of a name. Consideration should also be given to the application of non-entity organization federal and state statutory and common law regarding the use of names (e.g., tradenames).

[31] Occasionally the name of the Company will include the name of a Member.

[32] Consideration should be given as to whether such title-holding requirement is applicable to every situation. For example, title to Illinois real estate may be held through an Illinois land trust and the limited liability company itself may be a holding company which acquires its assets through various subsidiaries. An example might be an opportunity fund, which, for liability protection purposes, might choose to acquire investments through separate subsidiary entities. The use of a nominee may be appropriate in certain circumstances, including land assemblage where anonymity maybe desired.

[33] It is recommended that the limited liability company agreement state the principal office or place of business for the limited liability company in order to afford third parties and members with an office with which they may communicate. Because of revisions to Article 9 of the Uniform Commercial Code, a limited liability company, as a registered organization, is located in the jurisdiction of its formation and, at least for purposes of Revised Article 9,

2.4 ***Term*****.** The term of the Company commenced on the date of the filing of the Certificate of Formation pursuant to the Delaware Act and shall continue until December 31, 2040, unless sooner terminated or extended pursuant to the provisions of this Agreement.[34]

2.5 ***Registered Agent*****.** The Company's registered agent for service of process required to be maintained pursuant to the Delaware Act shall be _____ and the address of the Company's registered agent in the State of Delaware shall be _____, _____, Delaware.[35] Such agent and such office may be changed from time to time by the Executive Committee.

2.6 ***Purpose*****.** The purpose[36] of the Company shall be to:

(a) acquire, own, manage, maintain, repair, renovate, operate, lease, finance, refinance, securitize, sell, exchange and otherwise deal with, and dispose of, all or any portion of the Shopping Center;[37] and

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the principal place of business of the limited liability company should no longer be particularly relevant for purposes of determining the means of achieving perfection by filing. However, because of Revised Article 9's transition rules, the location of a principal place of business has some relevance for purposes of determining the applicable jurisdictions whose records must be searched for prior filings. As the transition progresses, this will be less and less a factor.

Although required to be stated in the certificate of formation, the parties may also choose to include the registered office in the State of Delaware of the limited liability company in the limited liability company Operating Agreement.

[34] A Delaware limited liability company does not require a term, and may have a perpetual existence. DLLCA §18-801(a)(1). See generally DLLCA §18-801 for events of dissolution of a limited liability company. The possibility of a perpetual existence is a relatively recent development. Prior to the so-called "check-the-box" rules, a perpetual existence made it less likely that an entity would satisfy the so-called "four factors" tests used to determine whether an entity would avoid taxation as a corporation under federal income tax laws. Opportunity funds will typically have stated terms inasmuch as the investors want results to occur within a specified time period. Other limited liability companies will have stated terms of existence in order to focus conclusion of a project. Persons doing business with the limited liability company should confirm that the action in question will likely be effected prior to the end of the term of existence of the limited liability company. See §11.1 of this Agreement for enumeration of dissolution events.

[35] A Delaware limited liability company must have a registered office and registered agent in the State of Delaware. DLLCA §18-104. Because the name and address of the registered agent must be stated in the certificate of formation, it may not be necessary to restate it in the limited liability company agreement. Service of process on the limited liability company in Delaware may be made upon the registered agent in Delaware DLLCA §18-105.

[36] A Delaware limited liability company may be organized for any lawful purpose whether for profit or not-for-profit except the insurance business of granting insurance policies or assuming insurance risks and banking. DLLCA §18-106(a). There may be purposes which may not be pursued by virtue of other laws or regulations (e.g., practice of law in certain jurisdictions by virtue of professional ethics' rules).

[37] This is a relatively limited purpose tied to a specific project. Members, and their capital sources, often prefer to limit the purpose of the limited liability company in order to "control" its activities and potential liabilities. A narrow purpose clause might preclude acquiring exchange property in connection with an IRC §1031 exchange.

(b) conduct all activities reasonably necessary, incidental, or appropriate in connection with the foregoing, including, without limitation, any acquisitions reasonably necessary and incidental to accomplishment of the foregoing.[38]

The Company shall not engage in any other business or activity without the approval of each of the Members, as well as any required approval of any lender to the Company.[39]

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[38] This recitation is probably not necessary in light of DLLCA §18-106(b). The language regarding acquisition of additional real estate should alleviate doubt as to whether the acquisition of incidental real estate related to the real estate project for which the Company was formed is within the Company's purpose. For example, an LLC formed to acquire a leasehold interest under a ground lease might also include within its purpose the acquisition of all or a portion of the fee interest. Some practitioners prefer a recitation of the powers of an LLC by including provisions such as the following:

"In furtherance of its purposes, the Company shall have all powers necessary, suitable or convenient for the accomplishment of its purposes, alone or with others, including the following: (a) to invest and reinvest the cash assets of the Company and its Subsidiaries in money-market or other short-term investments; (b) to have and maintain one or more offices within or without the State of Delaware, and, in connection therewith, to rent or acquire office space, engage personnel and compensate them and do such other acts and things as may be advisable or necessary in connection with the maintenance of such office or offices; (c) to open, maintain and close bank accounts and draw checks and other orders for the payment of moneys; (d) to form or cause to be formed and to own the stock of one or more corporations, whether foreign or domestic, and to form or cause to be formed and to participate in and own equity interests in partnerships, joint ventures and limited liability companies, whether foreign or domestic; (e) to enter into, make and perform all contracts, agreements and other undertakings as may be necessary or advisable or incident to carrying out its purposes; (g) to sue, prosecute, settle or compromise all claims against third parties, to compromise, settle or accept judgment of claims against the Company and its Subsidiaries, and to execute all documents and make all representations, admissions and waivers in connection therewith; (h) to distribute, subject to the terms of this Agreement, at any time and from time to time to Members cash or investments or other property of the Company or its Subsidiaries, or any combination thereof, (i) to borrow money, whether secured or unsecured, and to make, issue, accept, endorse and execute promissory notes, drafts, bills of exchange and other instruments and evidences of indebtedness, all without limit as to amount, and to guarantee the payment and performance thereof, and to secure the payment thereof by mortgage, pledge, or assignment of, or security interest in, the assets then owned or thereafter acquired by the Company or its Subsidiaries; (j) to buy, sell, own, operate and otherwise deal with assets of any nature, including real estate assets; (k) to hold, receive, mortgage, pledge, lease, transfer, exchange or otherwise dispose of, grant options with respect to, and otherwise deal in and exercise all rights, powers, privileges and other incidents of ownership or possession with respect to, all property held or owned by the Company or any of its Subsidiaries; (l) to hold, directly or indirectly, all of the equity interest of entities that own the Company's assets, including all existing facilities owned or operated, and any and all trademarks or other assets relating to the Company; and (m) to take such other actions necessary or incidental thereto as may be permitted under applicable law."

[39] The members will usually insist on the ability to control the purposes of the limited liability company as the purpose of the limited liability company may be a key basis on which they choose to participate in the limited liability company in the first place. In addition, to the extent that the purpose of the limited liability company may be expanded, members might run afoul of fiduciary duty limitations on the ability to compete with the limited liability company by virtue of an unexpected change in the limited liability companies business into businesses or endeavors the member might otherwise be engaged in or desirous of being engaged in.

The lenders to the limited liability company may be particularly concerned about limitations of purpose in that the lender may seek to limit the liabilities of the limited liability company to the specific project which serves as collateral for the loan in question. While this may form the basis of a covenant in the loan documents, the lenders may take additional comfort in the fact that any change in purpose made without its consent might be *ultra vires* and

ARTICLE 3
MEMBERS

3.1 ***Admission of Members.***[40] Member 1 and Member 2 are each hereby admitted as a member of the Company, and shall be shown as such on the books and records of the Company. Except as expressly permitted by this Agreement, no other Person shall be admitted as a member of the Company, and no additional Interests shall be issued, without the approval of each of the Members.

3.2 ***Limitation on Liability.***[41] The debts, obligations and liabilities of the Company (whether arising in contract, tort, or otherwise) shall be solely the debts, obligations and liabilities of the Company, and no Member shall be obligated personally for any such debt, obligation, or liability solely by reason of being a member of the Company. The liability of each Member shall be limited to the amount of Capital Contributions required to be made by such Member in accordance with the provisions of this Agreement, but only when and to the extent that the same shall become due pursuant to the provisions of this Agreement. Nothing contained in this Section 3.2 shall limit, affect, or impair any agreement, guaranty, or other document entered into by, between, among, or in favor of any of the Members or their respective Affiliates.

3.3 ***Withdrawal of Members.***[42] Except as otherwise specifically provided in this Agreement, neither Member may withdraw or resign from the Company without the prior written consent of the other Member. In the event that any Member withdraws or resigns from the Company in contravention of this Agreement, the same shall not affect such Member's liability hereunder or, to the extent provided in the Delaware Act, for the obligations of the Company. No such withdrawal or resignation shall constitute, or afford any Member the right to cause, the dissolution of the Company.

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not solely a default under the loan documents. The lender should insist on having a right to approve amendments to the limited liability company agreement either generally or with respect to provisions of significance to it in order to minimize the possibility that the desirable provision in the organic documents of its borrower are modified thereby depriving it of the comfort it thought it had.

Inasmuch as many loans are securitized, or are originated with an "eye" toward possible securitization, lenders will often insist on limitation of the purpose of an entity, to a limited specific purpose in order to satisfy rating agency concerns related to minimizing the possibility of insolvency of the borrowing entity.

[40] DLLCA provides for the admission of a member upon the later of the formation of the company or the time provided in the company agreement (or if the company agreement does not so provide, when the person's admission is reflected in the records of the company).

[41] DLLCA, §18-303, provides essentially the same limitation of liability as contained in this section.

[42] DLLCA, §18-603, provides that, with respect to new limited liability companies, a member may not resign from a limited liability company prior to the dissolution or winding up of the company, unless the limited liability company agreement provides otherwise.

ARTICLE 4
CAPITAL

[CONTAINS REQUIREMENTS FOR ADDITIONAL CAPITAL AND REMEDIES FOR FAILURE TO CONTRIBUTE]

4.1 ***Initial Capital Contributions.***[43] Contemporaneously with their execution and delivery of this Agreement, the Members have contributed in cash (the ***"Initial Capital Contributions"***) to the capital of the Company their pro rata shares (based upon their relative Percentage Interests) of the aggregate of:

(a) the amount necessary to close the acquisition of the Shopping Center (the "**Acquisition and Financing Costs**") (other than amounts to be financed with the Initial Loan), as determined by the Executive Committee;[44]

(b) a reasonable amount of initial working capital for the Company, as determined by the Executive Committee; and

(c) the amount of reasonable capital and operating shortfall reserves, as determined by the Executive Committee.

The Initial Capital Contributions have been made by wire transfers of good federal funds to a Company account designated by the Executive Committee.

4.2 ***Additional Capital Contributions.***[45] The Members shall (with respect to Mandatory Additional Capital Contributions) or may (with respect to Deadlock Additional Capital Contributions) make the following Additional Capital Contributions to the Company:

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[43] DLLCA, §18-301(d), provides that a person may be admitted to a limited liability company as a member and receive an interest in the company without making a contribution.

[44] The Company contemplated to be formed and operated in accordance with this Agreement, sets forth specific sums allocated to acquisition and financing costs, the initial loan and other economic criteria, subject to modification only by the Executive Committee. The investor member wishes to create these economic criteria as a means of protecting its investment and to place limitations on the developer member to alter the economic terms upon which the investor member agreed to become a member of the Company. A more simplistic alternative could be the following:

> "Upon the execution of this Agreement, the Members shall contribute cash or other property to the Company in the amounts set forth on Exhibit A."

The sum of subsections (a), (b) and (c) should be recorded in the Company's books and records. See DLLCA §18-305.

[45] This form of Operating Agreement contemplates the possibility of Additional Capital Contributions by the Members both for need in connection with work to be done by the Company in connection with its assets or in the event of a deadlock in connection with management decision-making. Any obligation on the part of the Members to make capital contributions, whether as initial capital contributions or as Additional Capital Contributions must be set forth in the Operating Agreement. Such obligations are unaffected by the Member's subsequent inability to perform

(a) *Scheduled Additional Capital Contributions.* If, and to the extent that:

(i) It is contemplated or foreseen that, in addition to the Initial Capital Contributions and any Additional Capital Contributions theretofore made by the Members under this Agreement, the Company will require additional funds to meet its obligations or needs from time to time (including, but not limited to, its obligations to pay leasing commissions, tenant improvement costs, capital improvement costs and/or operating cash flow deficits in connection with the Shopping Center and/or to establish or augment any reserve required to be either established or maintained pursuant to any of the Initial Loan Documents); and

(ii) provision for the amount and timing of the contribution of such additional funds is made in the then existing Operating Budget or Capital Budget,

then each Member shall, not later than thirty (30) business days after the written request of the other Member (which written request may not be made more than thirty (30) business days prior to the date for such contribution of additional funds set forth in such Budget), contribute its pro rata share (based upon the respective Percentage Interests of the Members) of the amount of such additional funds (a ***"Scheduled Additional Capital Contribution"***). All Scheduled Additional Capital Contributions shall be made by wire transfers of good federal funds to a Company account designated by the Executive Committee.

(b) *Shortfall Additional Capital Contributions*. If, at any time or from time to time after all of the Initial Capital Contributions have been made:

(i) additional funds are required to meet the obligations or needs of the Company (including, but not limited to, its obligations to pay leasing concessions, tenant improvement costs, capital improvement costs and/or operating cash flow deficits in connection with the Shopping Center and/or to establish or augment any reserve required to be either established or maintained pursuant to any of the Initial Loan Documents); and

(ii) such obligations or needs are not contemplated to be paid from Scheduled Additional Capital Contributions,

then the Executive Committee may (but shall not be obligated to) require that the Members make a further capital contribution (a ***"Shortfall Additional Capital Contribution"***) in the amount of such additional funds (a ***"Shortfall"***). If so required by the Executive Committee, each Member shall, not later than thirty (30) business days thereafter, contribute its pro rata share (based upon the respective Percentage Interests of the Members) of the amount of the applicable Shortfall. In lieu of requiring the Members to make Shortfall Capital Contributions, the Executive Committee

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and such obligation is subject to amendment only with the consent of all other Members. See DLLCA §18-502(a) and 502(b).

may cause the Company to obtain funds to cover any Shortfall through loans on terms approved by the Executive Committee (including loans from any Member or its Affiliates, with each Member or its Affiliates having the opportunity to participate in making any such loan on a pro rata basis). All Shortfall Additional Capital Contributions shall be made by wire transfers of good federal funds to a Company account designated by the Executive Committee.

(c) *Deadlock Additional Capital Contributions*. If, for more than fifteen (15) calendar days after the written request of any Member, the Executive Committee is unable or unwilling for any reason either:

(i) to determine that a Shortfall exists; and/or

(ii) to require that a Shortfall Additional Capital Contribution be made to meet any Shortfall,

then either Member 1 or Member 2, if it believes that there is a good faith Company business purposes[46] to require that a Shortfall Additional Capital Contribution be made to meet such Shortfall, shall have the option (but not the obligation), in its sole discretion, to contribute additional capital (a ***"Deadlock Additional Capital Contribution"***) to the Company to the extent necessary to meet such Shortfall. Promptly after Member 1 or Member 2 (as the case may be, the ***"Deadlock Contributing Member"***) shall make a Deadlock Additional Capital Contribution to the Company, the Deadlock Contributing Member shall deliver to the other Member (the ***"Deadlock Non-Contributing Member"***) an attested written statement certifying the amount so contributed and the circumstances underlying the Deadlock Contributing Member's belief that there is a good faith Company business purpose requiring such contribution to be made. Not later than ninety (90) calendar days after receipt of such statement, the Deadlock Non-Contributing Member may (but shall not be obligated to) contribute to the Company an amount of capital equal to the sum of:

(x) the Deadlock Non-Contributing Member's pro rata share of the Deadlock Additional Capital Contribution (based upon the respective Percentage Interests of the Members); plus

(y) if not waived by the Deadlock Contributing Member in its sole and absolute discretion, an amount necessary to provide a 15% Internal Rate of Return thereon and on the Deadlock Additional Capital Contribution made by the Deadlock Contributing Member for its own account.

[46] The "good faith Company purpose" is an opinion with which the other member may disagree. Section 13.18 below provides for arbitration in those instances where the Operating Agreement so mandates. Consideration should be given to adding language that would make the question of good faith an issue requiring arbitration pursuant to Section 13.18. In addition, if the issue should be subject to arbitration, it would be advisable to add language returning the members to their original ownership interest and refunding any Additional Capital Contribution as well as any interest paid, if the final decision overrules the good faith company business purpose decision of the Deadlock Contributing Member.

If the Deadlock Non-Contributing Member elects to contribute the foregoing amount to the Company within such 90-day period, then:

(A) the Company will distribute to the Deadlock Contributing Member the amount so contributed by the Deadlock Non-Contributing Member, which distribution shall be deemed to be (other than with respect to the portion of such payment, if any, constituting the 15% Internal Rate of Return) a return of a portion of its Deadlock Additional Capital Contribution; and

(B) upon the distribution of such funds to the Deadlock Contributing Member, the funds contributed by the Deadlock Non-Contributing Member (exclusive of the portion thereof, if any, constituting the 15% Internal Rate of Return), and the unreturned portion of the Deadlock Additional Capital Contribution of the Deadlock Contributing Member, shall each be deemed to be a Shortfall Additional Capital Contribution made on the date that the Deadlock Contributing Member contributed its capital to the Company.

Notwithstanding anything to the contrary provided herein, the making of a Deadlock Additional Capital Contribution by any Member shall, in no event, either:

(X) entitle the Deadlock Contributing Member to exercise any of the remedies set forth in Section 4.3 (which remedies shall apply only to the failure to make a Mandatory Additional Capital Contribution); or

(Y) constitute a resolution of the deadlock of the Executive Committee for purposes of Section 6.10, or a waiver by the Deadlock Contributing Member of its right to initiate the procedure for resolving such deadlock set forth in Sections 6.10 and 7.1, unless and until the Deadlock Non-Contributing Member makes the capital contribution to the Company referred to in subsections (x) and (y) above within the 90-day period referred to above.

4.3 ***Remedies for Failures to Make Mandatory Additional Capital Contributions.*** If any Member (the ***"Non-Contributing Member"***) fails to make any Mandatory Additional Capital Contribution (or any portion thereof) within the time period specified in this Agreement therefor, and the other Member (the ***"Contributing Member"***) has made such Mandatory Additional Capital Contribution, then the Contributing Member may cause either or both of the following actions to be taken (either sequentially or simultaneously, and, if sequentially, in any order) by delivery of notice to such effect to the Company and to the Non-Contributing Member:

(a) The Contributing Member shall have the option (but not the obligation), in its sole discretion, to contribute additional capital (a ***"Priority Additional Capital Contribution"***) to the Company in an amount equal to the amount of the Mandatory Additional Capital Contribution that the Non-Contributing Member failed to make. Upon making such Priority Additional Capital Contribution, the Contributing Member shall notify the Non-Contributing Member in writing of the fact and amount of the contribution, whereupon the Contributing Member shall be entitled to receive a

preferential return as provided in Section 5.4(a) (prior to any distributions to the Non-Contributing Member) with respect to both such Priority Additional Capital Contribution and the corresponding Mandatory Additional Capital Contribution made by the Contributing Member for its own account. Not later than ninety (90) calendar days after receipt of the aforesaid notice from the Contributing Member, the Non-Contributing Member may contribute to the Company an amount of capital equal to the sum of:

(i) the Mandatory Additional Capital Contribution that the Non-Contributing Member failed to make; plus

(ii) if not waived by the Contributing Member in its sole and absolute discretion, an amount necessary to provide a 20% Internal Rate of Return thereon and on the Mandatory Additional Capital Contribution made by the Contributing Member for its own account.

