A PRIMER ON
REAL ESTATE JOINT VENTURE AGREEMENTS

PENNSYLVANIA BAR INSTITUTE
REAL ESTATE INSTITUTE

Philadelphia, Pennsylvania

December 4, 2008

GREGORY G. GOSFIELD, ESQ.
Klehr, Harrison, Harvey, Branzburg & Ellers LLP
260 South Broad Street
Philadelphia, Pennsylvania 19102
(215) 569-4164

ERIC L. STERN, ESQ.
Morgan Lewis & Bockius LLP
1701 Market Street
Philadelphia PA 19103
(215) 963-5178

A PRIMER ON
MINDING THE Ps AND Qs OF THE JV*

TABLE OF CONTENTS

* This outline is derived in part from an earlier version prepared by Alan M. Hurvitz, Esq. and Gregory G. Gosfield, Esq. for presentation at the ICSC 2007 Law Conference.

I. CHOICE OF ENTITY AND JURISDICTION

1. Principal Types of Entities.

	Liability	Control	Tax Effect	Formality	Character
Joint Venture (Tenancy In Common)	Unlimited	None without co-owner agreement naming agent	Individual Ownership for 1031 swaps	Deed filing	Aggregate. Realty. Mortgage Lien.
General Partnership	Unlimited	Universal, each Partner is an agent. At least 2 partners.	Pass through benefits and losses based on investment	Deed filing; fictitious name	Entity/ Aggregate; Personalty UCC, Charging Order
Limited Partnership	General Partner Unlimited; Limited Partner Limited	General Partner. "Controlling" limited partner. At least 2 partners.	Pass through benefits and losses, like direct owners. Pass through benefits and losses; depreciate on "at risk" compliant non-recourse debt	Deed filing. Certificate of Limited Partnership. Certificate of Foreign Limited Partnership	Entity. Personalty UCC, Charging Order, May be regulated "security" for lack of control
Limited Liability Company	Limited for all members	Manager/ Operating Board. May have 1 member.	Same as LP.	Same as LP	Same as LP
S Corporation	Same as LLC	Same as LLC (except restrictions on maximum and types of shareholders for trusts, corporations, and partnership).	Pass through benefits and losses based on invested capital.	Same as LLC	Same as LLC (except restricted to only one class of stock)
C Corporation	Same as S Corporation	Same as S Corporation	Tax at Corporate level and shareholder level.	Same as S Corporation	Same as S Corporation, but no restriction on one class

2. Miscellaneous.

(a) Agreement versus Statute: rights are determined by statute or common law if the agreement is silent; for instance, apparent authority in the Uniform Limited Liability Company Act ("ULLCA") §301, unwaivable fundamental principles at ULLCA §103(b), or consent of all members for certain acts at ULLCA §404.

(b) Fiduciary Duties: Generally, general partners or managers owe a duty of loyalty and care to their entities. However, unlike Delaware corporate law, the entity agreement may modify these fiduciary duties. In particular, the agreement may make clear that the general partner or manager has very limited fiduciary duties.

(c) Amendment: (i) Corporations are the least flexible; (ii) entity agreements and shareholders agreements may provide that limited partners/members are deemed to consent if they do not respond within a certain period; and (iii) generally, amendments should not impair a venturer without current approval, or that venturer's pre-approval to follow and accept the majority vote.

(d) State of Formation: Many prefer Delaware because of its relentless support of formation agreements. For example, the Delaware Act provides a partnership agreement can supercede and stop the UCC power of transferability to a purchaser at foreclosure on the attempted foreclosure of a venture interest. (See DE RULPA §17-1101(e) and DE LLCA §18-1101(e).)

II. LOI; FORMATION; CONTRIBUTIONS FROM DEVELOPERS AND INVESTORS BY CO-INVESTING OR ASSET CONTRIBUTION; CONTRIBUTION AGREEMENTS; DISGUISED SALE

1. LOI. Many sophisticated JV transactions will start with a Letter of Intent or a Term Sheet. They can range from hurried sketches to painfully elaborate detailed tomes. If carefully drafted, it is not binding except for agreement that (i) the transaction requires a final formal agreement, (ii) confidentiality, (iii) exclusivity, and (iv) brokerage indemnity which are traditionally binding. In any event, it serves as a roadmap for preparing the initial draft of the JV Agreement. The economic terms set forth in the LOI are a frequent battleground where one venturer considers them absolute and the others an approximation, especially as defects in the deal come to light.

2. Formation Documents. Except for joint venture tenancies-in-common and general partnerships, a JV will not be formed until organizational documents are filed in the state of creation. Documents can be filed first, followed by the operative agreement for the other kinds of entities; or an operative agreement can be completed (oral or written) with covenants to file the organizational documents.

(a) Filed documents could include (i) Articles of Organization; (ii) Certificate of Limited Partnership; (iii) Fictitious Name Certificate; or (iv) Articles of Incorporation.

(b) Operative documents could include: (i) Limited Liability Company Agreement or Operating Agreement; (ii) Limited Partnership Agreement; (iii) Partnership Agreement; (iv) Bylaws and Shareholders Agreement.

(c) Additional documents could include qualification documents where assets are located in foreign jurisdictions.

3. Contributions from Developer and Investors.

(a) Contributions may be in real estate, cash, or nothing (a "carried" or "profits only" interest).

(b) Cash: The parties will structure timing and amounts of (i) coinvesting if any; (ii) initial contributions; (iii) additional contributions; (iv) notes to evidence phased obligations; (v) pledges to secure obligations; (vi) remedies. Remedies for failure to make initial contributions may be different, and more severe, than remedies for failure to make additional contributions.

(c) Contribution of real estate: (i) use of a Contribution Agreement, which replicates a purchase agreement so that the JV has protections both by way of conditions to closing and by warranties after taking title; (ii) determination of value whether by fair market value, or book value, or an agreed upon formula; (iii) structuring of transaction, whether conveying the real estate to the new JV entity, or transferring a real estate holding company to the new JV entity, or dropping the real estate into a new entity and having the JV acquire the new entity; (iv) contributor will receive a credit to its capital account for the agreed upon value of the real estate, and then either receive a special distribution of all or a part of the proceeds (while keeping an eye on "disguised sale" issues for federal tax purposes) or have a disproportionate capital account with the right to preferences; (v) other agreements with Developer's affiliates might be executed at the time of contribution, such as a development or redevelopment agreement; and a management agreement; a leasing and brokerage agreement.

(d) Carried Interest: (i) tax consequences; (ii) difference between fees and carried interest; (iii) structuring timing and amounts of return of capital, income distributions, preferred returns, paid returns, accrued returns, "catch-up" returns, and Promote after return of all accrued returns and capital.

III. VOTING; OPERATIONAL CONTROL VS. EXTRAORDINARY ISSUES

1. Day to Day Operations. As between the Developer, on the one hand, and the Investor on the other hand, the Developer is charged to manage the JV. The Investor would seek to construct a model business plan, whether based on income and expense items, sales or productivity, rates of return, or some other profile. The Investor would require Developer reports on compliance with the model. The Investor might also seek to further subject the Developer "Major Decisions" to the Investor's approval. "Major Decisions" can include extra-ordinary events such as sales, refinancing(s), insured loss adjustment, leases outside of pre-approved parameters, litigation and other material non-recurring events. See Exhibit A attached.

2. Affiliates. If the JV retains the Developer, or affiliates of Developer, whether in the subservient capacity of property manager, leasing broker, general contractor, and other related services, then the Investor would negotiate to have final approval and primary negotiation rights over: (a) all contracts with Developer's affiliates; and (b) the management of all defaults, remedies and dispute resolution relating to those contracts. The Investor would also seek to link defaults of Developer under the JV Agreement and under service agreements as cross-defaulted.