If the Non-Contributing Member contributes the foregoing amount to the Company within such 90-day period, then:

(x) the Company shall distribute to the Contributing Member the amount so contributed by the Non-Contributing Member, which distribution shall be deemed to be (other than with respect to the portion of such payment, if any, constituting the 20% Internal Rate of Return) a return of its Priority Additional Capital Contribution; and

(y) upon the distribution of such funds to the Contributing Member, the funds contributed by the Non-Contributing Member (exclusive of the portion thereof, if any, constituting the 20% Internal Rate of Return) shall be deemed to be a Scheduled Additional Capital Contribution or a Shortfall Additional Capital Contribution (as the case may be) made on the date that the Contributing Member made its corresponding Mandatory Capital Contribution to the Company.[47]

Conversely, if the Non-Contributing Member fails to contribute the foregoing amount to the Company within such 90-day period, then the Contributing Member shall have the right, to be exercised (if at all) within one hundred eighty (180) days after the expiration of the said 90-day period, to cause:

(A) the Percentage Interests of the Members to be adjusted as follows:

(I) the Non-Contributing Member's Percentage Interest shall be reduced by an amount equal to one hundred fifty percent (150%) of the percentage obtained by dividing the amount of the

[47] See DLCCA §503 and §504.

Priority Additional Capital Contribution by the sum of all Capital Contributions theretofore made by the Members (excluding, however, any Deadlock Additional Capital Contributions theretofore made), less any capital previously returned to the Members; and

(II) the Contributing Member's Percentage Interest shall be increased by the amount of the reduction of the Non-Contributing Member's Percentage Interest under subsection (I) above; and

(B) the provisions of Section 5.4 shall be deemed to be modified to require all distributions of Net Cash Flow to be made, after the distributions referred to in Sections 5.4(a) and 5.4(b) have been made in full, in proportion to the Member's respective Percentage Interests (adjusted as aforesaid), regardless of the amount of such distributions theretofore made to the Members.[48]

Upon the exercise by the Contributing Member of such right and the adjustments of the Percentage Interests and the distribution rights of the Members as hereinbefore set forth, the additional capital contributed by the Contributing Member to the Company resulting in such adjustments shall no longer be considered to be a Priority Additional Capital Contribution, but instead shall be recharacterized, for all purposes of this Agreement, as a Scheduled Additional Capital Contribution or a Shortfall Additional Capital Contribution (as the case may be) made by the Contributing Member.

(b) The Contributing Member shall have the right, in its sole discretion at any time after such default, to appoint one additional member to the Executive Committee, in which event the majority of votes of the members of the Executive Committee shall determine all Executive Committee action (including, but not limited to, Major Decisions). Whether or not the Contributing Member shall make such an appointment, the Contributing Member, acting through the member of the Executive Committee appointed by the Contributing Member and without the necessity of any consent by the member of the Executive Committee appointed by the Non-Contributing Member, may, by the delivery of notice to the Non-Contributing Member at any time after such default, terminate (to the extent applicable):

(i) any property management and/or other agreement between the Company and the Non-Contributing Member, the Property Manager (if the Property Manager is an Affiliate of the Non-Contributing Member) and/or any of their respective Affiliates;

[48] See DLCCA §503.

(ii) the appointment of the Non-Contributing Member as the Administrative Member of the Company; and/or

(iii) the appointment of any officer, employee, or agent of the Company theretofore appointed by the Executive Committee pursuant to Section 6.9 below.

Each Member acknowledges and agrees that the other Members would not be entering in this Agreement were it not for the Members agreeing to make the Capital Contributions provided for in Sections 4.1 and 4.2 above, and the remedy provisions set forth above in this Section 4.3. The parties hereto acknowledge and agree that the remedy provisions provided for above in this Section 4.3 could result in a Member's Percentage Interest being substantially and/or disproportionately reduced. Each Member acknowledges and agrees that, in the event any Member fails to make its Mandatory Capital Contributions pursuant to this Agreement, the other Members will suffer substantial damages, and the remedy provisions set forth above are fair, just and equitable in all respects and administratively superior to any other method for determining such damages. Each Member hereby agrees that, in the event its Percentage Interest is reduced as provided above, it shall execute and deliver (without any representation or warranty, except with respect to such Member's authority, the due execution of any documents and that such Member has not conveyed, assigned, or encumbered its Interest in favor of any third party) such conveyances, agreements, instruments, or other documents that may be necessary, in the sole and absolute discretion of the other Member, to confirm and render fully effective the remedy provisions set forth above (including, but not limited to, an assignment of the appropriate portion of its Percentage Interest and any amendments to this Agreement and to the Certificate of Formation). Each Member hereby irrevocably constitutes and appoints the other Member as its true and lawful attorney-in-fact, in its name, place and stead to make, execute, consent to, swear to, acknowledge, deliver, record and file such conveyances, agreements, instruments, or other documents that may be necessary, in the sole and absolute discretion of the other Member, to confirm and render fully effective the remedy provisions set forth above (including, but not limited to, any assignment of a portion of its Percentage Interest and any amendments to this Agreement or to the Certificate of Formation). It is expressly understood, intended and agreed by each of the Members, for itself its administrators, legal representatives, successors and assigns, that the grant of this power of attorney is irrevocable and coupled with an interest by reason of the facts, among others, that:

(X) the other Member will be relying on its powers to act as contemplated by this provision;

(Y) the other Member would not have entered into this Agreement were it not for the powers granted to it by these provisions; and

(Z) the other Member has rights in the Company Property that such powers are needed to protect.

The grant of this power of attorney shall survive the death, legal incompetence, disability, bankruptcy, retirement, resignation or withdrawal of any Member, or of the beneficial owners of

any Member, or the assignment of its or their interests in the Company or in such Member, as the case may be.

4.4 ***Capital Accounts.*** A separate capital account (a ***"Capital Account"***) shall be maintained for each Member in accordance with Treasury Regulation Section 1.704-1(b)(2)(iv). Consistent therewith, the Capital Account of each Member shall be determined and adjusted as follows:

(a) each Member's Capital Account will be credited with:

(i) all cash contributions made by such Member to the capital of the Company;

(ii) the Member's distributive share of Net Profit, items thereof and items of income and gain specially allocated to such Member pursuant to Section 6.2; and

(iii) any other increases required by Treasury Regulation Section 1.704-1(b)(2)(iv); and

(b) each Member's Capital Account will be debited with:

(i) any cash distributions made by the Company to such Member, plus the fair market value of any property distributed in kind to such Member (net of any liabilities to which such property is subject or that are assumed by such Member);

(ii) the Member's distributive share of Net Loss, items thereof and deductions or losses specially allocated to such Member pursuant to Section 6.2; and

(iii) any other decreases required by Treasury Regulation Section 1.704-1(b)(2)(iv).

The provisions of this Section 4.4 relating to the maintenance of Capital Accounts have been included in this Agreement in order to comply with Section 704(b) of the Code and the Treasury Regulations promulgated thereunder, and will be interpreted and applied in a manner consistent with those provisions.

4.5 ***No Further Obligation to Contribute Capital.*** Except as expressly provided in this Agreement or with the unanimous prior written consent of the Members, no Member shall be required or entitled to contribute any other or further capital to the Company, nor shall any Member be required or entitled to loan any funds to the Company. No Member shall have any obligation to restore any negative balance in its Capital Account upon the liquidation or dissolution of the Company or otherwise.

ARTICLE 4

[NO ADDITIONAL CAPITAL REQUIREMENTS]

4.1 ***Initial Contributions*****.** At the time this Agreement is executed, the Members shall make the contributions opposite their names on Schedule A attached hereto. No interest shall accrue on any Capital Contribution[49] and no Member shall have the right to withdraw or be repaid any Capital Contribution except as provided in this Agreement.

4.2 ***Definition of Capital Account.***[50] The Capital Account of a Member as of any date shall equal the amount of the Member's paid-in capital contribution increased by (i) any cash contributions he may make, (ii) the Gross Asset Value of any asset contributed by him to the Company (as determined immediately prior to such contribution), (iii) such Member's distributive share of Company profits and income (including tax-exempt income), (iv) any increase in the basis of Company assets pursuant to Section 50(c) of the Code, and (v) the amount of any Company liabilities that are assumed by such Member or that are secured by any Company properties distributed to such Member, and decreased by (i) such Member's distributive share of Company losses and deductions, (ii) cash distributed by the Company to such Member, (iii) the Gross Asset Value of any Company property distributed to such Member (as determined immediately prior to such distribution), (iv) the amount of any liabilities of such Member that are assumed by the Company or are secured by any properties contributed by such Member to the Company, (v) expenditures of the Company not deductible in computing its taxable income (such as syndication expenses, if any) and (vi) reductions in the basis of Company assets not otherwise taken into account (such as the reduction in basis provided by Section 50(c) of the Code). The Capital Accounts of all Members shall also be increased or decreased immediately prior to any Adjustment Date[51] to reflect the aggregate net increase or

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[49] One or more member's capital contributions *can* generate an additional return, if that is the business deal. See the discussion in the note at Section 7.7

[50] This agreement features the "long form" description of how to compute a capital account. While some clients might prefer something shorter, its comprehensiveness can avoid problems later, and it also serves to comply with the IRS requirements in order for allocations to have "substantial economic effect." The simple, sometimes-used alternative is "All members shall have a capital account maintained in accordance with Section 1.704-1(b)(2)(iv) of the Treasury Regulations."

[51] "Gross Asset Value" and "Adjustment Date" are defined in Section 5.7 below. The provisions related to these two terms are intended to address the problems of keeping a proper capital account where the LLC's property has increased or decreased in value. For example, suppose that A and B form an LLC and each contributes $100,000. Over the next five years, the Company generates profits, losses and distributions that "balance", so that A's and B's capital accounts are still $100,000. However, the business has grown, and it is now worth $2,000,000 (i.e., each interest is now worth $1,000,000). A and B decide to admit C as an equal 1/3 member for a capital contribution of $1,000,000. Without the kind of adjustment contemplated by the sentence to which this footnote is appended, C would have a $1,000,000 capital account, while A and B would still have capital accounts of $100,000. With the adjustment, each will have a capital account of $1,000,000, which is as it should be since the company's assets will now be worth $3,000,000.

Note that Section 1.704-1(b)(2)(iv)(f) of the Treasury Regulations makes the adjustment described in this section elective. Accordingly, a mere reference to "capital accounts maintained in accordance with the Treasury Regulations" will not assure that C does not get a much larger capital account than A and B.

decrease in Gross Asset Values on that date as if the upward or downward change in the Gross Asset Value arising from such adjustment had been income or loss, respectively, and allocated among the Members pursuant to Article 5. For the purpose of computing the amount of income and deductions to be reflected in a Capital Account, tax-exempt income shall be computed as though it were taxable, and expenditures which are not deductible or which are capitalized shall be computed as if they were deductible and these amounts shall be allocated pursuant to Article 5 as if they were profits or losses, as applicable. In the event that the foregoing fails to provide guidance as to the maintenance of capital accounts with respect to any Company item, then such item shall be allocated in a manner which is consistent with the underlying economic agreement of the Members and, wherever possible, so as to cause the allocation to be respected pursuant to applicable provisions of the Code and the Allocation Rules, as determined by the Members.

4.3 ***Transfer of Interest in the Company.*** If any interest in the Company is transferred in accordance with the terms of this Agreement, the transferee shall succeed to the Capital Account of the transferor to the extent it relates to the transferred interest.

4.4 ***In-Kind Distributions.*** If the Company at any time distributes any of its assets in-kind to any Member, the Capital Account of each Member shall be adjusted to account for that Member's allocable share (as determined under Article 5 below) of the Net Profits or Net Losses that would have been realized by the Company had it sold the assets that were distributed at their respective fair market values immediately prior to their distribution.

4.5 ***Compliance with Section 704(b) of the Code.*** The provisions of this Article 4 as they relate to the maintenance of Capital Accounts are intended, and shall be construed, and, if necessary, modified, to cause the allocations of Net Profits, Net Losses, and other items of income, gain, loss, deduction and credit pursuant to Article 5 to be respected under the Regulations promulgated under § 704(b) of the Code, in light of the Distributions made pursuant to Article 5 and the Capital Contributions made pursuant to this Article 4.[52] In the event the Members shall determine that it is prudent to modify the manner in which Capital Accounts are computed in order to comply with the Allocation Rules, the Members hereby agree that they will not unreasonably withhold their consent to any modification that is reasonably required to so comply, provided that such modification is not likely materially to affect the amounts distributable to any Member.[53]

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[52] This provision is intended to facilitate compliance with the Treasury Regulations if the law changes or tax advisors to the LLC believe that a change is appropriate.

[53] Some agreements give the authority to make such adjustments to the managing member of the LLC (or even the tax matters member, although its role is really to handle audits, and not to address "day-to-day" tax matters). By comparison, members and their individual tax advisors may be surprised to see that they have given away the right to adjust their capital account. The "not unreasonably withheld" language is perceived to be a fair way to handle this situation.

4.6 ***No Obligation to Restore.***[54] Notwithstanding anything herein to the contrary, no Member shall be obligated to restore a deficit in its Capital Account.

4.7 ***Additional Contributions.*** Except as provided in this Agreement, no Member shall be required to make any Additional Capital Contributions to the Company.[55]

PREFACE FOR ARTICLE 5
ALLOCATIONS AND DISTRIBUTIONS

Participants in a limited liability company are typically concerned with two aspects of the economics of the transaction. One is the distribution of cash and property of the LLC from operations and in liquidation. The other is the allocation of tax benefits arising from the LLC's operations. The distribution of cash and property will be governed by the business agreement of the parties. The tax benefits must comply with requirements established by the IRS in its regulations in order to be respected for tax purposes. There are three IRS approved approaches for allocating tax benefits among the members. These approaches are:

1. The "standard test for substantial economic effect";

2. The "alternate test for economic effect"; and

3. The "economic effect equivalence" test.

Tests 1 and 2 above are very similar. Each requires maintenance of capital accounts and distributions in accordance with capital accounts. However, the "standard" test for "substantial economic effect" is generally disfavored because it may require the members to contribute additional cash to the LLC at a later date. See the footnote at Alternate 2, Section 4.6 of this Agreement. Accordingly, Articles 4 and 5 are intended to comply with the "alternate test for economic effect" found in Section 1.704-1(b)(2)(ii)(d) of the Treasury Regulations.

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[54] The "standard" test for "substantial economic effect" in the Treasury Regulations requires a "deficit restoration obligation" (sometimes referred to as a "DRO"). Essentially, the IRS thinking is that you can always be allocated losses if you have an obligation to pay for them. However, as a business matter, few, if any advisors ever recommend such a provision in their client's LLC agreements. Instead, the overwhelming percentage of LLC agreements include a "no obligation to restore" provision, like the one that appears here in Section 4.6.

We can include the "no obligation to restore" provision because this agreement is intended to comply with the "alternate" test for economic effect, instead of the standard test. As noted previously, the alternate test does not require the members of an LLC to restore a deficit in their capital account. However, it does require a "qualified income offset" provision instead, and that appears in Section 5.3(e) of this Agreement. Rather than requiring a cash payment, as is the case with a deficit restoration obligation, this provision requires the allocation of income to a member as "quickly as possible" in certain circumstances.

[55] Of course, the parties may agree to provide for special capital contributions and preferred returns on those contributions, in which case this provision might begin with "Except as provided in this Section 4.7 . . ." and then have a procedure for calling for additional capital contributions.

Some clients find the provisions required to incorporate the "alternate test for economic effect" language a little daunting, While the provisions presented here are a few pages long, they are considerably shorter than what appears in many agreements, and they do offer a fair amount of comfort from knowing that there shouldn't be any surprises waiting from the IRS.

An alternative to having a lengthy tax section is to rely on the "economic effect equivalence" test of Section 1.704-1(b)(2)(ii)(i) of the Treasury Regulations. This section provides that "allocations made to a partner that do not otherwise have economic effect . . . shall nevertheless be deemed to have economic effect, provided that as of the end of the each partnership taxable year, a liquidation of the partnership at the end of such year or at the end of any future year would produce the same economic results as would occur if [the "standard" or "alternate" test was applied.] With this in mind, the members could effectively leave everything to the LLC's tax advisors, and select one of the following options:

> Simplified Option 1: Allocations of Profits and Losses. All profits and losses of the Company shall be allocated so that as nearly as possible, after such allocations, the capital accounts of the members shall equal the amount that they would receive if all assets of the Company were sold and the proceeds were distributed in accordance with Section 5.4(b). All other tax items of the LLC shall be allocated among the Members as provided in the Code and the Regulations.

Or alternatively:

> Simplified Option 2: Allocations of Profits and Losses. All profits and losses of the LLC and all items of gain and loss shall be allocated among the Members so that following such allocations, the Capital Accounts of the Members shall, as nearly as possible, be in the same ratio as their respective interests in the LLC. All other tax items of the LLC shall be allocated among the Members as provided in the Code and the Regulations.

The problem with both of these simplified options is that they still leave large, unanswered issues:

> First, what should be done with items that may not affect capital accounts? Simply referring to "as provided in the Code and Regulations" may address some of these questions, but it will leave others unanswered. While low income housing tax credits are allocated in accordance with the depreciation of the property that gave rise to the credits, and rehabilitation credits are allocated in accordance with the members' interests in profits, allocations attributable to nonrecourse debt (which might include those same depreciation deductions) can be allocated in more than one way. See the discussion at Section 5.3, below.
>
> Second, what should be done with elective items? For example, consider (i) adjustments for changes in the value of LLC assets at the time a new member is admitted; see the

discussion of "gross asset value" in the notes to Section 7.2, below; or (ii) Section 704(c), see the note at Section 5.3(f), below.

If the agreement does not comply with any of these tests, then the sharing of losses and deductions (other than certain deductions, particularly, nonrecourse deductions) will instead be made in accordance with the "partner's interest in the partnership" (or here, remembering that LLCs are taxed as partnerships, the "member's interest in the LLC"), an intentionally nebulous term that generally makes investors and their advisors uncomfortable.

Treasury Regulation Section 1.704-1(b)(3) provides that "All partners' interest in the partnership are presumed to be equal (determined on a per capita basis)," with that presumption rebuttable, based on the following facts and circumstances: "relative contributions," interest in "economic profits and losses," rights to "cash flow and other non-liquidating distributions," and rights to "capital upon liquidation." Because of the utter uncertainty of how these rules might be applied, as well as the explicit statement that these rules don't apply to nonrecourse debt (a staple of real estate transactions), few advisors recommend relying on "partner's interest in the partnership" rules for real estate transactions, except where the partners/members *do* have identical, pro rata interests.

ARTICLE 5
ALLOCATIONS AND DISTRIBUTIONS[56]

5.1 ***Allocations of Net Profits*.** Except as may be required by § 704(c) of the Code, and Section 5.3 of this Article 5, Net Profits and other items of income and gain shall be allocated among the Members as follows:

(a) First, to the Members with Section 5.4(a) Amounts in excess of their Adjusted Capital Account Balances, to make the Adjusted Capital Account Balances of such Members equal their respective Section 5.4(a) Amounts (pro rata in proportion to the differences between each such Member's Section 5.4(a) Amount and its then Adjusted Capital Account Balance);[57]

[56] Note the distinction between "allocations" and "distributions". In general, "tax items" are "allocated", while cash and property is "distributed". With that in mind, this single article is sometimes divided into two articles, entitled "Allocations" and "Distributions".

[57] As noted in the note to Section 4.7, the parties may provide for special capital contributions and preferred returns on those contributions (or even the initial capital contributions) if they wish. The procedure for making an additional contribution might go in Section 4.7, and appropriate distribution language would go in Section 5.4 (see the note at Section 5.4(a)(2)), but any such special distribution would likely be matched by a corresponding change in the allocation of profits and losses in Section 5.1 and 5.2. For example, suppose a member made a special capital contribution of $100,000, and it was entitled to receive a 10% return on the unrepaid portion of this contribution (e.g., $10,000 while the unrepaid amount was $100,000). Section 5.4(a)(2) would be modified to provide for such a distribution, and this section would probably also be modified to allocate $10,000 of income to the member to increase his capital account to the amount of this distribution. Note that such an allocation needn't be required currently. Instead, it might be made on liquidation or at some other time, depending on the business deal.

(b) Second, to the Members with Section 5.4(b) Amounts in excess of their Adjusted Capital Account Balances, to make the Adjusted Capital Account Balances of such Members equal to their respective Section 5.4(b) Amounts (pro rata in proportion to the differences between each such Member's Section 5.4(b) Amount and its then Adjusted Capital Account Balance);

(c) Third, to the Members who have received distributions of Net Cash Flow pursuant to Section 5.4(d), until the aggregate amount allocated pursuant to this Section 5.1 for all taxable periods equals the aggregate amount of such distributions, in the percentages set forth in Section 5.4(d); and

(d) Thereafter, to the Members in proportion to their respective Percentage Interests.

5.2 ***Allocations of Net Losses*.** Except as may be required by § 704(c) of the Code, and Section 5.3 of this Article 5, Net Losses and other items of deduction and loss shall be allocated among the Members as follows:

(a) First, among all Members with positive Capital Accounts until the amount of the Capital Accounts shall equal the amount of their Capital Contributions provided in Section 5.1 (reduced by any amounts distributed in accordance with that section),

(b) Second, in the ratio of Capital Accounts, so as to decrease the Capital Account of all Members until they equal zero;[58]

(c) Thereafter, in accordance with the Members' Percentage Interests in the Company.

5.3 ***Further as to Allocations*.**

(a) Company Nonrecourse Deductions.[59] Company Nonrecourse Deductions

[58] It is important to note the distinction between "negative capital account" and "negative basis". The first term refers to a member's capital account when it has been allocated more deductions than it has cash in the deal. For example, presume that the two members of an LLC each put up $50,000 (i.e., a total of $100,000), and the LLC borrows $900,000 on a nonrecourse basis to buy a depreciable property for $1 million (assume that none of the cost is allocable to non-depreciable costs, such as land). Presume that the LLC takes a $25,000 depreciation deduction each year, that all other profits and losses balance, and that no principal payments will be made on the loan for several years. On these facts, each member's capital account will decrease by $12,500 each year, so that by the fifth year, each will have a negative capital account because their $50,000 of capital will have been reduced below zero by the fifth allocation of $12,500 (i.e., starting capital account of $50,000 less 5 times $12,500, or $62,500, equals "negative $12,500"). On the other hand, the members continue to have a positive basis, this being equal to the sum of (a) their capital account (i.e., "negative $12,500"), plus (b) their share of the LLC's debts (most likely $450,000 each on these facts), yielding a positive basis of $437,500.

[59] The Treasury Regulations permit the members of an LLC to take losses not only to the extent of their capital contributions and their "deficit restoration obligation" (which is not present in this agreement), but also to take "nonrecourse deductions" to the extent of their share of "minimum gain", provided there is a "minimum gain chargeback" provision like the one found in Section 5.3(c) and (d) of this Agreement.

for any Taxable Year (excluding Member Nonrecourse Deductions) shall be allocated among the Members in proportion to their Percentage Interests in the Company.[60] Specific items of Company Nonrecourse Deductions shall be allocated in accordance with the ordering rules set forth at § 1.704-2(j) of the Regulations. This provision is intended to comply with the test for allocation of nonrecourse deductions set forth in § 1.704-2(e) of the Regulations and shall be interpreted consistently therewith or any successor provisions.

(b) Member Nonrecourse Deductions.[61] Member Nonrecourse Deductions for a Taxable Year shall be allocated to that Member which bears the economic risk of loss (as such term is defined in § 1.752-2 of the Regulations) for that Member Nonrecourse Liability to which such Member Nonrecourse Deductions are attributable. Specific items of Member Nonrecourse Deductions shall be allocated in accordance with the ordering rules set forth at § 1.704-2(j) of the Regulations. This provision is intended to comply with the test for allocation of nonrecourse deductions set forth in § 1.704-2(i) of the Regulations and shall be interpreted consistently therewith or any successor provisions.

(c) Company Minimum Gain Chargeback. Notwithstanding any provisions herein to the contrary, if there is a net decrease in Company Minimum Gain for a Taxable Year, each Member must be allocated items of income and gain for that Taxable Year equal to that Member's share of the net decrease in Company Minimum Gain. A

The term "minimum gain" refers to the amount of gain that would *have to be recognized if the LLC walked away from a property to which a nonrecourse debt applies*. In general, the minimum gain is the excess of the nonrecourse debt to which the property is subject over the owner's basis in the property. For example, assume that the company owns a property with a basis of $1,000,000 subject to a nonrecourse debt of $1,000,000. Now suppose that in the following year, the LLC takes a $50,000 depreciation deduction on the property, but it does not make any payments on the loan. As a result, it has a $950,000 basis in property subject to a $1,000,000 nonrecourse debt. If the LLC *walked away from the property*, it would have a $50,000 "minimum gain", because the tax rules would treat it as having sold the property for at least the amount of the nonrecourse debt. The regulations allow a depreciation deduction to be allocated to the members of the LLC, to the extent of this minimum gain. This is because a corresponding gain will have to be allocated to the members eventually, either because the LLC earns profits and pays off its debts, or, at worst, because the LLC walks away from the property and recognizes the minimum gain.

[60] Section 1.704-2(e)(2) of the Treasury Regulations requires nonrecourse deductions to be allocated "in a manner that is reasonably consistent with allocations that have substantial economic effect of some other significant partnership item attributable to the property securing the nonrecourse liabilities." So, it is permitted to allocate, as here, in accordance with the Members' Percentage Interests. However, if the members have equal 50% interests in profits, losses, cash flow, and liquidation proceeds, then it is unlikely that an allocation of 99% of the deductions attributable to nonrecourse debt (e.g., depreciation deductions on a property subject to nonrecourse debt) would be respected.

[61] Special treatment is required where the lender on a "nonrecourse debt instrument" is a member of the LLC or certain defined affiliates of members. See Treasury Regulation 1.704-2(b)(4) and 1.752-4(b). The IRS view is that on these facts, a member is "at risk", although the risk is in its capacity as lender rather than as borrower. Nonetheless, deductions attributable to "partner nonrecourse debt" (here, "member nonrecourse debt") are generally allocated to the member-lender (or the member who is affiliated with the lender, if applicable) rather than among the members, as described in the preceding sentence.

Member's share of the net decrease in Company Minimum Gain is the amount of the total net decrease multiplied by the Member's percentage share of the Company Minimum Gain at the end of the immediately preceding Taxable Year. A Member's share of any decrease in Company Minimum Gain resulting from a revaluation of the Company's property equals the increase in the Member's Capital Account attributable to the revaluation to the extent the reduction in minimum gain is caused by the revaluation. A Member is not subject to the Company Minimum Gain Chargeback requirement to the extent the Member's share of the net decrease in Company Minimum Gain is caused by a guarantee, refinancing, or other change in the debt instrument causing it to become partially or wholly a Company Liability or a Member Nonrecourse Liability, and the Member bears the economic risk of loss (within the meaning of § 1.752-2 of the Regulations) for the newly guaranteed, refinanced, or otherwise changed liability.

(d) Member Minimum Gain Chargeback. Notwithstanding any provisions herein to the contrary, if during a Taxable Year there is a net decrease in Member Minimum Gain, any Member with a share of that Member Minimum Gain (as determined under § 1.704-2(i)(5) of the Regulations) as of the beginning of that Taxable Year must be allocated items of income and gain for that Taxable Year (and, if necessary, for succeeding Taxable Years) equal to that Member's share of the net decrease in the Member Minimum Gain. A Member's share of the net decrease in Member Minimum Gain is determined in a manner consistent with the second sentence of the preceding paragraph. A Member is not subject to this Member Minimum Gain Chargeback, however, to the extent the net decrease in Member Minimum Gain arises because the liability ceases to be Member Nonrecourse Liability due to a conversion, refinancing, or other change in the debt instrument that causes it to become partially or wholly a Company Nonrecourse Liability. The amount that would otherwise be subject to the Member Minimum Gain Chargeback is added to the Member's share of Company Minimum Gain. In addition, rules consistent with those applicable to Company Minimum Gain shall be applied to determine the shares of Member Minimum Gain and Member Minimum Gain Chargeback to the extent provided under the Regulations issued pursuant to § 704(b) of the Code.

(e) Qualified Income Offset.[62] No Member shall be allocated Losses or deductions if the allocation causes a Member to have an Adjusted Capital Account Deficit or increases an existing deficit. If any Member unexpectedly receives an Offsettable Decrease, the Member will be allocated items of income and gain (consisting of a pro rata portion of each item of Company income and gain for such year) in an amount and manner sufficient to offset such Offsettable Decrease as quickly as possible. This Section is intended to satisfy the alternate test for substantial economic effect set forth in the Regulations under § 704(b) of the Code and shall be interpreted consistently therewith.

(f) Section 704(c) Allocations.[63] To the extent any Member contributes property to the Company, and at the time of such contribution, a discrepancy exists between the fair market value and the adjusted tax basis of such property so that the property meets the definition of "Section 704(c) Property" set forth in Regulation § 1.704-3(a)(3), then the Company shall allocate income, gain, deduction, loss, and credit arising from such Section 704(c) Property to such Member pursuant to the Regulations under Section 704(c) and in a manner consistent with and utilizing a method permitted by such Regulations, including but not limited to Regulation § 1.704-3, and when applicable, those provisions of the Regulations applicable under Section 704(b) of the Code. The

[62] A "qualified income offset" is required for agreements that do not have a "deficit restoration obligation". See Treasury Regulation 1.704-1(b)(2)(ii)(d)(3). Since none of the members has an obligation to restore its deficits (if any), the regulations at least indicate that the members should be allocated taxable income or gain "as quickly as possible". The term "Offsettable Decrease" is defined in Section 5.7. Many professionals like to follow the language of the Treasury Regulations reasonably closely. However, the jargon of this provision can be significantly improved by rewording as follows:

> (e) Qualified Income Offset. In the event that (i) distributions are made to Members or (ii) the LLC repays or otherwise reduces its nonrecourse indebtedness, if any, and, as a result, a Member has (or has increased) a deficit balance in his Capital Account as of the end of the year (such Capital Account balances to be adjusted in accordance with the provisions of the Allocation Rules), items of LLC income or gain shall be specially allocated to such Member in an amount and manner sufficient to eliminate the deficit balance in his or its Capital Account created by such distributions as quickly as possible.

For example, this provision eliminates references to oil and gas depletion that are contemplated by the Code and regulation references in the definition of Offsettable Decrease.

[63] Section 704(c) of the Code and Sections 1.704-1(b)(2)(iv)(d)(3) and 1.704-3 provide rules to assure that a member cannot contribute appreciated property to an LLC and thereby spread the taxable gain among the company's members. Instead, this gain must be borne by the contributing member. This is another area where the method of gain recognition is elective. Instead of the final sentence of Section 5.3 (leaving the method of recognition to be determined by the members), the agreement could specify one of the methods provided in the regulations. See 1.704-3(b), providing for the "traditional method", Section 1.704-3(c) providing the "traditional method with curative allocations", and Section 1.704-3(d) providing the "remedial method". As in the preceding section, a somewhat easier to read provision is as follows:

> (f) Section 704 Adjustments. Notwithstanding any provision of this Agreement to the contrary, in accordance with Section 704(c) of the Code, income, gain, loss and deduction with respect to any property contributed to the LLC shall, solely for tax purposes, be allocated among the Members so as to take account of any variation between the adjusted basis of such property and its initial Gross Asset Value.

choice of which method permitted by the Regulations is used by the Company to allocate items of income, gain, deduction, loss and credit from Section 704(c) Property to any Member shall be determined by the Members.

(g) Allocation of Recapture Income. Recapture income (under Sections 1245 and/or 1250 of the Code), if any, from the disposition of a Company asset shall be allocated among the Members as provided in the Code and applicable Regulations.

(h) Proration in the Event of a Transfer. If any interest in the Company is transferred during a single year, then each item of Company income, gain, loss, deduction, or credit attributable to the transferred Company interest shall be prorated between the Transferor and Transferee for Federal income tax purposes as required or permitted by the Code or Regulations, using any convention or method permitted by the Code or Regulations in making such proration as may be appropriate (all as determined by the Members); provided, however, extraordinary gain or loss (if any) shall be allocated to the holder of the Company interest on the date of the disposition giving rise to the extraordinary gain or loss.

(i) Allocations upon Admissions or Redemptions. If the percentage interest of a Member in the Company is changed during a taxable year for any reason other than the transfer of all or a portion of his or its interest to another person, then such Member's share of each item of Company income, gain, loss, deduction, or credit shall be determined for Federal income tax purposes by taking into account each such Member's varying percentage interests in the Company and using any convention or method permitted by the Code or the Regulations (all as determined by the Members).

5.4 ***Distributions***.[64]

(a) Non-Liquidating Distributions. Subject to any restrictions imposed by the Project Lender, Available Funds shall be distributed as follows:

(1) First, an amount of such Net Cash Flow shall be distributed pro rata (based upon the relative aggregate amounts then distributable under this subsection (a)(1)) to the Members with outstanding Priority Additional Contributions, until each of such Members has received aggregate distributions of Net Cash Flow pursuant to this subsection (a)(1) in an amount equal to the sum of:[65]

[64] DLLCA §18-607 prohibits any distribution to a Member at any time when such distribution would cause the liabilities of the Limited Liability Company to exceed the fair market value of its assets.

[65] Whether to include this subsection (and ones like it) depends on the agreement of the parties. For example, the agreement could provide for "special capital contributions", and here it might provide that those members who have made such special capital contributions shall receive them first (to the extent not already received) plus a 10% (or other percentage) return on the un-repaid amount of such contributions. Note that if special distributions are provided, then a comparable provision should be added in the allocation section, so as to increase the member's capital account to cover whatever it is supposed to get under this section.

(i) its outstanding Priority Additional Capital Contributions, plus its Mandatory Additional Capital Contributions to which such Priority Additional Capital Contributions relate; and

(ii) an amount necessary to provide a twenty percent (20%) Internal Rate of Return on such Priority Additional Capital Contributions and Mandatory Additional Capital Contributions, taking into account any amounts theretofore distributed to such Members pursuant to the foregoing subsection (i),

which distributions made pursuant to this subsection (a) shall be deemed to be made first with respect to the return described in subsection (ii) above and then with respect to the capital contributions described in subsection (i) above;

(2) Second, an amount of such Net Cash Flow shall be distributed pro rata (based upon the relative aggregate amounts then distributable under this subsection (a)(2)) to the Members with outstanding Deadlock Additional Capital Contributions, until each of such Members has received distributions of Net Cash Flow pursuant to this subsection (a)(2) in an amount equal to the sum of:

(i) its outstanding Deadlock Additional Capital Contributions; and

(ii) an amount necessary to provide a fifteen percent (15%) Internal Rate of Return on such Deadlock Additional Capital Contributions, taking into account any amounts theretofore distributed to such Members pursuant to the foregoing subsection (i),

which distributions made pursuant to this subsection (b) shall be deemed to be made first with respect to the return described in subsection (ii) above and then with respect to the capital contributions described in subsection (i) above;

(3) Third, an amount of such Net Cash Flow shall be distributed to the Members in proportion to their respective Percentage Interests, until the Members have received aggregate distributions of Net Cash Flow pursuant to this subsection (c) in an amount equal to the sum of:

(i) the aggregate amount of the Initial Capital Contributions made by the Members, together with the aggregate amount of any Mandatory Additional Capital Contributions made thereby; plus

(ii) an amount necessary to provide a twenty percent (20%) Internal Rate of Return to the Members on such Initial Capital Contributions and Mandatory Additional Capital Contributions, taking into account any amounts theretofore distributed to such Members pursuant to the foregoing subsection (i),

which distributions made pursuant to this subsection (c) shall be deemed to be made first with respect to the return described in subsection (ii) above and then with respect to the capital contributions described in subsection (i) above; and

(iii) thereafter, subject to the provisions of Section 4.3(a) above, the Net Cash Flow shall be distributed fifty percent (50%) to Member 1 and fifty percent (50%) to Member 2.

(b) Liquidating Distributions. Any Distributions to be made upon dissolution and winding up of the Company shall be made as follows:

(1) to creditors, including Members who are creditors, to the extent permitted by law, in satisfaction of Company Liabilities;

(2) to the Members, in the ratio of their Capital Contributions until their Capital Contributions have been repaid in full;[66] and

(3) to the Members in accordance with positive Capital Account balances taking into account all Capital Account adjustments for the Company's taxable year in which the liquidation occurs.[67]

5.5 ***Limitations on Distributions*.** No Member who assigns or disposes of such Member's Membership Interest in violation of this Agreement shall be entitled to any distribution of any property or money.[68]

5.6 ***Tax Distributions*.** Subject to the reasonable needs of the Company for working capital and other reasonably expected requirements of the Company, at least annually, the Company shall [make/endeavor to make][69] distribution equal to the reasonably estimated tax liability of the Members arising from any allocation of profits or gains to the Members, using a

[66] Again, this subsection depends on the agreement of the parties. It is not necessary that the parties explicitly recover their "capital contributions", and other different (or additional) choices are possible here as well. See the preceding footnote.

[67] The Treasury Regulations require distributions to be made in accordance with capital accounts in order for the tax allocations to be respected.

[68] This may be perceived as harsh, and it may be amended as appropriate.

[69] Remember that an LLC is a "pass-through" entity, and therefore, members may be allocated income in years when there is no cash to be distributed; for example, all of the LLC's cash may be invested in a new asset that will be depreciated over many years, or the cash may be used to pay non-deductible principal payments on the LLC's debts. This section is intended to provide for (or to strongly encourage) distributions of cash to enable the members to pay their taxes. Another option is to allow for quarterly distributions (to accommodate estimated taxes). Plainly, the parties should discuss whether the company will go as far as to borrow money in order to make tax distributions.

single tax rate for all Members.[70] Nothing in this section is intended to require or encourage a distribution that is not in the ratio of the Members' interests in the Company.

5.7 ***Applicable Definitions***.[71]

Adjusted Net Operating Income. For any period, the Net Operating Income of the Company, as adjusted for a normalized recurring level of capital expenditures by the Company for such period, as recommended by the Company's certified public accountants.