3. Investor Control. With respect to Major Decisions such as hiring or firing consultants, or refinancing, if the Investor has a disproportionately large capital investment compared to the Developer, the Investor would seek unilateral or at least equivalently disproportionate power; even if the Investor were concerned about general liability, it would seek at least veto rights, provided they do not wrongfully impair the Developer. The Developer would seek to dilute or confine that Investor power so that it could not be exercised to Developer's detriment with respect to amendment of the JV Agreement. assumption of new burdens that adversely affect the Developer, or changing the purpose of the JV, Institutional investors, especially equity funds, will frequently need approvals from their advisory boards for Major Decisions and similar material votes. The preparation of materials for those decisions is an important component of the administrative efficiency of the JV.

4. Approval Process. The request for approval would be in writing, with sufficient description of the issues and risks for the approving party to make an informed decision.

(a) Emergency. The joint venturers should consider whether the Developer will have authority to expend additional funds in the case of an emergency. Generally, this authority will be limited to events beyond the control of the Developer, which require immediate response. This authority is often subject to a dollar amount limit and strict notice requirements by the Developer.

(b) Indemnification. The joint venturers should consider when, and under what circumstances, the JV will indemnify the Developer, the venturers, and/or their officers, directors, employees, etc. Indemnification is generally not granted in situations of gross negligence, willful or intentional misconduct, criminal misconduct, breach of fiduciary duty, or fraud. Often the joint venturers will negotiate whether indemnification of ordinary negligence will be permitted. The managing joint venturer will want a broad indemnification to allow for more protection in carrying out the management of the venture.

5. Removal or Conversion of Rights of Developer for Cause. A damaged or concerned Investor may want to terminate the Developer as manager of the JV for any one of many Developer faults, including: (i) the loss of key officers of the Developer; (ii) failure to fund required capital; (iii) non-performance of obligations (for example, Developer not obtaining the necessary approvals): (iv) competing with the Project or usurping a business activity, (v) failure to meet specified performance criteria; (vi) intentional misconduct, misappropriation, gross negligence or other bad acts; or (vii) inciting a Project loan acceleration. The negotiation may address anything from expulsion from the JV, a sale of the interest, or preservation of only the profits interest but loss of rights and powers by being converted and stripped down to very limited interests.

6. Dilution of Developer Compensation. A Developer is often compensated in two ways. It may receive service fees from the JV under separate agreements and, it may be entitled to receive a Promote upon achievement of certain financial tests. Consequently, in the case of disputes, the parties may negotiate over the Developer's rights, not only to current returns, but returns from the ultimate success of the Project, which was sourced and sustained by the Developer. Important issues relating to special compensation include: (i) whether payments of catch-up of the Preferred or Promote distributions should be distributed into an escrow and held until the time of the elimination of Developer defaults; (ii) if the Investor is going to remove the Developer as the "manager", the Developer would insist it be released from its liability under any non-recourse carveout guaranty or environmental indemnity which the Developer (or its principals) may have provided to the JV's lenders; and (iii) if the Developer must be replaced by a substitute, the Investor may require that the Developer lose some or all of its right to return on investment to allow it to be used as compensation for the to-be-admitted "profits only" substitute venturer. To the extent a loss is due to Developer's fault, the Investor would push for the Developer to shoulder that loss.

7. Dilution of Developer's Power. The Investor may seize the opportunity to take away other common venturer rights of the Developer. One simple move is taking away the Developer's allowance. Ratcheting down the spending right may reach as deep as expending

additional funds for emergencies. Generally, this spending authority will be limited at a minimum to events that are beyond the control of the Developer, and that require immediate response. This authority is still often subject to a dollar amount limit and strict notice requirements by the Developer. Indemnification of Developer may also be limited, so that the malfeasance of the Developer is not defended at the cost of the JV. Indemnification would be suspended in situations of gross negligence, willful or intentional misconduct, criminal misconduct, breach of fiduciary duty, or fraud. Often the Investor will negotiate whether indemnification of ordinary negligence should be permitted.

IV. CAPITAL CALLS AND ADDITIONAL CAPITAL, REQUIRED LOANS; RIGHTS TO RETURN OF CAPITAL; DEBT OR DILUTION

1. Capital Calls. Capital Calls are used to bring cash into the JV. Initial capital calls are usually made simultaneously with the execution of the JV documents or in accordance with specific time requirements set forth in the JV documents. Additional calls may be made for either anticipated or unanticipated events. If anticipated, they are usually evidenced by notes and secured by pledges of JV interests. To the extent they are discretionary, the JV usually has elaborate procedures as to how venturers may make capital calls. The amount of cash contributed increases the contributor's capital account. For tax, accounting, and state law recovery purposes, capital calls are treated differently than loans made by the venturers, even though such loans may provide the equivalent economic benefit to the JV as if capital had been contributed.

(a) Initial Capital Calls: usually agreed upon by the venturers and set forth in the JV Agreement.

(b) Additional Capital Calls: the JV Agreement may set forth specific events upon which the venturers are required to contribute capital, such as the acquisition of an asset; providing the equity portion of a development project; operating expense shortfalls; changes for redeeming a withdrawing venturer’s JV interest; usually these types of capital calls have been approved by all of the venturers who voted for the event, or pre-approved by voting for the budget. Bigger issues are the funding of capital for events that are not anticipated. These may be resolved in numerous ways, including: (i) to preserve the business of the JV, such as Project operating costs or JV operating costs, or to address an emergency, or an uninsured accident, any venturer or designated party can require a mandatory additional capital call; or (ii) if the call is discretionary, the non-advancing venturers are not in default and may be subject to economic dilution, but no dilution in votes, together with a right to reverse the economic dilution within some period (say 5 years) for up to some portion (say 75%) upon payment to the advancing venturers and bearing a compensatory “lost opportunity” interest payment.

(c) Timing of additional capital calls: the JV Agreement can provide specific times for making additional capital calls. Typically the venturers have a certain number of days to contribute the capital or decline after a capital call has been formally given. The Agreement may also have a notice and cure period before any remedies may be enforced; the remedies may be "phased in" so that the more onerous remedies cannot be exercised for a longer period of time. There would be different time periods for mandatory compared to discretionary calls.

2. Required Loans in Place of Capital Contributions. The venturers may prefer to loan necessary cash to the JV rather than contribute capital. There may be tax or accounting or creditor rights reasons, or there may be a different set of priorities; or there may be a different interest rate. In S corporation situations, it is a way to put in cash disproportionately. The JV Agreement should specify whether the party making the capital call can require that the additional funds be made on a contribution or loan basis.

3. Guaranties as Additional Capital. The JV Agreement should contemplate the obligation of the venturers to guaranty loans or to have the JV itself guaranty loans or identify which of them, usually the Developer, guaranties. With respect to the JV guarantying loans, assuming that the JV has a sufficient equity buildup to do so and owns its Projects through a series of single asset entities, the main issue is whether the venturers are willing to allow the entire net worth of the JV to be exposed if a guaranty relating to one Project is called upon. With respect to the venturers guarantying loans, some of the issues to be faced include (i) whether the guarantees are joint or several; (ii) whether the required guarantees are for just exculpatory carve outs and environmental indemnities or if a venturer can be required to guaranty more than that; (iii) whether the venturer has an obligation to provide a net worthy entity to stand behind the guaranty; (iv) whether the venturers have an obligation to enter into a contribution agreement if a guaranty is called; (v) whether there are different remedies if a venturer fails to provide a guarantor as opposed to failing to pay its share of a guaranteed amount that is called; and (vi) how amounts paid under the guaranty are treated under the JV Agreement, whether as additional capital, as preferential loans, or otherwise.

V. CASH FLOW; PREFERRED RETURNS ON A CUMULATIVE OR COMPOUND BASIS; DEVELOPER PROMOTES, CATCH-UP; WATERFALLS; CAPITAL DISTRIBUTIONS

1. Distributions of Cash Flow. Cash generated by the JV (as opposed to the profits and losses allocated for tax and accounting purposes) generally arise either from (a) the "Cash Flow" generated from the day-to-day ordinary operation of the JV or (b) "Capital Proceeds" generated from an extra-ordinary event, such as a sale, refinancing, insured event (casualty or title), condemnation or similar disposition of the assets. The cash is then subjected to a Waterfall, a sequence of payment parameters. Those parameters may be set by the parties or re-set by the JV's mortgage lender upon default. However they may be arranged by contract, the taxing authorities (the "Invisible Partner") may rearrange them to reflect the required "substantial economic effect." In the case of a multi-asset JV, there is a tension between aggregating cash flows or segregating them. When asset based loans are collateralized by some but not all assets, the attributions and allocations are more important.