Adjustment Date. The date on which any of the following occurs: (a) the acquisition of an additional interest in the Company by any new or existing Member in exchange for more than a de minimis capital contribution; or (b) the distribution by the Company to a Member of more than a de minimis amount of Company Property. At the election of the Members, upon the distribution by the Company of any assets in-kind to any Member other than in consideration of an interest in the Company, only the Gross Asset Value of the assets actually distributed shall be adjusted.

Available Funds. For any fiscal period, without duplication, the aggregate dollar amount of (a) the Company's Net Cash Flow; plus (b) cash proceeds from any disposition of the Company's property, refinancing of Company indebtedness, insured casualty, or condemnation, in any case, net of all related costs and expenses; minus (c) all payments made by the Company as permitted by this Agreement which were not deducted from gross revenues in the computation of Net Cash Flow, and (d) any amounts that the Members determine to set aside for the purposes of the Company.

Capital Account. The account maintained for a Member determined in accordance with Article 4.

Capital Contribution. See Section 4.1.

Company Liability. Any enforceable debt or obligation for which the Company is liable or which is secured by any the Company's property.

Company Minimum Gain. An amount determined by first computing for each Company Nonrecourse Liability any gain the Company would realize if it disposed of the Company's property subject to that liability for no consideration other than full satisfaction of the liability, and then aggregating the separately computed gains. The amount of Company Minimum Gain includes such minimum gain arising from a conversion, refinancing, or other change to a debt instrument, only to the extent a

[70] More direction could be provided here; e.g., "45%", "the highest federal income tax rate applicable to individual taxpayers", or "the highest effective federal and state rate applicable to individual taxpayers (after allowing for the deductibility of state taxes for federal income tax purposes)".

[71] Consider adding the definitions set forth here to Article 1.

Member is allocated a share of that minimum gain. For any Taxable Year, the net increase or decrease in Company Minimum Gain is determined by comparing the Company Minimum Gain on the last day of the immediately preceding Taxable Year with the Minimum Gain on the last day of the current Taxable Year. Notwithstanding any provision to the contrary in this Agreement, Company Minimum Gain and increases and decreases in Company Minimum Gain are intended to be computed in accordance with the "partnership minimum gain" provisions of § 704 of the Code and the Regulations issued thereunder, as the same may be issued and interpreted from time to time. A Member's share of Company Minimum Gain at the end of any Taxable Year equals the sum of Company Nonrecourse Deductions allocated to that Member (and to that Member's predecessors in interest) up to that time and the distributions made to that Member (and to that Member's predecessors in interest) up to that time of proceeds of a nonrecourse liability allocable to an increase in Company Minimum Gain minus the sum of that Member's (and that Member's predecessors in interest) aggregate share of the net decreases in Company Minimum Gain plus their aggregate share of decreases resulting from revaluations of the Company's property subject to one or more Company Nonrecourse Liabilities.

Company Nonrecourse Deduction. For a Taxable Year, the net increase in Company Minimum Gain during such year reduced (but not below zero) by the aggregate distributions made during the year of proceeds of a Nonrecourse Liability that are allocable to an increase in Company Minimum Gain. However, increases in Company Minimum Gain resulting from conversions, refinancings, or other changes to a debt instrument do not generate Company Nonrecourse Deductions. Generally, Company Nonrecourse Deductions consist first of certain depreciation or cost recovery deductions and then, if necessary, a pro rata portion of other Company losses, deductions and expenditures under the "partnership nonrecourse deduction" provisions of § 705(a)(2)(B) of the Code for that Taxable Year; provided, however, the determination of Company Nonrecourse Deductions shall be computed in accordance with the "partnership nonrecourse deduction" provisions of the Regulations under § 704(b) of the Code and specifically to those ordering rules set forth at § 1.704-2(j) therein.

Company Nonrecourse Liability. A Company Liability to the extent that no Member or Related Person bears the economic risk of loss (as defined in §1.752-2 of the Regulations) with respect to the liability.

Debt Service. For any period, and without duplication, Interest Expense for such period, plus scheduled principal amortization (excluding balloon payments) for such period on all liabilities of the Company.

Distribution. A transfer of cash or property to a Member on account of a Membership Interest as described in Article 5.

Gross Asset Value. With respect to any asset, the adjusted basis of the asset for federal income tax purposes, except as follows:

(A) The initial Gross Asset Value of any asset contributed by a Member to the Company shall be the gross fair market value of such asset, as determined by the contributing Member and the Company;

(B) If the Members elect, the Gross Asset Values of all Company assets shall be adjusted to equal their respective gross fair market values, as determined by the Members, immediately prior to any Adjustment Date.

If the Gross Asset Value of an asset has been determined or adjusted pursuant to clauses (A) or (B) above, (i) income, gain, loss and deductions with respect to such asset shall be computed with respect to the Gross Asset Value, and not the adjusted basis of such asset, and (ii) such Gross Asset Value shall thereafter be adjusted by the depreciation taken into account with respect to such asset for purposes of computing profits and losses.

Member Minimum Gain. An amount determined by first computing for each Member Nonrecourse Liability any gain the Company would realize if it disposed of the Company's property subject to that liability for no consideration other than full satisfaction of the liability, and then aggregating the separately computed gains. The amount of Member Minimum Gain includes such minimum gain arising from a conversion, refinancing, or other change to a debt instrument, only to the extent a Member is allocated a share of that minimum gain. For any Taxable Year, the net increase or decrease in Member Minimum Gain is determined by comparing the Member Minimum Gain on the last day of the immediately preceding Taxable Year with the Minimum Gain on the last day of the current Taxable Year. Notwithstanding any provision to the contrary contained herein, Member Minimum Gain and increases and decreases in Member Minimum Gain are intended to be computed in accordance with the "partner minimum gain" provisions of § 704 of the Code and the Regulations issued thereunder, as the same may be issued and interpreted from time to time.

Member Nonrecourse Deduction. For a Taxable Year, the net increase in Member Minimum Gain during such year-reduced (but not below zero) by the proceeds of the Company Liability distributed during that year to the Member bearing the economic risk of loss for the Company Liability (as such term is defined in the "partner nonrecourse deduction" provisions of § 1.752-2 of the Regulations) that are both attributable to the Company Liability and allocable to an increase in Member Minimum Gain. However, increases in Member Minimum Gain resulting from conversions, refinancings, or other changes to a debt instrument do not generate Member Nonrecourse Deductions. Generally, Member Nonrecourse Deductions consist first of certain depreciation or cost recovery deductions and then, if necessary, a pro rata portion of other Company losses, deductions and expenditures under § 705(a)(2)(B) of the Code for that Taxable Year; provided, however, the determination of Member Nonrecourse Deductions shall be computed in accordance with the "partner nonrecourse deduction" provisions of the Regulations under § 704(b) of the Code and specifically to those ordering rules set forth at § 1.704-2(j) therein.

Member Nonrecourse Liability. Any Company Liability to the extent the liability is nonrecourse under applicable local law, and as to which a Member or Related Person bears the economic risk of loss under § 1.752-2 of the Regulations because, for example, the Member or Related Person is the creditor or a guarantor.

Membership Interest (or Member's Interest). The rights of a Member in the profits, losses, deductions, gains, Distributions and allocations of the Company, expressed as a percentage assigned to each Member as set forth on Exhibit A.

Net Cash Flow. For any period, the gross revenues of the Company from any source other than sale proceeds, refinancing proceeds, condemnation proceeds, or insured casualty, for the subject period, minus, without duplication, and, only to the extent incurred or expended in accordance with the applicable provisions of this Agreement, all Operating Expenses, Debt Service, capital expenditures, and (a) reserves (including reserves for working capital and for the payment of current liabilities and obligations (including Operating Expenses)) determined by the Members.

Net Losses. The losses and deductions of the Company determined in accordance with accounting principles consistently applied from year to year employed under the method of accounting adopted by the Company and as reported separately or in the aggregate, as appropriate, on the tax return of the Company filed for federal income tax purposes.

Net Operating Income. As determined by the Company's certified public accountants, for any period, the gross revenues derived from the customary operation of the Company during such period (to the extent actually received and earned), less Operating Expenses of the Company for such period, all as determined in accordance with customary accounting principles applicable to the Company's business and in accordance with the Uniform System of Accounts. Notwithstanding the foregoing, Net Operating Income shall not include, (a) any condemnation or insurance proceeds (excluding rent or business interruption insurance proceeds applied to such period), (b) any proceeds resulting from the sale, exchange, transfer, financing or refinancing of all or any portion of the Company's property, (c) amounts received from tenants as security deposits; and (d) any type of income otherwise included in Net Operating Income but paid directly by any tenant to a Person other than the Company.

Net Profits. The income and gains of the Company determined in accordance with accounting principles consistently applied from year to year employed under the method of accounting adopted by the Company and as reported separately or in the aggregate, as appropriate, on the tax return of the Company filed for federal income tax purposes.

Nonrecourse Liabilities. Nonrecourse liabilities include Company Nonrecourse Liabilities and Member Nonrecourse Liabilities.

Offsettable Decrease. Any allocation that unexpectedly causes or increases a deficit in the Member's Capital Account as of the end of the taxable year to which the allocation relates attributable to depletion allowances under § 1.704-1(b)(2)(iv)(k) of the Regulations, allocations of loss and deductions under § 704(e)(2), § 706(d) of the Code or under paragraph (b)(2)(ii) of § 1.751-1 of the Regulations, or distributions that, as of the end of the year are reasonably expected to be made to the extent they exceed the offsetting increases to such Member's Capital Account that are reasonably expected to occur during or (prior to) the taxable years in which such distributions are expected to be made (other than increases pursuant to a Minimum Gain Chargeback pursuant to § 1.704-1(b)(4)(iv)(e) or § 1.704-2(f) of the Regulations).

Operating Expenses. As determined by the Company's certified public accountants, for any given period (and including the pro rata portion for such period of all such expenses attributable, but not paid during, such period), all expenses paid, accrued, or payable, as determined in accordance with customary accounting principles and in accordance with the Uniform System of Accounts, by the Company during such period in connection with the operation of the Company. Notwithstanding the foregoing, Operating Expenses shall not include (i) depreciation or amortization or other non-cash items, (ii) interest, principal, fees, costs and expense reimbursements in respect of indebtedness for borrowed money, and (iii) any expenditure (other than leasing and financing costs, leasing commissions, tenant concessions, and improvements, and replacement reserves) which is properly treatable as a capital item under GAAP.

Regulations. Except where the context indicates otherwise, the final, temporary, proposed, or administrative regulations promulgated by the Department of the Treasury with respect to the Code as such regulations may be lawfully changed from time to time.

Related Person. A person having a relationship to a Member that is described in § 1.752-4(b) of the Regulations.

Taxable Year. The taxable year of the Company as determined pursuant to § 706 of the Code, initially to be the calendar year.

Taxing Jurisdiction. Any state, local, or foreign government that collects tax, interest or penalties, however designated, on any Member's share of the income or gain attributable to the Company.

ARTICLE 6
MANAGEMENT

6.1 ***Management.*** Except as otherwise specifically provided in this Agreement, the business and affairs of the Company shall be vested in, and controlled by, the Members, acting by means of, and through, a committee of persons appointed in writing pursuant to Section 6.2

(the ***"Executive Committee"***).[72] Each person appointed by a Member to the Executive Committee shall act at the exclusive direction of, be the agent of and be free to represent the views and positions of such appointing Member.[73] The Executive Committee, as agents accounting for and at the direction of the Members, shall have the responsibility for establishing the policies and operating procedures with respect to the business and affairs of the Company, as well as for making all decisions as to all matters that the Company has authority to perform (including, without limitation, all Major Decisions, but excluding all decisions that, by the express terms of this Agreement, require the unanimous approval of the Members), as fully as if both of the Members were themselves making such decisions in lieu thereof. All decisions made with respect to the management and control of the Company and approved by the Executive Committee (including, without limitation, all Major Decisions, but excluding all decisions that, by the express terms of this Agreement, require the unanimous approval of the Members) shall be binding upon the Company and all of the Members. Any documents, instruments, or agreements executed by all of the Members shall, for all purposes hereof, be deemed to have been approved by the Executive Committee. However, notwithstanding anything to the contrary contained in this Agent, for so long as the Initial Loan shall be outstanding and until the same shall be discharged [or deferred] in full, the Executive Committee shall not have the authority to:

(a) take or approve any of the following actions without the unanimous prior written consent of the Members:

(i) perform any act in contravention of this Agreement;

(ii) perform any act that would make it impossible to carry on the ordinary business of the Company, except as specifically otherwise provided in this Agreement;

(iii) possess any Company Property, other than for the purposes of the Company; or

(iv) either:

[72] The flexibility of limited liability companies is perhaps no better illustrated than by the myriad forms of management structures that may be implemented. The basic rule under the Delaware Act, which is consistent with most state acts, is that the company may be member managed or may be manager managed. DLLCA §18-402. This Agreement provides for member management with the members appointing and acting through an Executive Committee. DLLCA provides that the members may provide for any voting rights, voting procedures, meetings and the like that the members may provide. DLLCA §18-302. If the members do not otherwise provide for management, the default provisions in the DLLCA provide that management shall be vested in the members and the decision of members owning more than 50% of the profits interest shall be controlling. DLLCA §18-402. The intent of the DLLCA is to give maximum effect to the parties' freedom of contract in virtually any way they see fit. DLLCA §18-1101(b).

[73] DLLCA expressly permits a member or manager to delegate to one or more other persons the member's or manager's rights of management and control. DLLCA §18-407.

(s) file a voluntary petition or otherwise initiate any proceeding to have the Company adjudicated bankrupt or insolvent;

(t) consent to the institution of bankruptcy or insolvency proceedings against the Company;

(u) file a petition seeking, or consenting to, reorganization or other relief, with respect to the Company as a debtor, under any applicable federal or state law relating to bankruptcy, insolvency, or other relief for debtors;

(v) seek or consent to the appointment of any trustee, receiver, conservator, assignee, sequestrator, liquidator, or other similar official of the Company or of all, or any substantial part, of its assets;

(w) make any general assignment for the benefit of creditors of the Company;

(x) admit in writing the inability of the Company to pay its debts generally as they become due;

(y) declare or effect a moratorium on any debt of the Company; or

(z) take any action in furtherance of any action described in this subsection (iv); or

(b) take or approve any of the following actions without both the unanimous prior written consent of the Members and the prior written consent of the Initial Lender or the then holder of the Initial Loan (as the case may be):

(i) borrow money on behalf of the Company other than in the ordinary course of business or grant consensual liens on any of the Company Property (excluding, however, the Initial Loan);

(ii) sell, lease, or otherwise dispose of all, or substantially all, of the assets of the Company.

6.2 ***Appointment of Members of the Executive Committee.*** Except to the extent otherwise provided herein or otherwise approved by the Members, the Executive Committee shall consist of two members, one appointed by Member 2 and one appointed by Member *1.*[74] The initial members of the Executive Committee shall be _____ _____ (appointed by Member 2) and _____ _____ (appointed by Member 1). Each Member may, by written notice to the other Member, designate an individual to serve as an alternate for the member of the

[74] DLLCA §18-407 expressly permits such delegation. See Footnote 2, *infra.*

Executive Committee appointed by such Member, and may remove any person appointed by such Member and appoint a substitute therefor, ***provided, however***, that any new person appointed to the Executive Committee by any Member (and any alternate member of the Executive Committee) must be either:

(a) a general partner, manager, managing member, officer, or employee of such Member, or of an Affiliate of such Member, or

(b) approved by the Executive Committee members appointed by the other Member, such approval not to be unreasonably withheld.

6.3 ***Meetings of the Executive Committee*.** Regular meetings of the Executive Committee shall be held at such times and places as shall be designated, from time to time, by resolution thereof, provided, however, that:

(a) the Executive Committee shall meet no less frequently than quarterly; and

(b) such regular meetings of the Executive Committee shall be held as often as is necessary or desirable in order to carry out its management functions.

Special meetings of the Executive Committee may be called by, or at the request of, any Member. The person or persons authorized to call the special meeting of the Executive Committee may fix any reasonable place as the place for holding such meeting.[75]

6.4 ***Notice of Meeting*.** Notice of any meeting of the Executive Committee shall be given no fewer than five (5) days, and no more than thirty (30) days, prior to the date of the meeting. Notices shall be delivered in the manner set forth in Section 13.3. The attendance of a member of the Executive Committee at a meeting thereof shall constitute a waiver of notice with respect to such meeting, except where a member of the Executive Committee attends a meeting for the express purpose of objecting to the transaction of any business because the meeting is not properly called or convened. Neither the business to be transacted at, nor the purpose of, any regular or special meeting of the Executive Committee need be specified in the notice or waiver of notice of such meeting.

6.5 ***Quorum for Meeting*.** A majority in number of the members of the Executive Committee shall constitute a quorum for the transaction of business at any meeting of the Executive Committee, provided that, if less than a quorum is present at any meeting, a majority of the members of the Executive Committee present may adjourn the meeting at any time without further notice. The members of the Executive Committee may participate in, and act at, meetings of the Executive Committee through the use of a conference telephone or other communications equipment by means of which all persons participating in the meeting can hear

[75] DLLCA permits the members in their agreement to specify the time, notice requirements, place and purpose of any meeting, and any other matters with respect to the right to vote. DLLCA §18-302(c). Section 404(c) provides similar flexibility with respect to meetings by managers.

each other. Participation in such manner shall constitute attendance in person at the meeting of the person or persons so participating. [76]

6.6 ***Acts of the Executive Committee.*** Except as otherwise set forth herein, the act of a majority in number of the members of the Executive Committee present at a meeting at which a quorum is present shall be the act of the Executive Committee, unless the act of a greater number is required by this Agreement. Additionally, any action required to be taken at a meeting of the Executive Committee, or any action that may be taken at a meeting thereof, may be taken without a meeting if a consent in writing, setting forth the action so taken, is signed by a majority in number of the members of the Executive Committee entitled to vote with respect to the subject matter thereof provided that each Member shall be provided with at least twenty-four (24) hours prior notice of such proposed action. Any such consent, signed by a majority in number of the members of the Executive Committee, shall be the same effect as an act of a majority in number of the members of the Executive Committee at a properly called and constituted meeting of the Executive Committee at which all of the members of the Executive Committee were present and voting.[77]

6.7 ***Records of the Executive Committee.*** A written record of the meetings of the Executive Committee and all decisions made by it shall be made by the Administrative Member, as Secretary of the Executive Committee. Each such written record shall be initialed or signed by each of the members of the Executive Committee and kept in the records of the Company. The approval of any Budget and/or Operating Plan shall be evidenced by the signing or initialing of a copy of the approved version by at least a majority in number of the members of the Executive Committee. Minutes and/or resolutions of the Executive Committee, when initialed or signed by a majority in number of the members thereof, shall be binding and conclusive evidence of the decisions reflected therein and any authorizations granted thereby.

6.8 ***Compensation of Executive Committee Members.*** Except as otherwise determined by the Executive Committee, no member thereof shall be entitled to receive any salary, other remuneration, or expense reimbursement from the Company for his or her services as a member of the Executive Committee.

6.9 ***Appointment of Officers. Etc.*** The Executive Committee may, by resolution, appoint one or more individuals as officers, employees, or agents of the Company. Each such officer, employee, or agent shall have the authority, and shall perform the duties, designated by the Executive Committee from time to time. Any officer, employee, or agent appointed by the Executive Committee may be removed by the Executive Committee whenever, in their

[76] DLLCA §18-302(c) expressly permits the members to establish any quorum they desire in the agreement.

[77] DLLCA §18-302(d) permits members to vote in person or by proxy or to act by consent signed by not less than the number of votes necessary to approve the matter at a meeting. Consent may be by electronic transmission that can be retained and retrieved by the recipient and reproduced in paper form, e.g., email.

judgment, the best interests of the Company would be served. No officer, employee, or agent need be a Member of the Company.[78]

6.10 ***Deadlock of the Executive Committee.*** In the event that the member(s) of the Executive Committee appointed by Member 2 are unable to agree with the member(s) of the Executive Committee appointed by Member 1 with respect to any Deadlock Major Decision, Member 1 and Member 2 shall each have the right to deliver written notice (a **"First Deadlock Notice"**) to the other stating that a disagreement exists and specifying in reasonable detail the nature of such disagreement. If Member 1 and Member 2 are unable to unanimously agree on the resolution of the Deadlock Major Decision described in the First Deadlock Notice within fifteen (15) calendar days after the delivery of the First Deadlock Notice, Member 1 and Member 2 shall each have the right to deliver further written notice (a ***"Second Deadlock Notice"***) to the other, informing the other that, in the opinion of the notifying Member, a disagreement still exists with respect to the Deadlock Major Decision described in the First Deadlock Notice. Within five (5) business days after delivery of a Second Deadlock Notice, senior representatives of Member 1 and Member 2 shall hold a meeting (a ***"Deadlock Meeting"***) at the Company's principal place of business (or such other place as such senior representatives shall mutually agree) to attempt to resolve such disagreement. Notwithstanding the time periods set forth above, in situations that Member 1 or Member 2 believes in good faith are reasonably necessary to prevent personal injury, loss of life, material damage to Company Property, or substantial economic harm, or to capitalize upon an economically advantageous opportunity (such as, for illustration purposes, a sale or lease transaction), Member 1 or Member 2 (as the case may be) shall have the right in either First Deadlock Notice or the Second Deadlock Notice to specify reasonably shorter periods of time than those specified in this Section 7.10, based upon the circumstances. If the representatives designated by Member 2 are unable to agree with the representatives designated by Member 1 on the manner in which a Deadlock Major Decision should be handled within five (5) business days after the holding of a Deadlock Meeting, then both Member 1 and Member 2 shall have the right to deliver written notice to the other declaring, for purposes of Section 7.1 below, that a deadlock (**"Deadlock"**) exists.

6.11 ***Designation and Compensation of the Administrative Member.*** Member 1 is hereby designated as the Member of the Company having the primary responsibility to implement the decisions made by, and the policies and procedures established by, the Executive Committee (the ***"Administrative Member"***). Member 1 shall remain the Administrative Member until the earliest to occur of either:

(x) Member 1 shall elect to resign from such position (which such resignation shall require ninety (90) days' prior written notice to Member 2);

[78] DLLCA §18-407 permits the members to delegate to officers or boards such management rights as the members so elect. Most state statutes are not so specific on the authority of the members or managers to establish officers and boards. However, even in the absence of specific statutory authority, traditional common law rules would permit the delegation with the consent of the principal. See generally, *Restatement (Second) of Agency* §18 (1958).

(y) Member 1's appointment as the Administrative Member shall be terminated as provided in Section 7.15 or shall be suspended as provided in Section 6.16; or

(z) Member 1 shall Transfer its entire Interest in the Company to one or more Member 1 Permitted Transferees.

In the event that Member 1 shall resign, or be terminated or suspended, as the Administrative Member of the Company, Member 2 shall succeed Member 1 as the Administrative Member (either permanently or, if applicable, for the period provided in Section 7.16). In the event that Member 1 shall Transfer its entire Interest in the Company to one or more Member 1 Permitted Transferees, Member 1 shall have the right, in the instrument of such assignment, to designate one of such Member 1 Permitted Transferees as the successor Administrative Member hereunder. Administrative Member shall not be entitled to receive any fees, other compensation, reimbursement for compensation payable to any of its employees, or reimbursement for other direct or indirect overhead that may be attributable to the performance of its duties as the Administrative Member.

6.12 ***Authority of the Administrative Member*****.** Subject to the limitations set forth in this Agreement (including, but not limited to, in this Section 6.12 and in Section 6.24 below), the Administrative Member shall have the power and authority to perform the duties delegated to it pursuant to, or in accordance with, this Agreement in compliance with the then existing Budget, the then existing Operating Plan and any other guidelines adopted by the Executive Committee that are then in effect. Such power and authority shall include, but shall not be limited to, the power and authority to:[79]

(a) execute and deliver deeds, assignments, bills of sale, leases, notes, mortgages, deeds of trust, pledges, security agreements, satisfactions of mortgages, releases and other instruments and documents on behalf of the Company, as well as to amend and/or modify any of the foregoing on behalf thereof;

(b) transfer funds from the "Deposit Account" to the "Operating Account" (however denoted) established under the Management Agreement so as to enable the Company to meet timely its obligations; and

[79] This section establishes the actual authority of the members, in this case the authority of the Administrative Member, to bind the company. A limited liability company, like corporations and other business entities, cannot act except by and through its agents. Under the DLLCA, each member and manager, unless otherwise agreed, has the authority to bind the company. DLLCA §18-402. A related issue is the apparent authority of the members to bind the company. DLLCA §18-402 places no statutory limitation on the authority of the members or managers to bind the company; thus, each member and manager under the DLLCA would have apparent authority to bind the company. Some state acts place limitations on apparent authority of members or managers by introduction of statutory conditions of "notice" or "ordinary course of business." The DLLCA has no such limitations, and consideration should be given to adding a statement that the Members have no authority to bind the Company except as expressly set forth in the Agreement. In addition, some state acts provide that if the company is manager managed, the members are not agents of the company and thus would have no apparent authority to bind the company.

(c) make such expenditures of the funds of the Company as are necessary or desirable to implement the then existing Operating Plan and any other guidelines adopted by the Executive Committee that are then in effect.

Notwithstanding the foregoing, however, the Administrative Member shall not:

(i) make any decision, or take any action, constituting a Major Decision, unless the same has been specifically approved in writing by the Executive Committee or specifically provided for (as applicable) in the then existing Budget, in the then existing Operating Plan, in any other guidelines adopted by the Executive Committee that are then in effect and/or in this Agreement; or

(ii) make any decision, or take any action, that is reserved to the Members pursuant to this Agreement or otherwise,

except, however, that the Administrative Member is hereby authorized and directed to cause the Company to incur the Initial Loan, to execute the Initial Loan Documents and deliver the same to the Initial Lender on behalf of the Company and otherwise to grant a lien or liens on, as well as to otherwise encumber, any or all of the Company Property in favor of the Initial Lender and its successors or assigns in order to secure the Initial Loan.

6.13 ***Duties of the Administrative Member*****.** The Administrative Member shall, subject to the limitations set forth in this Agreement (including, but not limited to, in Section 6.12 above and in Section 6.24 below) and provided that funds of the Company are available to it pursuant to Article 4:

(a) administer the business and operation of the Company on a day-to-day basis in accordance with:

(i) the standard of care required of prudent and experienced third-party business administrators performing similar functions in accordance with customary industry standards; and

(ii) the then existing Budget, the then existing Operating Plan and any other guidelines adopted by the Executive Committee that are then in effect;

(b) perform the other duties assigned to the Administrative Member in this Agreement, as well as such other services as are reasonably requested from time to time by the Executive Committee; and

(c) otherwise carry out all lawful decisions and resolutions of the Executive Committee.

Without intention to limit the generality of the foregoing in any respect, the Administrative Member shall, subject to the limitations set forth in this Agreement (including, but not limited to, in Section 6.12 above and in Section 6.24 below) and in accordance with the then existing Budget, the then existing Operating Plan and any other guidelines adopted by the Executive Committee that are then in effect:

(i) oversee and supervise, on a day-to-day basis, the operation and management of any and all of the assets that comprise the Company Property (including, but not limited to, the Shopping Center);

(ii) take all proper and necessary actions reasonably required to cause the Company and all third parties to perform and comply with, at all times, the provisions (including, but not limited to, any provisions requiring the expenditure of funds by the Company, the compliance with any financial reporting requirements and/or the maintenance of any reserve or other similar account) of any loan commitment, mortgage, or other loan document (including, but not limited to, the Initial Loan and the provisions of the Initial Loan Documents), and in all material respects with the provisions of any lease or other contract, instrument, or agreement to which the Company is a party or that affects any Company Property or the operation thereof;

(iii) pay or cause to be paid, in a timely manner, all non-disputed operating expenses of the Company;

(iv) to the extent obtainable, obtain and maintain, or cause to be obtained and maintained, insurance coverage on the Company Property as required by the Executive Committee (which insurance coverage, at all times, shall comply in all respects with the requirements of any loan commitment, mortgage and/or other loan document (including, but not limited to, the Initial Loan and the provisions of the Initial Loan Documents) in effect with respect to the Company and/or the Company Property, and pay, or cause to be paid, all non-disputed taxes, assessments, charges and fees payable in connection with the ownership, use and occupancy of the Company Property;

(v) deliver, or cause to be delivered, to the other Members, promptly upon the receipt or sending thereof, copies of all notices, reports and communications between the Company and any tenant under any lease, or any holder of a mortgage, affecting all or any portion of any Company Property, which relates to any existing or pending default thereunder or to any material financial or operational information required by such Person;

(vi) deposit, or cause to be deposited, all receipts from operations of the Company Property, or otherwise with respect to the Company Property, in one or more separate segregated accounts established and maintained by the Administrative Member in the name of the Company, and the Administrative Member shall not commingle those receipts, or permit such receipts to be

commingled, with any funds or accounts of the Administrative Member or of any other Person;

(vii) establish a separate bank account into which all Additional Capital Contributions made by the Members shall be deposited, and pay from such account in a timely manner all Shortfall amounts; and

(viii) make, or cause to be made, emergency repairs, or other immediate expenditures that are necessary to respond to a threat of damage or injury to person or property, without regard to any limitations set forth in the then existing Budget (provided that prompt notice is given to each Member of each such expenditure made under this subparagraph (viii) that is not within the limits of the then existing Budget).

Notwithstanding anything to the contrary contained in this Agreement, the Administrative Member shall not be obligated to make any expenditures or to advance any funds on behalf of the Company, except from the accounts or funds of the Company.

6.14 ***Absence of Current Budget and/or Operating Plan*****.** Notwithstanding anything to the contrary contained herein, if, at the beginning of any calendar year, the Budget and Operating Plan for such calendar year, or any item or portion thereof, shall not have been approved by the Executive Committee, then

(a) any item(s) or portion(s) of the Budget and Operating Plan that have been approved shall become operative immediately, and the Administrative Member shall be entitled to expend funds or cause funds to be expended, as well as to perform its other duties under this Agreement, in accordance with such operative portions;

(b) with respect to any item(s) or portion(s) of the Budget that have not been approved, the Administrative Member shall be entitled to expend funds or cause funds to be expended in respect of:

(i) debt service on the Company's then financing (including, but not limited to, the expense of curing any defaults thereunder);

(ii) real estate taxes and assessments;

(iii) emergency repairs or other immediately necessary expenditures;

(iv) utility charges;

(v) repairs, additions, or modifications required to be made in order to comply with applicable laws or insurance requirements;

(vi) insurance premiums for insurance policies approved by the Executive Committee;

(vii) any final orders or judgments and all costs and expenses related thereto; and

(viii) any other non-capital, recurring expenses in any quarter of the then current calendar year, in an amount equal to the budgeted amount for the corresponding quarter of the immediately preceding calendar year, as set forth on the immediately preceding calendar year's Budget, after giving effect to any material changes with respect to the Company Property during the prior year (including, but not limited to, increases in occupancy and material increases in operating costs due to causes beyond the control of the Administrative Member), *provided, however*, that, if any contract approved by the Executive Committee provides for an automatic increase in costs thereunder after the beginning of the then current calendar year, the Administrative Member shall be entitled to expend the amount of such increase; and

(c) with respect to any item(s) or portion(s) of the Operating Plan that have not been approved, the Administrative Member shall be entitled to perform its duties hereunder in accordance with the corresponding item(s) or portion(s) of the immediately preceding calendar year's Operating Plan, after giving effect to any material changes with respect to the Company Property during the prior year (including, but not limited to, increases in occupancy and material increases in operating costs due to causes beyond the control of the Administrative Member), subject, however, to the provisions of subsection (b) above with respect to expenditures in connection with the same.

6.15 ***Termination of Appointment of the Administrative Member and/or Officers, Etc*****.** In addition to any other rights or remedies available under this Agreement (including, but not limited to, those specified in Section 13.2), the member(s) of the Executive Committee appointed by Member 2, acting alone and without the necessity of obtaining any consent from the member(s) of the Executive Committee appointed by Member 1, may terminate Member 1's appointment as the Administrative Member hereunder and/or the appointment of any officer, employee, or Agent of the Company theretofore appointed by the Executive Committee pursuant to Section 6.9 above at any time after the occurrence of any of the following events:

(a) in the event of fraud, willful misconduct, gross negligence, ordinary negligence (provided such ordinary negligence constitutes a material violation or breach of the Administrative Member's duties or obligations hereunder, causing material damage or loss to the Company), or material breach of obligations hereunder by the Administrative Member, which breach is not cured by the Administrative Member within a Reasonable Period;

(b) upon the bankruptcy, insolvency, liquidation, dissolution, or termination of the Administrative Member;

(c) in the event that neither Member 1 nor a Member 1 Permitted Transferee designated by Member 1 as the successor Administrative Member pursuant to Section 6.11 shall be a Member of the Company;

(d) in the event that, at any time, _____ and _____ (or a replacement thereof reasonably satisfactory to Member 2) do not jointly either:

(i) constitute the senior management of Member 1 or of a Member 1 Permitted Transferee designated by Member 1 as the successor Administrative Member pursuant to Section 6.11, whichever shall be the then Administrative Member, or

(ii) otherwise possess, directly or indirectly, the authority and responsibility to make the day to day decisions concerning the operation and management of Member 1 or such successor Administrative Member;

(e) under the circumstances set forth in, and in accordance with, Section 4.3(b) or any other applicable provision of this Agreement; and/or

(f) in the event that:

(i) the Property Manager is an affiliate of Member 1; and

(ii) the Management Agreement is terminated by the Company or shall expire.

6.16 ***Management of the Company Property*****.** Concurrent with the Closing, the Company shall enter into the Management Agreement substantially in the form attached hereto as Exhibit A, subject only to such variances therefrom as are acceptable to the Members.

6.17 ***Agreements with Affiliates*****.** Except as set forth in this Section 6.17, any agreements by the Company with an Affiliate of any Member must be approved by the Executive Committee, and no fees or compensation will be paid by the Company to any Member or any of its Affiliates. No Member or any Affiliate thereof shall be entitled to any leasing or other fees associated with the management and leasing of the Company Property (excluding, however, the fees and reimbursements payable to the Property Manager pursuant to the Management Agreement, if the Property Manager is an Affiliate of any Member), nor shall any Member or any Affiliate thereof be entitled to any reimbursement for its employees or other direct or indirect overhead except as permitted under the Management Agreement (if the Property Manager is an Affiliate of any Member) or any other property management agreement approved by the Executive Committee or under this Agreement. Notwithstanding anything to the contrary provided herein, or in the Management Agreement (if the Property Manager is an Affiliate of any Member), or in any other property management, leasing, or other agreement with Member 1, Member 2, or any Affiliate of either of them, to the extent that Member 1, Member 2, or any Affiliate of either of them is now, or hereafter becomes, a party to any agreement entered

into with the Company, the other Member, acting alone, shall have the exclusive right and authority, on behalf and at the expense of the Company, to:

(a) determine any action to be taken by the Company with respect to any default by such party under such agreement;

(b) exercise termination rights in accordance with the terms of such agreement;

(c) enforce and defend the Company's rights under such agreement (including, but not limited to, the prosecution or defense of any proceeding or action that it deems necessary or appropriate); and

(d) retain counsel of its choosing in connection with the foregoing.

In addition, under no circumstances shall the Administrative Member agree to any amendment or modification of any agreement with Member 1, Member 2, or any Affiliate of either of them, nor shall the Administrative Member waive any right of the Company under any such agreement, without the prior written approval of the other Member. Member 1 and Member 2 hereby grant to each other their irrevocable powers of attorney to take all actions described in this Section 6.17, which powers of attorney shall be deemed to be powers coupled with an interest that may not be revoked until the termination of the Company.

6.18 ***Duty to Devote Time: Compensation of Members*****.** The Members, and their respective officers and employees, shall devote such time to the Company business as they deem to be necessary or desirable in connection with their respective duties and responsibilities hereunder. Except as provided hereunder, or as otherwise agreed to in writing by the Executive Committee, neither any Member, nor, any member, partner, shareholder, officer, director, employee, agent, or representative of any Member, shall receive any salary or other remuneration for his, her, or its services rendered pursuant to this Agreement.

6.19 ***Conflicts of Interest*****.** Each of the Members recognizes and agrees that the other Member and its members, partners, shareholders, officers, directors, employees, agents, representatives and Affiliates:

(a) have, or may have, other business interests, activities and investments, some of which may be in conflict or competition with the business of the Company; and

(b) are entitled to carry on such other business interests, activities and investments.

Notwithstanding any duty otherwise existing, each of the Members may engage in, or possess an interest in, any other business or venture of any kind, independently or with others (including, but not limited to, owning, financing, acquiring, leasing, promoting, developing, improving, operating, managing and servicing real property on its own behalf or on behalf of other entities with which any of the Members is affiliated or otherwise), and each of the Members may engage

in any such activities (whether or not competitive with the Company) without any obligation to offer any interest in such activities to the Company or to the other Member. Notwithstanding any duty otherwise existing, neither the Company nor the other Member shall have any right, by virtue of this Agreement, in or to such activities, or the income or profits derived therefrom, and the pursuit of such activities, even if competitive with the business of the Company, shall not be deemed wrongful or improper, subject, however, to the provisions of Section 6.20.[80]

6.20 ***Use of Company Information*****.** Notwithstanding anything to the contrary contained in Section 6.19, in the event that any Member acquires an ownership interest in a Competing Property, such Member and its Affiliates shall not use any Company information, or otherwise act in violation of any fiduciary duties to the other Member that it may have hereunder, to solicit or induce existing or prospective tenants of the Shopping Center to relocate or locate in the Competing Property. As used herein, the term ***"Competing Property"*** shall mean any building or buildings of a character similar to the Shopping Center located within the area defined by a radius of fifteen (15) miles surrounding the same.

6.21 ***Company Expenses*****.** Except as otherwise provided in this Agreement, and except for any cost to be borne by any third party under any agreement with the Company, the Company shall be responsible for paying, and shall pay, all direct costs and expenses related to the business of the Company and of acquiring, holding, owning, developing, servicing, collecting upon and operating the Company Property (including, but not limited to, all fees payable under the Management Agreement, all costs and expenses relating to any employee, staff, or other personnel necessary to provide day-to-day operations and financial reporting, all costs of financing, fees and disbursements of attorneys, financial advisors, accountants, appraisers, brokers and engineers, and all other fees, costs and expenses directly attributable to the business and operations of the Company). In the event that any such costs and expenses are, or have been, paid by any Member, such Member shall be entitled to be reimbursed for such payment, so long as such payment was reasonably necessary for Company business or operations and has either been specifically approved by the Executive Committee or is specifically authorized in this Agreement or in the then existing Budget. Notwithstanding the foregoing, in no event shall the Company have any obligation to pay or reimburse any Member for any general overhead expense of such Member or any costs or expenses excluded for reimbursement under the form of Management Agreement attached hereto as ***Exhibit A***.