(a) Expenses: day to day operational costs include fixed costs such as taxes, insurance and utilities. Sometimes contention arises when it includes costs of debt service, or payments to Affiliate (such as management companies, maintenance companies, accounting administrators). Reserves can also be area of dispute when accounting for the timing of rights to distributions.

(b) Tax Distributions or Loans (advanced future distributions): to provide parties with cash to pay net tax due on account of ownership of the JV interest. Usually the attributable year is common for all parties, with a year to year look back for adjustment. The computation disregards any party's use of carry forward losses or current deductions from unrelated sources. Tax Distribution is a timing issue, not a guarantied independent payment, and may be subject to Clawback from Developer to the extent not paid to Taxing Authority. It may also be subject to potential claim by the holder of a charging order.

(c) Venturer Loans: seed money or subsequent loans made by a venturer to fund operations.

(d) Venturer Additional Calls: these advances to preserve or sustain the JV in the face of unanticipated expenses are sometimes considered a priority to a preferred return because the preferred return is an anticipated venturer payment.

(e) Preferred Returns: a percentage return on the capital invested by the Investor. Sometimes the Investor's return is paid first. To the extent the preferred return is not paid it can be cumulative as a preferred, growing in size as a priority and making the Developer's catch-up or Promote more remote. The cumulative preferred return can be further swollen if it compounds, so that the amount of preferred return due but not received would bear interest at a rate agreed upon, akin to an involuntary loan by the unpaid venturer.

(f) Return of Capital: this return can be on a pari passu basis or preferred basis with the Investor receiving its capital first. Usually it is based on the proportionate balance of unreturned capital contributions.

(g) Deferred, Accrued, or Look Back Return: once the Preferred Return is paid, and all capital returned, the subsequent cash can be split in a fashion weighted (sometimes 100%) to the Investor until the Investor receives an IRR of some agreed upon amount. Then the split between the Developer and Investor is readjusted to provide the Developer its Promote.

(h) Clawback: to the extent that Investor's economic projections are not met, it may require the Developer to make up the difference to the extent of distributions Developer received as a venturer, or for its fee services.

2. Distributions of Capital Event Proceeds. Applied in a different waterfall than for Distribution of Cash Flow.

(a) Third Party Debt: third party creditors must be paid. The Venture Acts frequently provide for a disgorgement of distributions to venturers if made to the detriment of creditors at the time the JV is insolvent. In the case of Tenancy-In-Common, the Uniform Fraudulent Conveyance Act would have the equivalent effect.

(b) Venturer Debt: loans by venturers are subordinate to third party loans, but ordinarily senior to return of equity.

(c) Venturer Cumulative Preferred Returns: these are in the nature of loans and treated as senior to equity.

(d) Restore Capital Accounts: if any venturer had received distributions after the capital account had reached zero (such as Tax Distributions), the account needs to be restored to zero.

(e) Distribution of Capital: this follows the return on a pari passu ratable basis until all equity has been returned to the Investors.

(f) Distributions of IRR: the Look Back is paid out of a disproportionate split to benefit the Investor.

(g) Distribution of the "Promote": the Developer is paid its Promote by a reallocated disproportionate split weighted to benefit the Developer.

VI. FEES AND CLAWBACK

1. Fees. Developers arrange for fees for various services provided to assist the venturer operating the Project, though sometimes the Investor also requests a consulting fee.

(a) Organization Fee – for conceiving of the Project

(b) Acquisition Fee – for negotiating the acquisition

(c) Owner's Representative Fee – for supervising and negotiating issues related to construction and redevelopment of the Project

(d) Property Management Fee – for managing the maintenance operation, security, repairs etc.

(e) Investor Relations Fee – for collecting and disseminating JV information as to tax, accounting, change in circumstances

(f) Cash Management Fee – for managing the investment of cash holdings by negotiating the investment procedures

(g) Asset Management Fee – for negotiating with investment providers for various investments and providing market research and other information.

(h) Sale Fee – for negotiating the sale of the Project

(i) Financing Fee – for negotiating the financing of working capital loans

(j) Leasing Fee – for negotiating leases

(k) Refinance Fee – for negotiating the refinance of the acquisition financing and subsequent financings

(l) Liquidation Fee – for supervising liquidation of the JV

2. Clawback and Claw-Forward. Clawback is a right of the Investor to require that the Developer pay back to the Investor amounts distributed to the Developer in the event, upon liquidation of the investment, it is determined that the Developer received Promote distributions or fees and the Investor did not receive a return of its investment plus a specified return on its investment (often described as a minimum IRR). This can occur in any number of circumstances including: (i) if the JV Agreement provided for payment of Promote distributions out of operating cash flow before a return of capital to the Investor; (ii) if the JV has multiple assets, some are sold for an amount sufficient to return all initial capital, meet the Preferred Return hurdle and to pay the Promote but thereafter additional capital is required in connection with the remaining assets; and (iii) additional unanticipated capital contributions are made by the Investor after the Developer has received distributions on its promote. In multiple asset/multiple pool situations there can also be "Claw-forwards" to anticipate any losses in connection with other investments based on appraisals, etc, before paying any promote to the Developer.

3. Clawback carve-outs: (i) payment of the Developer's Promote to employees as incentive compensation; (ii) Tax Distributions.

4. Clawback security: (i) personal guarantees from the principals; (ii) deposits of all, or a portion of, Promote distributions into an escrow until the end of the investment; (iii) deposits of all or a portion of, promote distributions into an escrow until certain financial tests are achieved or during those time the tests are not achieved, such as EBITDA, appraisals, or sales; and (iv) pledge of venture interests.

VII. ADMISSION; WITHDRAWAL

1. Admission. Admission of a new venturer can customarily occur in one of two ways: (i) a current venturer can transfer its venture interest and the assignee can be admitted as a new venturer; (ii) the JV can admit a new venturer. When a new venturer succeeds to the interest of an assignor venturer, there is no change in the outstanding interests, no dilution; rather all or a portion of a venturer’s interest is taken owner by a new venturer. The issue for the assignor is whether it is released. Separate from whether it is permitted, the admission of a new venturer typically requires the following: (1) execution by the new venturer of a subscription agreement providing an assumption by new venturer of all obligations under the JV; (2) the new venturer is an “accredited investor” for purposes of the Securities Acts and can bear the possibility of actual loss of the investment; (3) that the interest is not being acquired for resale; (4) assumption of remaining obligations of a mandatory future capital call; (5) payment of any amounts relating to outstanding assignor charges or costs of consultants to the JV engaged with respect to the admission issue. If the admission is by the JV, then there would be a dilution of the pre-existing percentages and interests. The newly admitted venturer could be required to pay some amount which equates to either the market value of the interest, or the book value of the interest, or be admitted without any payment as a “profits only” venturer. Typical conditions include that the counsel to the JV confirm that the transfer is not a regulated sale of securities. In the context of multiple investors, a later Investor may pay an additional amount to prior Investors to account for its later entry into the JV.

2. Withdrawal. Withdrawal is not the opposite of admission. A redemption of JV interests is usually reflected by an assignment of the interest and the venturer releasing the JV.

Sometimes the JV releases the redeemed party. Under the old Venture Acts, a withdrawal of a general partner triggered automatic dissolution, which if not reversed, required winding up and termination.

VIII. RESTRICTIONS ON TRANSFERABILITY; ROFR; TAG-ALONG AND DRAG ALONG RIGHTS

1. Fears of Transfer

The Investor (i) expects to be able to monetize its investment without restriction, customarily by transferring its interest to a third party and (ii) to prevent the Developer from assigning its interest to a less capable performer. The Investor's concerns are (x) expertise – how well would a substitute Developer function; (y) stability – how well positioned economically would a successor Developer be; and (z) chemistry – how will the relationship with a stranger progress. The Developer concerns are: (p) control – how will the Major Decisions process work, (q) capital– how will future capital needs or calls be met and when will cash flow be distributed, and (r) chemistry - how will the relationship with a stranger progress.

2. Mechanisms.

(a) Investor will contractually restrict the right of the Developer or key principals to resign or withdraw from the JV. The operating agreement might contain provisions relaxing restrictions on Developer transfers after the Project has "stabilized" by meeting certain agreed upon objectives. The Developer certainly will restrict any transfer of the Investor's interest until all required capital has been contributed.

(b) The safeguards of a right of first offer to purchase the interest of the joint venturer prior to its going to market to transfer its interest or right of first refusal prior to sale to a third party (should not apply to transfers to affiliates, change of control, or IPO's so long as it is not for the purpose of circumventing the ROFR); and a right to tag along and sell its interest if Investor finds a buyer. If a joint venturer agrees to a tag along, it is likely to also insist upon a "drag along" pursuant to which it can require the other venturer to sell its interest in conjunction with a prospective sale by its own interest. Issues of pricing affect all these activities. The Developer receives fees and Promote distributions which the Investor does not. One way is to value the joint venture based on the price to be paid to the Investor for its interests and prorate the Developer's share based on the ratio of their capital accounts. Another way is to appraise the Project, and calculate how much should be due Developer based on a liquidation. Different values affect the exercise of drag-along or tag-along.

(c) If the JV Agreement is not carefully drafted, an easy way to circumvent transfer restrictions are indirect transfers. For example, an agreement may prohibit a venturer's transfer of its interest in a limited liability company but not address the ability of the owner of the equity in the venturer to transfer its equity interest in the venturer.

(d) Common transfer restrictions relate to (i) indirect transfers of equity interests in the joint venturer, (ii) securities laws, (iii) avoidance of being taxed as a publicly traded partnership, (iv) foreign ownership, (v) tax-exempt owners, (vi) pension funds, (vii) transferees that do not have adequate financial capabilities, (viii) competitors, (ix) consequences of divorce, (x) regulatory concerns, (xi) tax terminations, (xii) involuntary transfers by foreclosure, dissolution, bankruptcy, or incapacity of the joint venturer, among others.

3. Right of First Refusal. Generally, neither the Developer nor the Investor will want to be forced to accept an unknown or undesirable venturer. This sometimes provides the optical illusion of protection from an unknown or undesirable venturer. Common exclusions from the operation of the ROFR are transfers of economic rights to affiliates, family members for estate planning purposes, trusts, charities or other venturers. Even in the case of "permitted transfers" the transferee may be subject to restrictions on voting generally, or on some or all approval rights. The ROFR is cumbersome because it repels a suitor in light of the need to negotiate terms to a point of closure, only to have the opportunity usurped by the pre-existing joint venturer. The ROFR retards the speed of transition by requiring the two steps of bidding (first to the third party, second to the joint venturer). It also enhances a risk of liability if the ultimate terms at closing diverge in some way from the terms initially offered. In addition to those core issues there are ancillary issues that can prove fatal. Sometimes an offer cannot be matched because consideration is in the form of unique assets (real estate or privately held securities). Sometimes a brokerage commission is at issue. If the seller is willing to take back purchase money financing from a third party, either because it qualifies as credit worthy or its guarantor does, the joint venturer may not be as qualified in the eyes of the seller. If there are more than two venturers, then each venturer has a proportionate right of first refusal and for those venturers that do want to exercise when less than all want to exercise, a mechanism of majority rule or step-up for short falls must be provided. If the joint venturer exercising the right defaults, appropriate remedies need to be provided including (i) damages whether for "expectation" as if the ROFR holder followed through, "reliance" for the losses incurred from pursuing the sale to the ROFR or "restitution" to put the Seller in the same position as if the ROFR had never been exercised for the difference in the lost sale as measured against a subsequent sale, (ii) specific performance, or (iii) right to compel the sale of the Project. Time periods are also important, long time periods detract from value. These reasons make the existence of a right of first refusal a large inhibitor to transferability, and the ROFR automatically causes a discount to the value of the interest compared to the proportionate share of the value of the underlying asset.

IX. PROGRAM STRUCTURE; EXCLUSIVE RIGHTS; FUTURE PROJECTS; NONCOMPETES

1. Program Structure. If the JV has a programmatic strategy to continue to conduct the same business with more assets, the JV is routinely structured in one of two ways. Either the parties will form one master JV entity with each asset being owned by the master JV indirectly through a series of single asset entities wholly owned by the JV. The other structure is to have the parties form separate, sibling JV entities for each separate asset. The advantages of the former are: (i) ability to build up a net worth in one entity that can serve as guarantor and indemnitor; (ii) efficiency in documentation and creation of taxable entities; (iii) efficiency in financing assets since new JV entities are not underwritten for each transaction, but only a single asset entity pursuant to an agreed upon template, (iv) administrative efficiency in moving cash among the SPEs. Advantages of the latter are: (i) inability of a creditor to attack the overall net worth of the master JV entity (although the single member entities should provide an effective shield); (ii) keeping accounting separate and discreet for each transaction on a stand alone "silo"

basis; and (iii) flexibility for the parties to change their economic agreements from transaction to transaction.

2. Exclusive Rights. Many times an Investor will want a long term relationship with a Developer and will want the right of first look at the Developer's future projects. This is good for the Investor who is looking to deploy a large sum of capital in a certain defined class of asset and it is good for the Developer who needs a steady stream of capital to use in its acquisitions and new developments. Some of the terms and conditions for such rights can include the following:

(a) Term: Typically the exclusive is for a period of a few years.

(b) Capital: An Investor will typically agree to fund a certain number of equity dollars in a venture and to look at all projects in a defined class until the dollars have been expended. Many times the Investor will want a covenant that the Developer will expend best efforts or commercially reasonable efforts to find appropriate projects either by quantity per year or by dollars per year, ultimately to expend all of the dollars ("filling the fund"). The Investor will look to have the Developer focus on assets that meet certain return criteria, project types, demography profiles, earnings forecasts, and size.

(c) Geography: Sometimes limits are placed with boundaries of states or regions or certain markets or demographic information based on population.

(d) Asset Class: Identity of the kinds of assets suitable for investment by class, such as core, core plus, opportunistic, new development, mixed use, or narrowed by use such as multi-family, office, industrial, retail, assisted living, resort, entertainment, hospitality. This can be critical to the Investor who allocates different funds to different asset investments.

(e) Size Minimum and Maximum: Can be based on investment dollars required, footprint, percentage of portfolio the Project represents as to investment, revenue or profit.

(f) Approval Process and Milestones. (i) types of due diligence materials to be submitted; (ii) milestone conditions for Developer to present initial "go or no go" decision; (iii) timing of decision making; (iv) milestone when Developer's due diligence costs become JV entity costs; (v) inspection, question, objection period; (vi) degree to which proformas and operating and development budgets can be relied upon; (vii) steps for final approval; (viii) loan commitments; (ix) rights of Developer to proceed with those prospective Projects that were either not qualified for submission or disapproved after submission.

(g) Rights of early termination of exclusive period: if the Investor rejects a number of Projects that fit within the stated criteria of exclusivity over a certain period of time, or if the Investor rejects a smaller number of Projects fitting that criteria serially, then the Developer may have the right to terminate or suspend the exclusive right of the Investor. The Investor may have corresponding right to terminate or suspend if Developer has failed to present Investor with sufficient number or concentration of qualified Projects.