6.22 ***Fulfillment of Loan Obligations*****.** To the extent that any loan agreement or document (including, but not limited to, any of the Initial Loan Documents) obligates a Member

[80] This section raises the question of what fiduciary duties members owe to each other under the DLLCA and the extent to which they may be waived. Under DLLCA §18-1101(c), to the extent a member of manager has duties (including fiduciary duties) to the company or the other members, such member shall not be liable to the other members for good faith reliance on the provisions of the agreement and such duties may be expanded or restricted in this agreement. It should be noted that under the DLLCA, "reasonableness" or other tests contained in some state acts are not conditions to the waiver of such duties, and hence provisions such as Section 6.19 should be enforceable. This is consistent with DLLCA expressed intention to give maximum effect to freedom of contract. DLLCA §18-1101(b). For an excellent discussion of fiduciary duties under DLLCA and a comparison with other business forms, see, Kenneth M. Jacobson, *Fiduciary Duty Considerations In Choosing Between Limited Partnerships and Limited Liability Companies, ACREL Papers* (Fall 2000).

or an Affiliate of a Member (including, without limitation, the Property Manager, if the Property Manager shall be such an Affiliate) to take a specified action, or obligates the Company to cause a Member or an Affiliate of a Member (including, without limitation, the Property Manager, if applicable) to take a specified action, such Member shall be obligated hereunder to take such action or to cause its Affiliate (including, without limitation, the Property Manager, if applicable) to take such other action (as the case may be) as is necessary to comply in good faith with, and/or to prevent the commission of a default under, such agreement or document. Without limiting the foregoing, to the extent that the Company is obligated under any loan agreement or document (including, but not limited to, any of the Initial Loan Documents) to deliver any financial statements, reports, or other documents concerning a Member or an Affiliate of a Member (including, without limitation, the Property Manager, if the Property Manager shall be such an Affiliate) to any lender or any other third party, such Member shall deliver such statements, reports, or other documents to such lender or third party, or cause its Affiliate (including, without limitation, the Property Manager, if applicable) to deliver the same, in sufficient time to permit the Company to timely meet its obligations. Further, if the Executive Committee shall determine, in its sole discretion, that the delivery of any financial statements, reports, or other documents concerning a Member or an Affiliate of a Member (including, without limitation, the Property Manager, if the Property Manager shall be such an Affiliate) to any prospective lender or other third party is necessary or desirable in connection with any application made by the Company for financing, refinancing, or securitization (including, but not limited to, interim and permanent financing) of and/or any portion of the Company Property (including, but not limited to, all or any portion of the Shopping Center) and/or of the operations of the Company (regardless of whether secured or unsecured), such Member shall deliver such statements, reports, or other documents to such prospective lender or third party, or cause its Affiliate (including, without limitation, the Property Manager, if applicable) to deliver the same, in sufficient time to permit the Company's application to be duly considered thereby.

6.23 ***Reliance on Professional Advice*****.** The Executive Committee may employ, engage, or retain, on behalf of the Company, any qualified Persons to act as brokers, accountants, attorneys, or engineers, or in such other capacities as the Executive Committee may determine, from time to time, are necessary or desirable in connection with the Company's business. Except as otherwise specifically provided in this Agreement, the members of the Executive Committee, the Administrative Member and the officers of the Company shall each be entitled to rely in good faith upon the recommendations, reports and advice given to them by any such Persons in the course of their professional engagement[81]

6.24 ***General Requirements Concerning Separateness and Operational Matters*****.** Notwithstanding anything to the contrary provided in this Agreement, the Executive Committee, the Administrative Member and the officers of the Company shall conduct the Company's business and operations in compliance with the following provisions:

[81] DLLCA §18-406 provides that any member or manager shall be "fully protected" in relying in good faith on professional advisors elected with reasonable care and acting within the scope of their professional competence.

(a) the Company shall not assume any liability for the debts of any other Person, and the Company shall not hold itself out as being liable for any such debts;

(b) none of the liabilities of the Company shall be paid from the funds of its Members, or of any other Person, without the Company being obligated for such liabilities;

(c) the Company shall not guarantee the debts of, or the performance of any obligation by, any of the Members or of any other Person;

(d) the Company shall not pledge any of the Company Property for the benefit of any of the Members or of any other Person, and no Person shall pledge its assets for the benefit of the Company;

(e) the Company shall conduct its affairs strictly in accordance with this Agreement, and shall observe all necessary, appropriate and customary limited liability company formalities, including, but not limited to, maintaining accurate and separate books, records and accounts (including, without limitation, transaction accounts with any Affiliate of the Company);

(f) the books, records and accounts of the Company shall, at all times, be maintained in a manner permitting the assets and liabilities of the Company to be easily separated and any ascertained from those of any other Person;

(g) the Company shall hold itself out to creditors and to the public as a legal entity, separate and distinct from any other entity, and will not hold itself out to the public or to any of its individual creditors as being a unified entity with assets and liabilities in common with any other Person; and

(h) the Company shall not commingle its assets or funds with those of any other Person.[82]

ARTICLE 7
BUY-SELL PROVISIONS

7.1 ***General Buy-Sell Provisions*.**[83] In the event that a Deadlock[84] has occurred and is continuing (the ***"Initial Buy-Sell Date"***), either Member 2 or Member 1 (the **"Offeror"**) shall

[82] "These covenants are similar to those typically required by "conduit" or CMBS lenders. For a complete discussion, see Standard & Poors two publications: Legal and Structured Finance Issues in Commercial Mortgage Securities ("Rating Guidelines I") and Legal Issues in Rating Structured Finance Issues ("Rating Guidelines II"). Both (and more) are available on the internet at S&P.com.

[83] The concept of a Deadlock involving the members of a limited liability company is not specifically dealt with in the Delaware Limited Liability Company Act ("DLLCA"). See however DLLCA §18-110 with regard to actions related to the admission, election, appointment, removal or resignation of a manager of a limited liability company and the right of any person to become or continue to be Manager of the limited liability company.

have the right to make an offer as described below (the ***"Buy-Sell Offer"***) to the other (the ***"Offeree"***) as set forth below:

(a) The Buy-Sell Offer[85] shall:

(i) be in writing and be signed by the Offeror,

(ii) specify a cash purchase price (the ***"Overall Purchase Price"***) at which the Offeror would purchase all of the assets of the Company, if such assets were free and clear of all liabilities, liens, claims and encumbrances;

(iii) disclose all liabilities and potential liabilities of the Company known to the Offeror, and the monetary amount of such liabilities;

(iv) specify the other major economic terms and conditions upon which the Offeror would be willing to purchase from the Offeree its Interest, including its interest in any loans made by the Offeree to the Company (and, in such case, under the circumstances described below, those same terms and conditions shall apply to the sale by the Offeror to the Offeree of its Interest), consistent with the terms of the alternative elections set forth in subsection (b) below; and

(v) disclose the terms and details of any proposed financing, proposed sale, or proposed lease that the Offeror has entertained, negotiated, or discussed during the prior 180 calendar days with any third party for all or any portion of the Company's assets.[86]

(b) A copy of the Buy-Sell Offer shall be delivered to the Company Accountant, who shall, within fifteen (15) calendar days after its receipt, determine in his or her professional opinion, based on current facts and applicable laws, including federal, state and local tax laws, and notify the Members as to the amount that the Offeree would receive as a Member (the ***"Offeree Value")*** *and* the amount that the Offeror would receive as a Member (the **"Offeror Value"**) on account of its Interest (including, but not limited to, the balance of any loans made by such Member to the Company) if all Company Property were sold for the aggregate Overall Purchase Price, all liabilities of the Company (including, but not limited to, any loans secured by Company Property and any loans by any such Member to the Company) were paid in full and the remaining proceeds distributed to the Members in accordance with Section 5.4.

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[84] The definition of the term "Deadlock" is described above in Section 6.10.

[85] In DLLCA §18-702(e), a limited liability company may acquire by purchase, redemption or otherwise, any limited liability company interest of a member or manager in the limited liability company, which interest upon acquisition shall be deemed cancelled.

[86] On a practical level, the manager member would probably be the party with the most current and detailed information, and therefore more likely obligated to disclose the information requested in this Section. However, see DLLCA §18-305 as to the rights of any member to obtain detailed information as to the business of the limited liability company.

(c) The Offeree shall have the right, exercisable by delivery of notice in writing (the ***"Election"***) to the Offeror within ninety (90) calendar days after the receipt of the Buy-Sell Offer to elect to either:

(i) sell to the Offeror all of the Offeree's right, title and interest in and to its Interest, and in any loans to the Company, for a cash purchase price equal to the Offeree Value, or

(ii) purchase all of the Offeror's right, title and interest in and to its Interest, and in any loans to the Company, for a cash purchase price equal to the Offeror Value.

Failure of the Offeree to give the Offeror notice of the Offeree's Election shall be deemed, upon the expiration of such ninety (90) day period, to be an Election to sell under subsection (i) above.[87]

(d) within five (5) business days after the Offeree's Election or deemed Election, the purchasing Member shall deposit in escrow, in an interest-bearing account with a bank or other financial institution selected by the selling Member, an earnest money deposit in cash in an amount equal to ten percent (10%) of the Offeree Value or Offeror Value, as applicable, which amount, along with all accrued interest thereon, is hereinafter referred to as the Deposit. If such purchasing Member fails to close such as provided in this subsection (d), then the selling Member may retain such deposit and either:

(i) elect to purchase all of the right, title and interest of the purchasing Member in and to its Interest, and in any loans made by such purchasing Member to the Company, for a cash purchase price equal to eighty percent (80%) of the Offeree Value or Offeror Value, as the case may be; or

(ii) exercise any other rights or remedies available at law or in equity.

All closings of any purchase and sale under this Section 7.1 shall be held at the Company's principal office, and shall take place on the date that is ninety (90) calendar days after the later of the Offeree's Election or deemed Election, or such earlier date as may be designated in writing by the purchasing Member, time being of the essence. All transfer, stamp and recording taxes imposed on the transfer shall be allocated fifty percent (50%) to the selling Member and fifty percent (50%) to the purchasing Member. All other closing costs including without limitation, costs of title insurance, surveys, appraisers or charges, fees or expenses imposed by the purchasing Member to lender shall be borne by the purchasing Member. Prior to the closing of such purchase and sale, the

[87] These provisions usually favor the investor member which generally has better access to cash to fund the purchase contemplated in this Section. The developer member will generally require additional time and the opportunity to bring in new investors in order to fund the acquisition.

Members shall continue to perform their respective duties under this Agreement in the same manner as prior to the delivery of the Buy-Sell Offer.

(e) The Members acknowledge and agree that each Member's Interest is extraordinary and unique, and, that each Member shall be entitled to enforce its rights under this Section 7.1 by specific performance. If any selling Member defaults in its obligations under this Section 7.1, in addition to all other remedies available to the purchasing Member, the purchasing Member shall have the right, in its sole and absolute discretion, to extend the date of the closing for such period as it determines is necessary for it to enforce such defaulting selling Member's obligation to transfer its Interest. If the purchasing Member defaults under this Section 8.1, it shall have no right to make any future Buy-Sell Offer. No Buy-Sell Offer may be made until all periods for making elections and performing obligations under any previous Buy-Sell Offer pursuant to this Section 7.1 shall have terminated.

(f) The purchasing Member may freely assign its rights and obligations to complete the purchase and sale contemplated under this Section 8.1 to any other third party, by delivering notice of such assignment to the selling Member, provided that the purchasing Member shall remain liable for any and all obligations of its assignee, as if such purchasing Member had not assigned its rights pursuant to this subsection (f).[88]

(g) At the closing of the transfer of the Interest pursuant to this Section 8.1:

(i) the selling Member shall:

(x) deliver to the purchasing Member (or its assignee or designee) a duly executed assignment of its Interest, in form reasonably acceptable to the purchasing Member (without any representation or warranty except with respect to such Member's authority, with respect to the due execution of any documents and that such Member has not conveyed, assigned, or encumbered its Interest in favor of any third party); and

(y) execute and deliver such other documents and records as the purchasing Member (or its assignee or designee) reasonably determines are necessary or desirable to conclude the closing and to otherwise allow the purchasing Member (or its assignee or designee) to own, operate, manage, develop, use, sell, rent, or dispose of all Company Property; and

(ii) the purchasing Member shall:

(x) cause a wire transfer of funds to be made to an account designated by the selling Member in an amount equal to

[88] See DLLCA §18-301 as to admission of members.

the full consideration payable to the selling Member on account of such sale, less the amount of the Deposit, referred to in subsection (d) above; and

(y) execute and deliver such other documents and records as the selling Member reasonably determines are necessary or desirable to conclude the Closing.

If the selling Member's Interest is subject to any lien, claim, or encumbrance that is not discharged by the selling Member at the closing, the same shall constitute a default, and the purchasing Member may elect, in its sole discretion:

(I) to cause all amounts (or a portion thereof) payable to the selling Member to be applied to discharge such lien, claim, or encumbrance;

(II) take the Interest subject to such lien, claim, or encumbrance and to reduce the amount otherwise payable by the purchasing Member to the selling Member by the amount of such lien, claim, or encumbrance; or

(III) to terminate the buy-sell proceedings under this Section 8.1 because of the existence of such lien, claim, or encumbrance and, in such event, the Deposit shall be immediately disbursed to the purchasing Member and the purchasing Member shall have the right to pursue any and all remedies available in this Agreement, at law and in equity.

7.2 ***Termination of Other Agreements.*** If any Member's Interest is purchased under Section 7.1, all other agreements between the Company and such Member or its Affiliates will be terminated on the date that such Member's Interest is purchased.[89]

ARTICLE 8
BOOKS AND RECORDS

8.1 ***Books and Records.*** The Administrative Member shall maintain, or cause to be maintained, in a manner customary and consistent with good accounting principles, practices and procedures and in accordance with the applicable provisions of this Agreement (including, but not limited to, Section 6.24 above), a comprehensive system of office records, books and accounts (which records, books and accounts shall be and remain the property of the Company), in which shall be entered fully and accurately each and every financial transaction with respect to the ownership and operation of the Company Property. Bills, receipts and vouchers shall be maintained on file by the Administrative Member. The Administrative Member shall maintain said books and accounts in a safe manner and separate from any records not having to do directly with the Company or any Company Property. The Administrative Member shall cause audits to

[89] See DLLCA §18-107 for the rights of a member or manager to transact business with the limited liability company.

be performed, and audited statements and income tax returns to be prepared, as required by Section 8.3. Such books and records of account shall be prepared and maintained by the Administrative Member at the principal place of business of the Company or at such other place or places as may from time to time be determined by the Members. Each Member or its duly authorized representative shall have the right to inspect, examine and copy such books and records of account at the Company's office during reasonable business hours for any purpose reasonably related to the Member's Interest as a Member.[90] A reasonable charge for copying books and records may be charged by the Company.

8.2 ***Accounting and Fiscal Year.*** The books of the Company shall be kept, and the Company shall report its operations for tax purposes, on the cash basis. The fiscal year of the Company shall end on December 31 of each year, unless a different fiscal year shall be required by the Code.

8.3 ***Financial Reports.*** The Administrative Member shall cause the following to be performed as a part of its duties to the Company:

(a) The Administrative Member shall cause to be prepared, and shall furnish to the other Member within thirty (30) calendar days after the end of each calendar month, both:

(i) an unaudited statement of cash flows for such calendar month; and

(ii) an unaudited report showing, on a Budget line by Budget line basis and in the aggregate, a comparison of the results of operations for such calendar month and for the year-to-date with the respective budgeted amounts therefor, each of which shall be certified by the Administrative Member as being, to the best of its knowledge, true and correct. The Administrative Member shall further cause to be delivered to the other Member, promptly after the Administrative Member's receipt of the same, copies of all bank statements issued in connection with the bank accounts maintained for the Company or in which any funds of the Company shall be deposited (including, but not limited to, the "Deposit Account" and the "Operating Account" (however denoted) established under the Management Agreement and any "lockbox", "reserve", or other similar account established in connection with the Initial Loan or any replacement or refinancing thereof).

(b) The Administrative Member shall cause to be prepared and shall furnish to the other Member within thirty (30) calendar days after the end of each fiscal quarter of the Company:

(i) unless such fiscal quarter is the last fiscal quarter of any fiscal year of the Company:

[90] Without the qualification that such information is reasonably related to the Member's Interest as a Member, the standard may be deemed waived. See DLLCA §18-305.

(w) an unaudited balance sheet of the Company, dated as of the end of such fiscal quarter;

(x) an unaudited related income statement of the Company for such fiscal quarter,

(y) an unaudited statement of each Member's capital account for such fiscal quarter; and

(z) an unaudited statement of cash flows for such fiscal quarter;

(ii) a statement showing the aging of the receivables and payables for the Company and the Company Property as of the last day of such fiscal quarter; and

(iii) a status report of the Company's activities during such fiscal quarter, including summary descriptions of additions to, dispositions of and leasing and occupancy of the Company Property during such fiscal quarter,

all of which shall be certified by the Administrative Member as being, to the best of its knowledge, true and correct.

(c) The Administrative Member shall cause to be prepared and shall furnish to the other Member within ninety (90) calendar days after the end of each fiscal year of the Company:

(i) the final audited amount of net income of the Company for such fiscal year;

(ii) an audited balance sheet of the Company dated as of the end of such fiscal year,

(iii) an audited related income statement of the Company for such fiscal year,

(iv) an audited statement of cash flows for such fiscal year, and

(v) an audited statement of each Member's Capital Account for such fiscal year,

all of which shall be certified by the Administrative Member as being, to the best of its knowledge, true and correct, and all of which shall be certified in the customary manner by the Company Accountant. If requested by the other Member, the Administrative Member shall also furnish promptly to such Member copies of all previously prepared

supporting schedules and backup information for the fiscal year in question, as reasonably requested by such Member:

(d) The Administrative Member shall cause to be prepared and shall furnish to the other Member:

(i) not later than each April 21st, a schedule of actual taxable income and book income of the Company for the three (3) months ending on the preceding March 31st;

(ii) not later than each July 21st, a schedule of actual, taxable income and book income of the Company for the six (6) months ending on the preceding June 30;

(iii) not later than each October 21st, a schedule of actual taxable income and book income of the Company for the nine (9) months ending on the preceding September 30th; and

(iv) not later than each December 21st, a schedule of actual book income of the Company for the eleven (11) months ending on the preceding November 30th and of estimated book income of the Company for the (1) one month ending on the following December 31st (including all estimated accruals as of such December 31st).

Promptly after the end of each fiscal year, the Administrative Member shall use reasonable efforts to cause the Company Accountant to prepare and deliver to each Member a report setting forth in sufficient detail all such additional information and data with respect to business transactions effected by, or involving, the Company during the fiscal year as will enable the Company and each Member to timely prepare its federal state and local income tax returns in accordance with applicable laws, rules and regulations. The Administrative Member shall further use reasonable efforts to cause the Company Accountant to prepare all federal, state and local tax returns required of the Company, submit those returns to the other Member for its approval no later than February 1st of the year following such fiscal year and file such tax returns after they have been approved by the other Member. If each of the Members shall not have approved any such tax return prior to the date required for the filing thereof (including any extensions granted), the Administrative Member shall timely obtain an extension of such date to the extent that such an extension is available.