3. Noncompete. The JV Agreement may have an exclusive clause as to JV Projects, but should also permit each venturer to participate in other real estate ventures without the other venturer, or any restrictions on such right. An Investor may not want a Developer to be involved in a Project within a certain radius, or within the same demographic market, since that will lead to the Developer having competing interests in leasing up and operating the centers. Existing Projects owned by the Developer should be excluded, and there also should be exclusions for portfolio purchases and entity transactions such as mergers and acquisitions. It is unusual that the Investor will be subject to any sort of noncompete.

X. DISPUTE RESOLUTION

1. Triggers. Either in the JV Agreement, or after a dispute in any amendment, there may be different triggering events, and different tension levels, before a dispute resolution mechanism may be exercised. There may also be different layers of procedures to follow before a final exit strategy type of dispute resolution mechanism is exercisable. In the event of disputes and deadlocks, new or modified procedures can be adopted. Triggering events may be on a portfolio (global) level. They may also be at the asset level. Typically a triggering event is when the venturers cannot agree upon a Major Decision. It is possible, though, that the venturers may not get along but that there is no Major Decision in dispute allowing a venturer to trigger a dispute mechanism. The fewer Major Decisions in a venture, the fewer opportunities there will be to trigger the dispute resolution mechanism. A global dispute may lead to the liquidation and dissolution of the JV entity. An asset level dispute may lead more narrowly to a disposition of the asset in question, but leave the JV entity intact. Examples of asset level disputes include failure to agree upon (a) a budget for a Project, either operating or development or redevelopment; (b) leasing criteria for a Project; (c) terms for financing or sale of the Project; and (d) improving, expanding, or otherwise renovating a Project. Examples of portfolio, or global, level disputes include not only assets, which are generally disputes over business tactics or strategies, but also disagreements over business goals and purposes such as investment goals, asset mix, lever ratios, and sunsets.

2. Procedures and Mechanisms. The classes of dispute resolution procedures can intensify through a range starting with cool down, expert determination, mediation, arbitration, and end with litigation. The parties may first elect to impose “cool down” time frames for resolving property level disputes. They are typically shorter than for resolving global disputes. The parties may agree that a property dispute must be resolved in 30 days before more aggressive dispute resolution mechanism may be exercised, but that the parties have 180 days to resolve a global dispute or until an irreversible material adverse change would occur, before exercising a dispute resolution mechanism. Once a “cool down” expires the parties may move to engage in direct resolution procedures. Use of experts for identified and segregatable issues can permit the parties to defer to a consultant the recommendation of decisions about disputes. This includes using accountants for budget and other financial disputes; local brokerage community for leasing parameters and fairness of sale disputes; structural engineers for necessity of capital expenditures. Mediation and other alternative dispute resolution techniques are in many instances a pragmatic way to resolve dispute with less expenditure of time and money, but there is a tendency for mediators to "split the baby." Arbitration can provide resolution in a shorter period of time than litigation, but it still takes time. It is usually most convenient for resolving issues limited to dollar damages that are less than substantial in size. If arbitration is used then

rules of AAA should be used (or other agreed upon specialized rules should be specifically set forth) and language included to make the results fully binding. By comparison, the strength of litigation is in its pressure by broad procedural powers to establish the factual circumstances of an event. Its tools are wielded by the force of the government and include unique procedures such as discovery, subpoena, personal jurisdiction over witnesses, and fines and imprisonment for disobedience. Those powers are not available in arbitration or mediation. Further, courts can exercise injunctive remedies over and above allocating liability for money damages, but arbitration and mediation cannot.

As identified in Exit Strategies, dispute resolution mechanisms can include Liquidation, Put/Call, Buy/Sell.

XI. DEFAULT AND REMEDIES

1. Defaults. Defaults can generally be categorized as occurring as an outcome of disputes, a conspicuous failure to pay or perform, or from bad acts. Bad acts may be from malfeasance, misfeasance or bad luck.

(a) Malfeasance: Acts which are (i) grossly negligent, (ii) intentional breach of fiduciary duty, (iii) bad faith, (iv) commercially unreasonable, (v) malicious misconduct, (vi) fraudulent, or (vii) criminal, and that had a material adverse affect on the venture. Bad acts are usually not listed because they are inherently actionable and generally relate back to the fiduciary duty venturers owe to each other.

(b) Misfeasance: Acts which are expressly prohibited in the JV contract such as transferring an interest without permission, or misusing funds.

(c) Change of circumstances: Failure to maintain credit worthiness, brand value, or being subjected to bankruptcy, whether filing a voluntary petition in bankruptcy, making an assignment for the benefit of creditors, becoming the subject of an order for relief or being declared insolvent, making an admission in writing of an inability to pay debts as they mature, giving notice to a governmental body that insolvency has occurred, is pending or that operations have been suspended, or seeking/acquiescing in the appointment of a trustee, receiver, or liquidator.

2. Remedies. The remedies available to the aggrieved non-defaulting venturer (“NDV”) involve depriving the defaulting venturer (“DV”) of rights or benefits. Sometimes the DV transfers them to the NDV, sometimes they are extinguished, and sometimes they are transferred to third parties. When a JV owns more than one property, either directly or indirectly through a series of single asset entities, the JV Agreement should contemplate whether the remedies against the DV affect the DVs interest in the JV as a whole, or only the DV's interest in the particular asset for which the additional capital call was made. Attached as Exhibit C is a collection of provisions relating to workout of venturer disputes and defaults.

(a) Remedies for Performance Defaults:

(i) The NDV would seek to impose the right to remove the DV by either the vote of a certain percentage of interests such as a majority or supermajority, the direction of the Investor, or the determination of an independent director or an arbitrator.

(ii) Then the remaining venturers must also decide whether to select a new managing venturer. If there is more than a 50% transfer in ownership, it causes a taxable event. A more moderate approach would be to convert the managing venturer's interest to the more limited rights of an assignee. Slightly more drastic would be dilution by decreasing managing venturer's interest and transferring the difference to a new venturer. More drastic than that would be suspension of Developer's economic or voting rights until Project stabilization. Termination of contracts with Developer's affiliates may be fatal because it may eliminate the life's blood of regular revenue for the Developer. Sale of the JV assets would be an irreparable end, requiring dissolution, winding up and termination. But even then, the individual venturer would retain liability to creditors of the JV over a period of time for the amount of distributions received while the JV's liabilities exceeded the fair market value of its assets.

(b) Remedies for Prohibited Transfers. Violation of a transfer restriction can cause a number of remedies. It can be: (i) void from its initial effort; (ii) voidable by right of rescission; (iii) deemed a breach of contract for which the NDV is entitled to (a) damages, (b) conversion of venturer's interest to a non-voting "assignee," (c) forfeit of future fees, preferred returns, or Promotes; and (iv) repurchased by the JV, usually in the case of involuntary transfers caused by death, divorce, foreclosures, bankruptcy, or incapacity.

(c) Remedies for Payment Default. The remedies for failure to contribute capital are usually distinct and separate from the remedies for other defaults under the JV Agreement. The remedies stated may be exclusive or nonexclusive, and may either be exercised in any combination or as alternatives. Typical remedies would include:

(i) Right of the NDV to withdraw its commitment for the additional contribution and rescind the additional capital call, with the likely consequence of facing dissolution, wind up and termination.

(ii) Right of the NDV to loan the DV the share of the capital call at a penal interest rate, but restrict the use of the proceeds to fund the DV's share of the capital call. The loan balance and accrued interest would be secured by the DV's share of future distributions

(iii) Right of the NDV to withdraw the commitment for the additional contribution and instead loan the JV the amount of the required capital call, at a penal interest rate. Typically the DV then has a period of time to pay some substantial fraction of the amount of the loan, plus the interest on that repaid amount, to the NDV, in which event the DV can reinstate that fraction of its venture interest and be treated as if it had contributed that portion of the capital on a timely basis. There is a risk that the loan of the NDV to the JV would be equitably subordinated in a bankruptcy of the JV if the typical conditions are present.

(iv) Right of the NDV to cause the JV to sue the DV for the contribution and take a charging order lien upon its interest.

(v) Right of the NDV to cause the JV to foreclose upon the interest of the DV in the JV for the shortfall.