(e) The Administrative Member shall enforce the timely submission of all financial statements, tax returns and other reports required to be delivered to the Company under the Management Agreement. In the event that the Management Agreement does not require the Property Manager to prepare and submit each of the financial statements, tax returns and other reports required to be prepared and submitted pursuant to this Agreement (including, but not limited to, pursuant to subsection (f) below), or if there is

no Management Agreement then in effect, then the Administrative Member shall prepare and deliver such financial statements, tax returns and other reports to the Members.

(f) The Administrative Member shall cause to be prepared, and shall furnish to the other Member, such additional financial statements, tax returns, other reports and other information as the Executive Committee shall reasonably require. Additionally, the Administrative Member shall cause to be prepared and submitted to the Company's lender(s) on a timely basis all financial statements, tax returns, other reports and other information required to be furnished by the Company to such lender(s) pursuant to the applicable deed(s) of trust, loan agreement(s) and/or other document(s) executed by the Company in favor of such lender(s), a copy of each of which financial statements, tax returns, other reports and other information shall be contemporaneously furnished to the other Member.

Each of the financial reports and statements referred to above shall be in reasonable detail and be prepared in accordance with GAAP, to the fullest extent that GAAP shall be applicable thereto. All decisions as to accounting principles shall be made by the Executive Committee, subject to the applicable requirements of GAAP, any requirements of the Company's lender(s) and the provisions of this Agreement.

8.4 ***The Company Accountant.*** The Company shall retain the firm of _____ as the regular accountant and auditor for the Company (the ***"Company Accountant"***). If the then designated Company Accountant at any time is unable or refuses to serve as the accountant and auditor for the Company, or is terminated by the Executive Committee, a different accounting firm acceptable to the Members shall be designated as the replacement firm. The fees and expenses of the Company Accountant shall be a Company expense.

8.5 ***Reserves.*** The Executive Committee shall, subject to such conditions as it shall determine, establish such reserves as are reasonable and appropriate for the Company (including, but not limited to, any reserves that may be required in connection with the Initial Loan and/or any replacement or refinancing thereof).

8.6 ***Submission of Budget and Operating Plan.*** The Administrative Member has heretofore submitted (or caused to be submitted) to the Executive Committee a Capital Budget, an Operating Budget and an Operating Plan for the Company for the current fiscal year, which Operating Budget, Capital Budget and Operating Plan have been approved by the Executive Committee. Not later than sixty (60) days prior to the end of the current fiscal year and of each succeeding fiscal year of the Company, the Administrative Member shall prepare (or cause to be prepared) and submit to the Executive Committee, for its consideration and approval, a Capital Budget, an Operating Budget and an Operating Plan with respect to the following fiscal year. Subject to such modifications as may be requested by the Executive Committee, each such Budget and Operating Plan shall be in the same form as the corresponding Budget and Operating Plan for the then current fiscal year, ***provided, however,*** that, in all events, each such Budget and Operating Plan shall conform, in all respects, with any applicable requirements of the Company's lender(s). If the Executive Committee shall reject a Budget and/or Operating Plan so

submitted by the Administrative Member and shall direct that the Administrative Member revise and resubmit the same, the Administrative Member shall revise such Budget and/or Operating Plan (or cause the same to be revised) in accordance with the guidelines, comments and/or directives (if any) issued by the Executive Committee regarding the same and promptly resubmit the same to the Executive Committee for its consideration and approval.

ARTICLE 9
TRANSFERS OF INTERESTS

9.1 ***No Transfer*****.** Except as expressly permitted or contemplated by Section 9.2 or otherwise in this Agreement, no Member may sell, assign, give, hypothecate, pledge, encumber, or otherwise transfer ***("Transfer"***) all or any portion of its Interest, whether directly or indirectly, without the written consent of the other Member. Any Transfer in contravention of this Article 9 shall be null and void

9.2 ***Permitted Transfers*****.** Member 2 may, from time to time, in its sole discretion and without the consent of any other Member, Transfer all or a portion of its Interest to any Member 2 Permitted Transferee, provided that notice of such assignment shall be given to Member 1. Such assignee shall be admitted as a substitute member only with the consent of Member 1 (which consent may be withheld in its sole discretion) and after complying with the provisions of Section 9.3. Member 1 may, from time to time, in its sole discretion and without the consent of any other Member, Transfer all or a portion of its Interest to any Member 1 Permitted Transferee, provided that notice of such assignment shall be given to Member 2. Such assignee shall be admitted as a substitute member only with the consent of Member 2 (which consent may be withheld in its sole discretion) and after complying with the provisions of Section 9.3. Any permitted Transfer shall not relieve the transferor of any of its obligations prior to such Transfer. Notwithstanding anything to the contrary contained in this Agreement, no transfer of all or any part of any Interest shall be made if, as a result thereof, any income of the Company will be subject to corporate or other tax on account thereof. Nothing contained in this Article 9 shall prohibit a Transfer indirectly of any interest in the Company if a direct Transfer would otherwise be permitted under this Section 9.2. Each Member and its Permitted Transferees shall be treated as one Member for all purposes of this Agreement. The provisions of this Section 9.2 shall not apply to, or be deemed to authorize or permit, any collateral transfer of, or grant of a security interest in, a Member's Interest (which transfer or grant shall be subject to the other provisions of this Article 9).

9.3 ***Transferees*****.** No transferee of all or any portion of any Interest shall be admitted as a Member unless:

(a) such Interest is transferred in compliance with the applicable provisions of this Agreement;

(b) if Section 9.2 is not applicable to such Transfer, such Transfer shall have been approved in writing by the remaining Member, which consent may be withheld in its sole discretion;

(c) if Section 9.2 is applicable to such Transfer, such transferee shall have furnished evidence of satisfaction of the requirements of Section 9.2 reasonably satisfactory to the remaining Members; and

(d) such transferee shall have executed and delivered to the Company such instruments as the remaining Member deems necessary or desirable to effectuate the admission of such transferee as a Member and confirm the agreement of such transferee to be bound by all of the terms and provisions of this Agreement with respect to such Interest.

At the request of the remaining Members, each such transferee shall also cause to be delivered to the Company, at the transferee's sole cost and expense, a favorable opinion of legal counsel reasonably acceptable to the Company, to the effect that:

(i) such transferee has the legal right, power and capacity to own the Interest proposed to be transferred;

(ii) if applicable, such Transfer does not violate any provision of any loan commitment or any mortgage, deed of trust, or other security instrument encumbering all or any portion of the Company Property;

(iii) if applicable, such Transfer will not cause the termination of the Company for purposes of Section 708 of the Code, or that such termination will not materially adversely affect the Company or any Member; and

(iv) if applicable, such Transfer does not violate any federal or state securities laws, and will not cause the Company to become subject to the Investment Company Act of 1940, as amended.

As promptly as practicable after the admission of any Person as a Member, the books and records of the Company shall be changed to reflect such admission. All reasonable costs and expenses incurred by the Company in connection with any Transfer of any Interest (and, if applicable, the admission of any transferee as a Member) shall be paid by the transferee.

ARTICLE 10[91,92]

EXCULPATION, INDEMNIFICATION AND INSURANCE

10.1 Exculpation.[93] No Member, member of the Executive Committee, Manager, Authorized Person,[94] officer of the Company, general or limited partner, employee, agent, shareholder, member, or other holder of an equity interest in or officer of any of the foregoing (each, an "Indemnitee") shall be liable to the Company or to any Member for any losses, claims, or damages, arising from any act or omission by it in connection with this agreement or the Company's business or affairs, if such act or omission:

(a) was believed to be in the best interests of the Company and not unlawful; and

(b) was not the result or consequence of such Indemnitee's fraud, bad faith, willful misconduct.

No general or limited partner, shareholder, member, or other holder of an equity interest in, or officer or director of, any of any Manager or Member shall be personally liable for the performance of any such Member's obligations under this Agreement[95], but the foregoing shall not relieve any partner or member of any Member from its obligations to such Member.

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[91] DLLCA §18-108 provides:

"Indemnification

Subject to such standards and restrictions, if any, as are set forth in its limited liability company agreement, a limited liability company may, and shall have the power to, indemnify and hold harmless any member or manager or other person from and against any and all claims and demands whatsoever."

[92] DLLCA §18-108 permits a Delaware limited liability company to indemnify any and all persons from any and all liability. California's comparable statute (Cal. Corp. C. §17153) excludes a Manager's breach of fiduciary duty from the scope of permitted indemnification. The following form of Indemnification provision provides very broad indemnification of members, managers, the LLC's organizer and certain affiliates, but does not extend to breach of fiduciary duty. This form can, of course, be scaled back, based on negotiations and circumstances, but is intended to provide as broad an indemnification as the author conceives could be reasonably requested.

[93] Many Operating Agreements do not expressly provide for Indemitees to be exculpated from liability to the Company or Members for matters which are clearly covered within the scope of indemnification by the Company for liability to third parties. This form makes explicit this exculpation.

[94] Although this Operating Agreement does not provide for Managers or an Organizer, for drafting purposes managers and the Organizer are included as Indemnitees.

[95] The exculpation extends to constituents of Members and Managers to clarify that their obligations to the Company are non-recourse to the constituents.

10.2 Indemnification.

(a) The Company shall,[96] to the fullest extent permitted by applicable law and public policy, indemnify, defend (using counsel reasonably satisfactory to the Company) and hold harmless each Indemnitee from and against any claims, demands, liabilities, costs, expenses, penalties, damages and losses (collectively, a "Claim") to which such Indemnitee may become subject due to the Indemnitee's affiliation with the Company or in connection with the defense settlement or adjudication (actually and reasonably paid) of any threatened, pending, or completed action, suit, or proceeding, whether civil, criminal, administrative, or investigative and whether formal or informal arising out of, or in connection with, this Agreement or the Company's business or affairs, irrespective of the nature of the legal or equitable theory upon which a Claim is made, including, without limitation, negligence, breach of duty, mismanagement, waste, breach of contract, breach of warranty, strict liability, violation of federal or state securities law, violation of the Employee Retirement Income Security Act of 1974, as amended, or violation of any other state or federal law, except for any Claim to the extent attributable to the Indemnitee's fraud, bad faith, willful misconduct or arising out of an act or omission the Indemnitee did not believe to be in the best interests of the Company or lawful. The termination of any action, suit, or proceeding by judgment, order, settlement or conviction or upon a plea of nolo contendere or its equivalent, shall not, of itself, create a presumption that the Indemnitee did not act in good faith and in a manner believed to be in the best interests of the Company, and with respect to any criminal action or proceeding, believed that his or its conduct was unlawful.[97]

(b) If any Indemnitee becomes involved in any capacity in any Claim, then the Company shall reimburse such Indemnitee for his, her, or its reasonable legal and other reasonable out-of-pocket expenses (including, but not limited to, the cost of any investigation and preparation and establishing a right to indemnification under this Section 11.2; "Defense Costs") as they are incurred in connection therewith; provided that such Indemnitee shall have executed an agreement satisfactory to the Company promptly to repay to the Company the amount of any such reimbursed expenses paid to it if it shall ultimately be determined that such Indemnitee was not entitled to be indemnified by the Company in connection with such action, proceeding, or

[96] This form provides that the Company "shall" indemnify, subject to various conditions and limitations specified. Many Operating Agreements allow that the Company "may" indemnify as provided by Del. C. § 18-108, then go on to specify situations where indemnification is a matter of right. This permissive approach creates ambiguities and is not adopted here.

[97] The scope of the indemnification stops short of covering the Inderrmitees' willful misconduct, bad faith and the like. The indemnification does not exclude the Indemnitees' gross negligence or require analysis of the reasonableness of the Indemnitees' beliefs that their actions were in the LLC's best interests, although many Operating Agreements do exclude such behavior. The theory here is that the scale of negligence or the reasonableness of a belief is too subjective to be predictably proven.

investigation.[98] If such conditions are not satisfied, then reimbursement of Defense Costs shall be made after successful defense of the Claim by the Indemnitee.

(c) The provisions of this Section 10.2 shall survive for a period of four (4) years from the date of winding up and termination of the Company,[99] provided that:

(i) if, at the end of such period, there are any actions, proceedings, or investigations then pending, and the Indemnitee notifies any Member, Executive Committee the Company and members thereof at such time, which notice shall include a brief description of each such action, proceeding or investigation and the liabilities asserted therein, then the provisions of this Section 10.2 shall survive with respect to each such action, proceeding, or investigation set forth in such notice (or related action, proceeding, or investigation based upon the same or similar claim) until such date that such action, proceeding, or investigation is finally resolved; and

(ii) the obligations of the Company under this Section 10.2 shall be satisfied solely out of Company assets.[100]

10.3 **Insurance**.[101] The Company may purchase and maintain insurance or other similar protection for its benefit, the benefit of any Indemnitee, or both, against any Claims, whether or not the Company would have the obligation to indemnify such Indemnitee against such liability.

ARTICLE 11
DISSOLUTION AND TERMINATION; MERGER

11.1 ***Dissolution*.**[102] The Company shall be dissolved, and its business wound up,

[98] Some Operating Agreements impose a further condition to reimbursement of defense costs when incurred: the determination by a vote of the Members, by counsel to the Company or an Executive Committee or other representative that the Indemnitee is likely to be entitled ultimately to indemnification.

[99] Providing a survival period after Company dissolution is intended to flesh out any pending claims of which the Company was unaware and to allow completion of the winding-up process without concern about contingent indemnity liability to Indemnitees

[100] This provision clarifies that the members do not have personal liability for the indemnification obligation of the Company, even in a dissolution context.

[101] To manage the risk of potential indemnification claims by Indemnitees against the Company, the Company may choose to purchase insurance to pay the costs of such claims. This form allows the purchase of insurance. Depending on the terms of coverage, the policy may cover defense costs even if the Claim is not ultimately determined to be indemnified against. The purchase of an insurance policy may also reduce the time and energy required to administer an indemnity claim by an Indemnitee.

[102] Under DLLCA §18-801, unless otherwise provided in the limited liability company agreement, dissolution can occur upon the affirmative vote or written consent of the members who own more than two-thirds of the then current

upon the earliest to occur of any of the following events:

(a) the sale, condemnation, or other disposition of all Company Property, and the receipt of all consideration therefor (including, in the case of any sale of assets in connection with which the Company takes back a promissory note from the purchaser, final payment of any such promissory note);

(b) the expiration of the period related to the election under Section 12.2;

(c) the expiration of the period set forth in Section 2.4;

(d) the written consent of all of the Members;

(e) at any time when there are no Members of the Company, unless the Company is continued in accordance with the Delaware Act; or

(f) the death, incapacity, adjudication of incompetence, expulsion, bankruptcy, or dissolution of any Member, or the occurrence of any other event that terminates the continued membership of any Member in the Company, unless, within ninety (90) days after such event, each of the remaining Members elects in writing to continue the business of the Company.[103]

However, notwithstanding the foregoing or anything else to the contrary provided in this Agreement, for so long as the Initial Loan shall be outstanding and until the same shall be discharged in full:

(x) in the event of the incapacity, adjudication of incompetence, resignation, expulsion, bankruptcy, or dissolution of any Member, or the occurrence of any other event that terminates the continued membership of any Member in the Company:

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percentage interests in the limited liability company or, if multiple classes, then two-thirds of the then current percentage interests of each class or group of members.

Other causes of dissolution under DLLCA §18-801 are:

(a) at any time that there are no members, unless within ninety (90) days after the occurrence of the event that terminated the continued membership of the last remaining member, the personal representative of such member agrees in writing to continue the limited liability company and the admission of the personal representative or its nominee or designee to the limited liability company as a member or a member is admitted to the limited liability company within ninety (90) days of the occurrence of the event that terminated the continued membership of the last remaining member if provision for such an admission after there is no longer a remaining member of the limited liability company, is provided for in the limited liability company agreement, and

(b) The entry of a decree of judicial dissolution under DLLCA §18-802.

[103] DLLCA §18-801(b) provides that, unless otherwise provided in the limited liability company agreement, the death, retirement, resignation, expulsion, bankruptcy or dissolution of any member or the occurrence of any other event that terminates the continued membership of any member shall not cause the limited liability company to be dissolved or its affairs to be wound up.

(A) the same, in and of itself, shall not cause the termination, liquidation, or dissolution of the Company;

(B) the business of the Company shall continue notwithstanding the same; and

(C) upon any such occurrence, the trustee, receiver, executor, administrator, committee, guardian, or conservator of such Member shall have all of the rights of such Member for the purpose of settling or managing its estate or property, ***provided, however,*** that:

(I) such trustee, receiver, executor, administrator, committee, guardian, or conservator shall not be considered, or deemed to be, a substitute Member in the Company unless and until all of the requirements set forth in Section 10.3 above are first satisfied with respect thereto; and

(II) the transfer by such trustee, receiver, executor, administrator, committee, guardian, or conservator of any of the rights of such Member shall be subject to all of the restrictions contained in this Agreement (including, but not limited to, those contained in Article 10 above) to which such transfer would have been subject if such transfer had been made by the Member in question;[104] and

(y) the Company shall not be terminated, liquidated, or dissolved pursuant to the provisions of subsection (a), (b) or (d) above without the prior written consent of the Initial Lender or the then holder of the Initial Loan (as the case may be).[105]

Further, regardless of whether the Initial Loan shall then be outstanding, the assignment of all or any part of a Member's Interest permitted hereunder will not, in and of itself, result in the dissolution of the Company.

[104] See DLLCA §18-301 as to admission of members.

[105] The provisions of (x) and (y) are negotiated items and are included here as an example of what a lender or investor member may require.

11.2 ***Termination.***[106] Upon the dissolution of the Company, the business of the Company shall be wound up and the Company terminated as promptly as practicable thereafter, and each of the following shall be accomplished:

(a) The Liquidating Member shall cause a statement to be prepared, setting forth the assets and liabilities of the Company as of the date of dissolution. A copy of such statement shall be furnished to all of the Members.

(b) The Company Property shall be liquidated by the Liquidating Member as promptly as possible (but in an orderly, businesslike and commercially reasonable manner), subject to the provisions of a liquidating plan approved by each of the Members. The Liquidating Member may distribute Company Property in kind only with the consent of each of the Members.

(c) The proceeds of sale and all other assets of the Company shall be applied and distributed as follows:

(i) first, to the payment of debts and liabilities of the Company (including any outstanding amounts due on any indebtedness encumbering the Company Property or any part thereof) and the expenses of liquidation;

(ii) second, to the setting up of any reserves that the Members shall determine are reasonably necessary for contingent, unliquidated, or unforeseen liabilities or obligations of the Company or any Member arising out of or in connection with the Company; and

(iii) the balance, if any, to the Members in accordance with Section 5.4.

Any reserves established pursuant to subsection (ii) above may, in the discretion of the Liquidating Member, be paid over to a national bank or national title insurance company selected by the Liquidating Member and authorized to conduct business as an escrow agent, to be held by such bank or title insurance company as escrow agent for the purposes of disbursing such reserves to satisfy the liabilities and obligations described above. At the expiration of such period as the Liquidating Member shall reasonably consider to be advisable, any remaining balance of such reserves shall be distributed as provided in subsection (iii) above, ***provided, however,*** that, to the extent that it shall have been necessary, by reason of applicable law or regulation, to create any reserves prior to any and all distributions that would otherwise have been made under subsection (i) above

[106] A manager, or if none, the members (or a person approved by the members) may wind up the limited liability company's affairs subject to the right of the Court of Chancery to appoint a liquidating trustee, upon application of any member or manager. See DLLCA §18-803.

and, by reason thereof, a full distribution under such subsection (i) has not been made, then any balance remaining shall first be distributed pursuant to such subsection (i).[107]

11.3 ***Authority of the Liquidating Member.*** The Liquidating Member is hereby irrevocably appointed as the true and lawful attorney in the name, place and stead of each of the Members, such appointment being coupled with an interest to make, execute, sign, acknowledge and file with respect to the Company all papers that shall be necessary or desirable to effect the dissolution and termination of the Company in accordance with the provisions of this Article 11. Notwithstanding the foregoing, each Member, upon the request of the Liquidating Member, shall promptly execute, acknowledge and deliver all such documents, certificates and other instruments as the Liquidating Member shall reasonably request to effectuate the proper dissolution and termination of the Company (including, but not limited to, the winding up of the business of the Company).[108]

11.4 ***Merger or Consolidation.*** The Company may be merged or consolidated with another entity only with the unanimous prior written approval of the Members. Further, for so long as the Initial Loan shall be outstanding and until the same shall be discharged in full, no such merger or consolidation may be effected without the prior written consent of the Initial Lender or the then holder of the Initial Loan (as the case may be).[109]

ARTICLE 12
DEFAULT BY A MEMBER

12.1 ***Events of Default.*** If a Member commits a violation or breach of any of the provisions of this Agreement that causes material damage or loss to the Company, and such violation or breach is not cured within a Reasonable Period, then such Member shall have committed an "***Event of Default.***"

12.2 ***Effect of Event of Default.*** Upon the occurrence of an Event of Default by any Member, Member 1 (if the defaulting Member is Member 2) or Member 2 (if the defaulting Member is Member 1) shall have the right, in addition to pursuing any other right or remedy

[107] DLLCA §18-804(d) requires a limited liability company which has dissolved to pay or make reasonable provision to pay all claims and obligations in any claim which is the subject of a pending action to which the limited liability company is a party and for claims that have not been made known or that have not arisen but that based on facts known to the limited liability company are likely to arise within ten (10) years after the date of dissolution. If there are insufficient assets to pay all such claims in full, then the claims are to be paid according to their priority and among claims of equal priority pro rata to the extent of the assets available.

[108] Upon dissolution, the persons winding up the limited liability company's affairs are given the requisite power and authority, on behalf of the limited liability company, to prosecute and defend suits, settle and close the limited liability company's business, dispose of and convey the limited liability company's property, discharge or make provision for the limited liability company's liabilities and distribute to the members any remaining assets. DLLCA §18-803.

[109] DLLCA §18-209 requires the approval of the members of a limited liability company who owns more than fifty percent (50%) of the then current percentage or other interest in the profits or the limited liability company owned by all of the members or by the members in each class or group, to approve a merger or consolidation. The limited liability company agreement may provide for a lesser or greater number.

available at law or in equity (but subject to the provisions of Section 11.1 above), to elect to dissolve the Company at any time within one hundred eighty (180) days from the date of such Event of Default, upon giving the defaulting Member ten (10) calendar days' written notice of such election (provided that such Event of Default is continuing through the end of such 10-day period). The default of any Member hereunder shall not relieve any other Member from its agreements, liabilities, and obligations hereunder. A defaulting Member's appointee(s) to the Executive Committee shall not be entitled to participate in any vote thereof while such Event of Default is continuing, and the non-defaulting Member or Members shall have the right to take any action permitted or authorized hereunder on the part of the Executive Committee without the necessity of any consent by the defaulting Member, ***provided, however,*** that this sentence shall not apply with respect to:

(a) the refusal or failure by a Member to make any Mandatory Additional Capital Contribution (which default shall be governed by Section 4.3(b), insofar as the effect thereof on Executive Committee voting rights is concerned); or

(b) a breach by the Administrative Member of its obligations under this Agreement (which breach shall be governed by Section 6.15).

ARTICLE 13
MISCELLANEOUS

13.1 ***Representations and Warranties of the Members*****.** Each Member represents and warrants to the other Members as follows:

(a) such Member is duly organized, validly existing and in good standing under the laws of its jurisdiction of formation, with all requisite power and authority to enter into this Agreement and to conduct the business of the Company;

(b) this Agreement constitutes the legal, valid and binding obligation of such Member and is enforceable in accordance with its terms;

(c) no consents or approvals are required from any governmental authority or other person or entity for such Member to enter into this Agreement and become a member of the Company;

(d) all limited liability company, corporate, or partnership action on the part of such Member necessary for the authorization, execution and delivery of this Agreement, and the consummation of the transactions contemplated hereby, have been duly taken;

(e) the execution and delivery of this Agreement by such Member, and the consummation of the transactions contemplated hereby, does not conflict with, or contravene, the provisions of its organic documents or any agreement or instrument by which it is, or its properties are, bound, or any law, rule, regulation, order, or decree to which it is, or its properties are, subject;

(f) such Member has not retained any broker, finder, or other commission or fee agent, and no such person has acted on its behalf, in connection with the acquisition of the Shopping Center or the execution and delivery of this Agreement;

(g) such Member has acquired its Interest for its own account for investment only, and not with a view to, or for sale in connection with, any distribution thereof in violation of the Securities Act of 1933, as amended (the "***Securities Act***"); and

(h) such Member understands that:

(i) the Interest that it is acquiring has not been registered under the Securities Act or any applicable state securities law, and cannot be resold unless subsequently registered under the Securities Act and such laws or unless an exemption from such registration is available; and

(ii) such registration under the Securities Act and such laws is unlikely at any time in the future, and neither the Administrative Member nor the other Member is obligated to file a registration under the Securities Act or such laws.

13.2 ***Further Assurances*****.** Each Member shall execute, acknowledge, deliver, file, record and publish such further instruments and documents, and do all such other acts and things, as may be required by law or as may be necessary or desirable to carry out the intent and purposes of this Agreement.

13.3 ***Notices*****.** All notices, demands, consents, approvals, requests, or other communications that any of the parties to this Agreement may desire or be required to give hereunder (collectively, "***Notices***") shall be in writing and shall be given by personal delivery, facsimile transmission, or a nationally recognized overnight courier service, fees prepaid, addressed as follows:

If to Member 2, to:

With a copy to:

If to Member 1, to:

With a copy to:

Any party may designate another addressee (and/or change its address) for Notices hereunder by a Notice given pursuant to this Section 13.3. A Notice sent in compliance with the provisions of this Section 13.3 shall be deemed given on the date of receipt.

13.4 ***Governing Law*****.** This Agreement shall be governed by, and construed in accordance with, the laws of the State of Delaware applicable to agreements made and to be performed wholly within such jurisdiction.

13.5 ***Attorneys' Fees*****.** In the event of any arbitration or other legal or equitable proceeding for the enforcement of any of the terms or conditions of this Agreement, or any alleged disputes, breaches, defaults, or misrepresentations in connection with any provision of this Agreement, the prevailing party in such proceeding, or the non-dismissing party where the dismissal occurs other than by reason of a settlement, shall be entitled to recover its reasonable costs and expenses (including, but not limited to, reasonable attorneys' fees and costs) paid or incurred in good faith at the arbitration, bankruptcy proceedings, pre-trial, trial and appellate levels, as well as in enforcing any award or judgment granted pursuant thereto. Any award, judgment, or order entered in any such proceeding shall contain a specific provision granting the recovery of attorneys' fees and costs incurred in enforcing such award or judgment, including, but not limited to:

(a) post-award or post-judgment motions;

(b) contempt proceedings;

(c) garnishment, levy, and debtor and third party examinations;

(d) discovery; and

(e) bankruptcy litigation.

The "***prevailing party***," for purposes of this Agreement, shall be deemed to be that party who obtains substantially the result sought, whether by dismissal, award, or judgment.

13.6 ***Captions*****.** All titles or captions contained in this Agreement are inserted only as a matter of convenience, and for reference, and in no way define, limit, extend, or describe the scope of, or the intent of any provision in, this Agreement.

13.7 ***Pronouns*****.** All pronouns, and any variations thereof, shall be deemed to refer to the masculine, feminine, and neuter, singular and plural, as the identity of the party or parties may require.

13.8 ***Successors and Assigns*****.** This Agreement shall be binding upon the parties hereto and their respective executors, administrators, legal representatives, heirs, successors and assigns, and shall inure to the benefit of the parties hereto and, except as otherwise provided herein, their respective executors, administrators, legal representatives, heirs, successors and assigns.

13.9 ***Extension Not a Waiver*****.** No delay or omission in the exercise of any power, remedy or right herein provided or otherwise available to a Member or the Company shall impair or affect the right of such Member or the Company to exercise the same. Any extension of time or other indulgence granted to a Member hereunder shall not otherwise alter or affect any power, remedy, or right of any other Member or of the Company, or the obligations of the Member to whom such extension or indulgence is granted.

13.10 ***Creditors Not Benefited*****.** The provisions of this Agreement (including, but not limited to any provisions that make reference to any lender or other third party or that could benefit any lender or other third party) are intended for the exclusive benefit of the parties hereto, and no other person (including, but not limited to, the creditors of the Company or of any Member) shall have any right or claim against any party by reason of any provision of this Agreement or be entitled to enforce any provision of this Agreement against any party (including, but not limited to, any provision relating to the Initial Loan). Without limiting the foregoing, nothing contained in this Agreement is intended or shall be deemed to benefit any creditor of the Company or any Member, and no creditor of the Company shall be entitled to require the Company or the Members to solicit or accept any Additional Capital Contribution from any Member or to enforce any other right that the Company or any Member may have against any Member under this Agreement.

13.11 ***Recalculation of Interest*****.** If any applicable law is ever judicially interpreted so as to:

(a) deem any distribution, contribution, payment, or other amount received by any Member or the Company under this Agreement as interest; and

(b) render any such amount in excess of the maximum rate or amount of interest permitted by applicable law,

then it is the express intent of the Members and the Company that all amounts in excess of the highest lawful rate or amount theretofore collected either be credited against any other distributions, contributions, payments, or other amounts to be paid to the recipient of the excess amount or be refunded to the appropriate Person. Further, the provisions of this Agreement shall be immediately deemed reformed, without the necessity of the execution of any new document, so as to comply with the applicable law, but so as to permit the payment of the fullest amount otherwise required hereunder. All sums paid, or agreed to be paid, that are judicially determined to be interest shall, to the extent permitted by applicable law, be amortized, prorated, allocated and spread throughout the term of such obligation so that the rate or amount of interest on account of such obligation does not exceed the maximum rate or amount of interest permitted under applicable law.

13.12 ***Severability*****.** If any one or more of the provisions contained in this Agreement, or any application thereof, shall be invalid, illegal, or unenforceable in any respect, the validity, legality and enforceability of the remaining provisions contained herein, and other application thereof, shall not in any way be affected or impaired thereby.

13.13 ***Entire Agreement; Amendment.*** This Agreement contains the entire agreement between the parties relating to the subject matter hereof, and all prior agreements relative hereto that are not contained herein are terminated. Amendments, variations, modifications, alterations, or changes to this Agreement shall be effective and binding upon the Members if, and only if:

(a) the same are set forth in a document duly executed by each Member, and

(b) for so long as the Initial Loan shall be outstanding and until the same shall be discharged in full, the Initial Lender or the then holder of the Initial Loan (as the case may be) has consented to the sane in writing.

Any alleged amendment, variation, modification, alteration, or change to this Agreement that is not so documented shall not be effective as to any Member or as to the Company.

13.14 ***Publicity*****.** The parties agree that no Member shall issue any press release, or otherwise publicize or disclose the terms of this Agreement or the proposed terms of any acquisition of the Shopping Center, without the consent of each of the other Members, except as such disclosure may be made in the course of normal reporting practices by any Member to its members, shareholders, or partners or as otherwise required by law.

13.15 ***Counterparts*****.** This Agreement may be executed in multiple counterparts, each of which shall be an original but all of which together shall constitute but one and the same agreement.

13.16 ***Confidentiality*****.** The terms of this Agreement, the identity of any person with whom the Company may be holding discussions with respect to any investment, acquisition, disposition, or other transaction, and all other business, financial, or other information relating directly to the conduct of the business and affairs of the Company or the relative or absolute

rights or interests of any of the Members (collectively, the "***Confidential Information***") that has not been publicly disclosed with the authorization of the Executive Committee is confidential and proprietary information of the Company, the disclosure of which would cause irreparable harm to the Company and the Members. Accordingly, each Member represents that it has not, agrees that it will not and shall direct its shareholders, partners, directors, officers, employees, agents, advisors and Affiliates not to, disclose to any Person any Confidential Information, or confirm any statement made by third Persons regarding Confidential Information, other than to shareholders, partners, directors, officers, agents, advisors and Affiliates, until the Company has publicly disclosed the Confidential Information with the authorization of the Executive Committee and has notified each Member that it has done so. Notwithstanding the foregoing, however, any Member (or its Affiliates) may disclose Confidential Information if:

(a) required by law (it being specifically understood and agreed that anything set forth in a registration statement or any other document filed pursuant to law will be deemed required by law); or

(b) necessary for it to perform any of its duties or obligations hereunder or in any property management agreement to which it is a party covering any Company Property.

Subject to the foregoing, each Member agrees not to disclose any Confidential Information to any Person (other than a Person agreeing to maintain all Confidential Information in strict confidence or a judge, magistrate, or referee in any action, suit, or proceeding relating to, or arising out of, this Agreement or otherwise), and to keep confidential all documents (including, but not limited to, responses to discovery requests) containing any Confidential Information. Each Member hereby consents in advance to any motion for any protective order brought by the other Member represented as being intended by the movant to implement the purposes of this Section 13.16, provided that, if a Member receives a request to disclose any Confidential Information under the terms of a valid and effective order issued by a court or governmental agency, and the order was not sought by or on behalf of, or consented to by, such Member, then such Member may disclose Confidential Information to the extent required thereby, ***provided, however,*** that the Member shall, as promptly as is practicable after its receipt of such order:

(i) notify the other Member of the existence, terms and circumstances of the order;

(ii) consults in good faith with the other Member on the ability of taking legally available steps to resist or narrow the order, and

(iii) if disclosure of the Confidential Information is required, exercises its best efforts to obtain a protective order or other reliable assurance that confidential treatment will be accorded to the portion of the disclosed Confidential Information that any other Member designates. The cost (including, but not limited to, attorneys' fees and expenses) of obtaining a protective order covering Confidential Information designated by such other Member shall be borne by the Company.

Confidential Information shall not include, and any Member or its Affiliates may disclose without limitation of any kind, any information with respect to the "tax treatment" and "tax structure" (in each case, within the meaning of Treasury Regulation Section 1.6011-4(b)(3)(iii) of the Company and the transactions in which it engages and all materials of any kind (including opinions or other tax analyses) that are provided to such party relating to such tax treatment and tax structure; provided that with respect to any document or similar item that in either case contains nonpublic information, this sentence shall only apply to such portions of the document or similar item that relate to the tax treatment or tax structure of the Company or Company transaction, as the case may be.

The covenants contained in this Section 13.16 shall survive the Transfer of the Interest of any Member and the termination of the Company.

13.17 ***Venue*****.** Each of the Members consents to the jurisdiction of any court in New Castle County, Delaware for any action arising out of matters related to this Agreement.

13.18 ***Arbitration*****.** In instances where this Agreement expressly provides that a matter is to be submitted to, or determined in accordance with, arbitration pursuant to this Section 13.18, such matter shall be resolved by a binding arbitration conducted in either Wilmington, Delaware or Washington, D.C. in accordance with all applicable Delaware statutory and decisional law and, to the extent not inconsistent with the provisions of this Section 13.18, the Expedited Procedures and Commercial Arbitration Rules of the AAA (the "***Arbitration Rules***"). Except as otherwise required by the Delaware Uniform Arbitration Act, any arbitration called for by this Section 13.18 shall be conducted in accordance with the following procedures:

(a) The Company or a Member (the "***Requesting Party***") shall demand arbitration pursuant to this Section 13.18 by giving written notice of such demand (the "***Demand Notice***") to all of the other Members and (if the Requesting Party is not the Company) to the Company, which Demand Notice shall describe in reasonable detail the nature of the claim, dispute, or controversy.

(b) Within fifteen (15) days after the giving of a Demand Notice, the Requesting Party, on the one hand, and each of the other Members and (if the Requesting Party is not the Company) the Company against whom the claim has been made or with respect to which a dispute has arisen (collectively, the "***Responding Party***"), on the other hand, shall select and designate in writing to the other party one reputable, disinterested individual (a "***Qualified Individual***") willing to act as an arbitrator of the claim, dispute, or controversy in question. Each of the Requesting Party and the Responding Party shall use its best efforts to select a present or former partner of an accounting firm having no affiliation with any of the parties as its respective Qualified Individual. Within fifteen (15) days after the foregoing selections have been made, the arbitrators so selected shall jointly select a present or former partner of an accounting firm having no affiliation with any of the parties as the third Qualified Individual willing to act as an arbitrator of the claim, dispute or controversy in question (the "***Third Arbitrator***"). In the event that the two arbitrators initially selected are unable to agree on the Third Arbitrator within the second fifteen (15) day period referred to above, then, on the application of either party,

the AAA shall promptly select and appoint a present or former partner of an accounting firm having no affiliation with any of the parties as the Qualified Individual to act as the Third Arbitrator in accordance with the terms of the Arbitration Rules. The three arbitrators selected pursuant to this subsection (b) shall constitute the arbitration panel for the arbitration in question.

(c) The presentations of the Members in the arbitration proceeding shall be commenced and completed within sixty (60) days after the selection of the arbitration panel pursuant to subsection (b) above, and the arbitration panel shall render its decision in writing within thirty (30) days after the completion of such presentations. Any decision concurred in by any two (2) of the arbitrators shall constitute the decision of the arbitration panel, and unanimity shall not be required. If a decision concurred in by at least two (2) of the arbitrators is not rendered within such thirty (30) day period, then each of the parties shall select a new Qualified Individual willing to act as an arbitrator and a new arbitration proceeding shall commence in accordance with this Section 13.18.[110]

(d) The arbitration panel shall have the discretion to include in its decision a direction that all or part of the attorneys' fees and costs of the prevailing party or parties and/or the costs of such arbitration be paid by any other party or parties. On the application of a party before or after the initial decision of the arbitration panel, and proof of its attorneys' fees and costs, the arbitration panel shall order the other party to make any payments directed pursuant to the preceding sentence.

(e) The Third Arbitrator shall have the right, in his or her discretion, to authorize the obtaining of discovery (including, but not limited to, the taking of depositions of witnesses for the purpose of discovery).

(f) At the request of any party, the arbitrators shall make and provide to the parties written findings of fact and conclusions of law. Any decision rendered by the arbitration panel pursuant to this Section 13.18 shall be final and binding on the parties thereto, and judgment thereon may be entered by any state or federal court of competent jurisdiction.

Arbitration shall be the exclusive method available for resolution of any matter that this Agreement specifically provides is to be submitted to, or determined in accordance with, arbitration pursuant to this Section 13.18, and the Company and the Members stipulate that the provisions hereof shall be a complete defense to any suit, action, or proceeding in any court, or before any administrative or arbitration tribunal, with respect to any such matter. Nothing contained herein shall be deemed to give the arbitrators any authority, power, or right to alter, change, amend, modify, add to, or subtract from any of the provisions of this Agreement. The provisions of this Section 13.18 shall survive the dissolution of the Company.

(SIGNATURES FOLLOW ON NEXT PAGE)

[110] Consider as an alternative the baseball form of arbitration.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date first written above.

WITNESS: _____

_____ By:_____

_____

_____ By:_____