(vi) Right of the NDV to advance its additional contribution and cause a dilution of the DV's interest to occur, resulting in the NDV having a larger interest. While this is a significant remedy, it has increased significance if the governance rights under the JV Agreement require a majority in interest to take any action and the dilution will result in the NDV becoming the majority in interest. Then the DV would seek to preserve some basic right to veto major sales, refinancings or abandonments of the business. There are different formulas for dilution; some of them straight, based on the respective capital contributed by the parties compared to all debt and equity capitalization; some of them penal, so that the DV loses not only a proportionate percentage of its interest, but an additional percent of its interest.

(vii) Other remedies might include a loss of all governance voting rights which creates risk that the NDV sells or refinances on a basis that is an impairment of the DV's interests; a cutoff as to when a cure may occur, after which the DV remains a defaulting venturer even after the NDV is made whole; and possibly a termination of the DV's interest.

(d) <u>Foreclosure for Damages.</u> In a dispute between venturers for contributions, the NDV can become a creditor of the DV. A venturer's share of rights, obligations and interests in a JV can be subject to the claims of the venturer's creditor in one of two basic ways: the creditor as a judgment creditor can obtain a charging order under the Venture Acts, or the creditor as a secured party can exercise remedies under the UCC. In each instance, the creditor of the JV is senior to the venturer's separate creditors (except in a tenancy-in-common). There is a difference between the two procedures. Generally foreclosure under a charging order exposes the NDV to less liability, but takes significantly longer. Below is a rough comparison of their characteristics.

	Judgment Creditor by Charging Order	Secured Party under UCC
1) Collateral Subject to Lien	judgment applicable to all non-exempt property of venturer	security interest applicable to all collateral of venturer defined in security agreement
2) Source of lien	issuance of charging order, appointment of court ordered receiver of JV interest	Grant in security agreement of JV interest
3) Breadth of Remedies	obtain all "other orders"	pursue all other remedies available
4) Recovery Process	sell JV interest by public court supervised foreclosure; judgment holder can credit bid with restrictions	obtain JV interest by consensual strict foreclosure; foreclose by non-consensual public or private sale with recovery to extent of outstanding obligation; if private sale, no "credit bid" by secured party; if public sale must be assessed at fair value for deficiency or excess recovery
5) Description of Collateral	acquire statutorily defined "partnership interest"	acquire contractually defined "partners share and rights"
6) Redemption Rights	redemption right prior to sale	redemption right prior to sale
7) Defenses	improper procedures, usually notice issues	conduct of sale not in "commercially reasonable" manner; failure to "prepare collateral" and prepare due diligence package

XII. EXIT STRATEGY AND LOCKUP

1. Exit Strategy. An exit strategy is a device or a procedure for liquidating an investment in the JV and ending a venturer's involvement. The JV Agreement may contemplate an exit strategy for the venturers. Some of the reasons for contemplating an exit strategy include: (i) Investor is a closed end fund with an end date; (ii) intent of the parties to develop a specific asset and sell the asset once operating; (iii) intent of the parties is to hold the portfolio for a set number of years and then liquidate; (v) an exit strategy gives the venturers flexibility in a changing market even if only one of the venturers has governance rights, and (vi) the exit strategy serves as a means of dispute resolution. The exit strategy may be "all or nothing" (i.e.

complete end of involvement with the JV) or it may be on an asset by asset basis (i.e. the venturer utilizing the exit strategy may liquidate its indirect interest in one asset while retaining its interest in the remaining assets held by the JV). An exit strategy differs from a dispute resolution mechanism in that an exit strategy can be exercised even if there is no dispute.

2. Liquidation. Right to require the sale of an asset (or all assets) on the open market. This typically is allowed after the JV entity has owned the asset or portfolio for a number of years or upon the occurrence of a specified event, such as the second anniversary of the grand opening of a newly developed asset. Typically a venturer can demand that the manager market the asset on the open market using a broker. Other venturers may require that they have a right of first offer before they asset is marketed on the open market, and/or an ROFR that comes in from the open market. Issues that should be negotiated include (i) whether the other venturer must put up a deposit if it exercises its right of first offer; (ii) whether the commission that will be paid if the property is marketed is taken into account in comparing a market offer to a venturer offer; (iii) whether the offer must be an all cash offer; (iv) whether the JV entity has to allow the other venturer a right to rebid if the offer the JV receives from the market is slightly below the offer made by the venturer; (v) whether the terms of the purchase agreement with the third party must be approved by the parties or if commercially reasonable terms will be deemed approved; and (vi) whether there are certain assets that are not subject to this mechanism.

3. Put or Call. A venturer can have an option to "put" its interest to the JV and compel a sale, or an option to "call" the other venturer's interest and buy it. This right would typically be after a number of years or upon the occurrence of a particular event, and has a number of issues, including (i) valuation, such as whether the put or call is for a specific IRR or based on fair market value or some other formula; (ii) the types of warranties and liabilities for which the assignor will retain liability; (iii) whether the assignor is released from any debt obligations or is indemnified against them; (iv) whether the asset transferred is the asset itself or an entity interest.

4. Buy/Sell. This technique is not effective when the parties have extremely unequal investments in the JV, because in terms of liquidating a JV interest or an asset, there is always a chance that the initiator of the buy-sell can wind up compelled to buy out rather than sell to the other venturer. Nor when there is dramatic divergence in the parties' credit worthiness or liquidity, because the venturer who cannot meet a call will be forced to sell. The procedure is that either venturer has the right to offer to, in essence, buy the JV for whatever price is set forth in the offer. The other venturer has the right to either agree to the sale at that price or to buy the JV for the equivalent price, but must elect one or the other within a specified period of time. Refinements can include netting out extraneous costs such as excluding broker fees or transfer taxes, but retaining fixed costs such as debt discharge or debt assumption fees. This Buy-Sell device may be used to resolve a global dispute, in which case the buying venturer would acquire the selling venturer's interest in the main JV entity, or may elect to buy the interest for the grossed up amount needed for the selling venturer to have received the same amount it would have received on the asset sale, or it may be used to resolve a property level dispute, in which event the price is based on the amount the selling venturer would receive if the asset in dispute were sold for the stated value and then proceeds distributed through the main JV entity. In the latter case the JV entity would either convey the asset in dispute to the buying venturer or the JV entity would transfer its interest in the property level single purpose entity that owns such asset

to the buying venturer. In drafting the clause, time frames for responding to an offer and closing are important and the ability to raise cash quickly must be taken into account when one venturer can raise the necessary cash for a buy out more quickly than the other venturer with more meager resources. Other issues are whether a deposit will be required; the necessity of releasing any guaranties or other long term liabilities that the selling venturer may have with respect to the JV entity or the asset at issue or, alternatively, providing an acceptable indemnity; the right of the selling venturer to distributions and the obligation of the selling venturer to contribute capital in the interim period; and rights and obligations if the buying venturer defaults. A variation of the Buy-Sell is for the offering venturer to produce an appraisal of either the JV entity or the asset in question. The offering venturer then has the right (but not the obligation) to make the offer using the fair market value as determined by the appraiser as the basis for valuation: If the offering venturer declines to make such an offer, then the non-offering venturer would have the right (but not the obligation) to make the offer based on the fair market value. There are different methods of determining fair market value, for example, one appraiser can make a determination then each side has an appraiser determine, and the average of the two establishes fair market value; or if the two appraisals are not close, having the two appraisers pick a third who either determines fair market value or picks one of the two other appraisals as the correct valuation; or, by each party submitting a proposed value with reasons and compelling an appraiser to select the one value the appraiser believes is closest.

5. Lockup. One venturer may require that certain assets are subject to a lockup for a number of years or until certain specified events occur. This is common in equity funds with specific timetables for achieving investor returns. The assets cannot be sold by the JV entity until the lockup period ends. Some reasons for this: (a) if a venturer has contributed the asset to the JV entity it may have significantly different tax consequences upon a sale than the other venturers; (b) the asset may not be mature and the developing venturer may want to wait until the asset matures before a sale in order to maximize value; (iii) there may be a decline in the market and a venturer wants some time for the market to recover before an asset is sold.

(a) Lockup clauses may cover all assets for a period of time after each individual asset is acquired, or may run from the formation of the JV entity regardless of when assets are acquired, or may only cover specific assets. There may be different lockup periods for different assets.

(b) There will be an inherent tension between a venturer that contributes an asset and a venturer that contributes cash with respect to that asset and with respect to the flexibility of selling that asset. This may be resolved by giving the asset contributing venturer a right of first refusal to acquire the cash contributing venturer's interest in that asset if the cash contributing venturer desires to sell the asset, either in lieu of a lockup period or after the lockup period ends.

(c) Some thought must be given as to whether a lockup clause has priority over a dispute resolution mechanism that involves the sale of an asset or an interest. If there is a three year lockup period for a certain asset, but in the second year the venturers have a major dispute as to an issue involving that asset and the dispute resolution mechanism involves the sale of that asset or a venturer's interest in that asset, does the dispute resolution mechanism govern so that the asset is sold even though it is during the lockup period? If so, then a venturer could circumvent the lockup period by creating a major dispute. If not, then the venturers may not have an effective dispute resolution mechanism during the lockup period. One deterrent is to overlay a make-whole provision in the event of premature sale in violation of the Lockup.

XIII. DISSOLUTION, WINDING UP, LIQUIDATION, TERMINATION, CANCELLATION

1. Contract Dissolution. The JV Agreement should describe events and circumstances under which the JV entity is dissolved. Typical events would include (i) a sale of all or substantially all of the assets; (ii) a date certain; (iii) the agreement of all of the venturers; or (iv) the disability of a venturer or of the managing member.

2. Statutory Dissolution. In addition to dissolution events set forth in the agreement, the governing statutes may set forth specific dissolution events, and a disgruntled venturer can petition for court ordered dissolution.

3. Winding-Up and Liquidation. Though dissolution is not an immediate shut down of business, it can have the unexpected consequence of preventing the pursuit of new business opportunities or expanding old ones. Upon dissolution, unless reversed, the JV is obligated to wind-up its affairs and liquidate its assets. If the dissolution is occurring for reasons other than the sale of all or substantially all of the assets, the agreement should set forth the specific mechanism for liquidating the assets and winding up the JV entity. Many times the provisions in the JV Agreement regarding the sale of the assets on the open market (including any rights of first refusal or rights of first offer) are instituted for liquidation purposes. Once the liquidation has occurred, the JV Agreement should provide for the holding of reserves and then the distribution of funds.

4. Liquidation Distributions. Distribution of funds in liquidation may not follow the waterfall distribution procedures if to do so would result in adverse and unintended tax consequences. If the allocations resulting from the waterfall do not have "substantial economic effect" the allocations will be disregarded by the IRS. Specific allocations and distribution provisions may be set forth in the liquidation section, which provisions will have precedence over the waterfall provisions in the distributions section.

5. Termination and Cancellation. Once liquidation has occurred, the JV entity is terminated and filed organizational documents are cancelled; a final tax return is filed.

XIV. MISC ISSUES TO BRING IN OTHER EXPERTS- ALLOCATIONS; REIT ISSUES; ERISA ISSUES; DEALING WITH PENSION OR GOVERNMENTAL FUNDS, ETC.

1. Tax Issues. Allocation of profits and losses, liquidation provisions, capital account provisions, dilution mechanisms, transfer rights, contributions of appreciated or depreciated property, distribution of in-kind property, withholding taxes, effects of recourse and non-recourse debt.

2. REIT Issues. adding a provision ensuring that the JV entity will take no action adverse to REIT status, particular focus on bad income and prohibited transactions, mini REIT for foreign investors of domestically owned real estate.

3. ERISA Issues. covenants made in connection with pension funds and other ERISA concerns; avoiding unfunded liabilities

4. Pension or Governmental Funds as a Venturer. Fractions Rules and other unique issues.

5. Banker's Rule. Calculating preferred interest on a 360 day year for actual number of days = 1%+ add on.

6. Accounting Issues. Consolidation (FIN 46R), fair value accounting (FAS 157).

EXHIBIT A

MAJOR DECISION LIST

- Extension of the JV term.
- Change in JV purpose or scope.
- Approval of any contract, agreement, and/or transaction where a conflict of interest may occur.
- Any material amendments or modifications to material agreements.
- Material indebtedness or any renewals, extensions, material amendments, or material modifications to any indebtedness.
- Adopting budgets
- Divergence from budget or business plan.
- Doing any act that would make it impossible to carry on the ordinary business of the JV.
- Litigation strategies or settlement and any confession of judgment.
- Settling any claims greater then $[X].
- Executing or delivering any assignment for the benefit of creditors of the joint venture.
- Filing any voluntary petition in bankruptcy or receivership with respect to the joint venture.
- Acquiring or disposing of any real property or equity interest.
- Adjusting any insurance or disposition claims, including title insurance, property insurance or condemnation awards.
- Acquiring or disposing of any capital asset.
- Lending any funds of the JV.
- Approval of any significant election for federal income tax purposes on behalf of the JV.
- Approval of legal counsel, accountants, or other key consultants of JV.
- Additional capital contributions to the JV.
- Merger or consolidation of the JV.

- Material leases, with month base rent in excess of $[X], and square footage in excess of [Y], and modifications or amendments to a material leases.

- Infrastructure or development agreements.

- Construction contracts in excess of $[X].

- Selection or termination of architects, engineers and contractors of JV.

- Granting or amending easements or encumbrances affecting JV assets.

- Recording restrictions affecting JV land.

- Service contracts in an amount greater $[X] or a term in excess of [Y] 4 years.

- Termination of any material lease.

- Engaging officers.

- Engagement or termination of an outside broker.

- Termination or suspension of construction.

- Admission of new joint venturers.

- Approval of the sale of all, or substantially all, of the JV assets.

- Dissolving, liquidating, or terminating the JV.

EXHIBIT B

GLOSSARY

The following is a list of some of the terms commonly utilized when discussing, negotiating, and drafting joint venture agreements.

Additional Capital. The additional capital above the initial capital invested or the committed.

Allocations. The tax basis on which the profits and losses generated by the JV are allocated among the venturers. Distinguished from Distributions which are cash payments.

Buy/Sell. Provisions which allow venturers to demand other venturers either buy from or sell to the initiator the JV interests usually for a uniform value for each percentage of JV interests.

Clawback. Investor's right to compel Developer to repay prior distributions or a portion of fees.

Claw Forward. Investor's right to retain Developer fees to fund projected shortfalls.

Dilution. The reduction of a venturer's original ownership interest in a JV either from the admission of additional venturers or a failure to meet an Additional Capital call.

DV. The Defaulting Venturer.

Distributions. Distributions of Cash Flow and Net Capital Proceeds to the venturers of the JV. Distinguished from allocations which ascribe tax outcomes.

IRR or Internal Rate of Return. Projected compound return on invested capital.

Net Capital Proceeds. Capital proceeds generated by a sale, refinance, insured loss or condemnation of JV assets, less costs of such activity. Net Capital Proceeds are generally distributed by the joint venture in a different manner than Cash Flow.

Cash Flow. Net revenue generated from the day-to-day operation of the joint venture, as distinguished from Net Capital Proceeds. Cash Flow is generally distributed by the joint venture in a different manner than Net Capital Proceeds.

NDV. The Non-Defaulting Venturer.

Preferred Return. Preferred Return is a return on the unreturned capital invested by a venturer, distributed to the venturer or venturers providing capital prior to any Distributions to a venturer who has not contributed any capital.

Promote. A Promote (or "promoted interest") is a right to receive certain Distributions of the JV which is granted to a venturer in recognition of being the Promoter of the JV. Distinguished from returns based on capital invested

Promoter. The Promoter of a JV is the venturer who located the Project and organized the JV.

ROFR. The right of first refusal to the take over and be a substitute purchaser under an offer made by a third party to purchase the asset.

SPE or Single Purpose Entity. An SPE is created to avoid consolidation with other entities and is commonly holder of a single asset. It may also be bankruptcy remote by having an independent director required to vote on all decisions to file a bankruptcy petition.

Venture Acts. Various National Conference of Commissioners on Uniform State Laws ("NCCUL") versions of the Uniform Partnership Act (1914) ("UPA"), Revised Uniform Partnership Act as amended (1997) ("RUPA"), Uniform Limited Partnership Act (1916) ("ULPA"), Revised Uniform Limited Partnership Act of 1976 with 1985 amendments ("RULPA"), and the Uniform Limited Liability Company Act ("ULLCA").

Waterfall. This the sequence distributions made from Cash Flow or Net Capital Proceeds by the joint venture to the venturers. It is available, increased, or as Distributions exceed an agreed upon IRR to the Investor.

EXHIBIT C

MISCELLANEOUS DEFAULT/WORKOUT CLAUSES

S P E C I M E N
JV REMEDIES PROVISIONS

A. <u>Default Representations and Warranties.</u>

1. DV acknowledges and agrees that DV is in default of its obligations under the "**Venture Agreements**."

All notice provisions required to be delivered by NDV have been complied with, all grace periods to which DV is entitled have either expired or been waived by it.

2. The DV does not have any intent to (i) file any voluntary petition under any Chapter of the Bankruptcy Code, Title 11, U.S.C.A. ("**Bankruptcy Code**"), or in any manner to seek any proceeding for relief, protection, reorganization, liquidation, dissolution or similar relief for debtors under any local, state, federal or other insolvency law or laws providing relief for debtors ("**Debtor Proceeding**"), or (ii) directly or indirectly to cause any involuntary petition under any Chapter of the Bankruptcy Code to be filed against DV, Makers and Pledgors, or (iii) directly or indirectly to cause the Collateral or any portion or any interest of DV, Makers and Pledgors in the Collateral to become the property of any bankrupt estate or the subject of any Debtor Proceeding. DV acknowledges that the filing of any petition or the seeking of any relief in a Debtor Proceeding by DV, Makers, and Pledgors whether directly or indirectly, would be in bad faith and solely for purposes of delaying, inhibiting or otherwise impeding the exercise by NDV rights and remedies upon the occurrence of an event of default hereunder against DV and the Collateral pursuant to this Agreement, and the Operative Documents.

3. Without limiting the foregoing, NDV shall be and is entitled to and DV hereby consent to, relief from the stay imposed by Section 362 of the Bankruptcy Code, as amended, in any bankruptcy proceedings, and DV shall not object to, defend against or oppose any motions or proceedings by NDV seeking relief from the automatic stay; DV releases any claims or counterclaims relating to the automatic stay, and agree not to seek; sue for or avail itself of any alternative stay or injunction whether under 11 U.S.C. §105 or otherwise. In addition, if any such stay, or injunction is granted, DV consents and agrees to the termination of such stay or injunction, and will consent to and support any motion filed by NDV from relief from the automatic stay or any other such injunction, to permit NDV to foreclose on the Collateral as soon as possible.

4. The covenant not to sue provided in Section [ ] of this Agreement will at NDV's election be void ab initio and will be of no force or effect and the DV will be jointly and severally and personally obligated for prior claims of NDV against DV if any one or more of the matters described below in this Subsection (e) occurs. The reinstatement of the obligations of the DV and the abrogation of the covenant not to sue provided by Section [ ] of this Agreement will not operate to affect or to alter the release given by the DV to the NDV pursuant to Section [ ] of this Agreement. The conditions subsequent for preserving this Agreement are as follows:

a. Litigation. The DV, or any person claiming by or through the DV ever commence, join in, assist, cooperate in or participate as an adverse party or as an adverse witness (subject to compulsory legal process which requires testimony) in any suit or other proceeding against any NDV Parties (defined in Section [ ]) relating to the Operative Agreements, this Agreement, the Collateral, including in the event of foreclosure of the Collateral, the DV opposing, defending, or committing any act whatsoever which may delay, impede, or prohibit said foreclosure action.

b. Avoidance. The assignment or any other document evidencing a conveyance of the Collateral to the NDV is ever rendered void or is rescinded by operation of law, or by order of any state or federal court, by reason of an order arising out of any claim or proceeding initiated or commenced in favor of, against, on behalf of, or in concert with, directly or indirectly, the DV or any person claiming by or through the DV or any of its respective agents, employees, representatives, officers, directors, shareholders, subsidiaries, affiliates, heirs, personal representatives, successors or assigns.

c. Warranty Breach. The warranties contained in the assignment or any other document evidencing a conveyance of the Collateral to the NDV are breached.

d. Covenant Breach. The covenants contained in Sections [payment, conveyance, release] of this Agreement are breached.

e. Access. The DV or any person claiming by or through the DV deny the NDV, or the NDV's representatives, the right to inspect, audit and transcribe the books, records, contracts, maintained by the DV or any person claiming by or through the DV in connection with the preservation of the value of the Collateral.

f. No Release. The release of the Seller Parties set forth in Section [ ] of this Agreement is ever rendered void, is rescinded or adjudicated unenforceable by operation of law or by order of any state or federal court of competent jurisdiction, by reason of an order arising out of any claim or proceeding initiated or commenced in favor of, against, on behalf of, or in concert with, directly or indirectly, the DV or any person claiming by or through the DV or any of its respective agents, employees, representatives, officers, directors, shareholders, subsidiaries, affiliates, heirs, personal representatives, successors or assigns.

g. Insolvency or Bankruptcy. The DV is the subject of a bankruptcy proceeding or insolvency or receivership proceeding after the transfer of the Pledged Interests.

h. Reversal Event. In the event a court or other tribunal having jurisdiction in a federal, bankruptcy or state proceeding, which is commenced on or before the Conclusion Date (defined below), or which is commenced on or before such longer period within which such claim can be asserted under applicable state law, thereafter declares the conveyance of title to the Collateral to be a preference or fraudulent transfer or conveyance or sustains a claim of a similar nature or otherwise declares this Agreement or any of the other documents executed in connection therewith to be void or voidable or rescindable or illegal; and, as a consequence thereof NDV, its nominee, or its successors or assigns, are ordered or compelled to reconvey any of the Collateral (whether to DV, its trustee in bankruptcy, or another party), or in lieu of a reconveyance to pay money to DV, its trustee in bankruptcy or another party on account of the conveyance of title ("**Reversal Event**").

i. "**Contest Event**" means DV (and including any such party acting as "debtor in possession" in a bankruptcy case, or its trustee in a bankruptcy case), in any action or proceeding (including a bankruptcy case) which is commenced prior to the Conclusion Date, raises any claim or otherwise in any way challenges any foreclosure or transfer of the Collateral pursuant to an assignment-in-lieu of foreclosure or in strict foreclosure, this Agreement or the transactions contemplated by this Agreement, and the documents or instruments or funds executed and/or delivered or to be executed and/or delivered pursuant hereto or thereto , including without limitation, the validity of the conveyance of the title to the Collateral pursuant to the Foreclosure (or assignment-in-lieu, if NDV so elects), or the adequacy or sufficiency of the consideration for such transfer.

j. "**Conclusion Date**" means the period ending on the latest of: (i) the One-Year Period; (ii) if a Contest Event is asserted during the One-Year Period, the date upon which such Contest Event is resolved without any of the Reversal Events having occurred; (iii) if at any time during the One-Year Period DV, Makers, or Pledgors, are in or the subject of a Bankruptcy case, the earlier of (x) the date on which an order closing such Bankruptcy case is entered (after proper notice to all parties in interest) and becomes final and unappealable, without any of the Reversal Events having occurred, or (y) the date when any Contest Event which has occurred in such Bankruptcy case is dismissed with prejudice and resolved in favor of NDV, without any of the Reversal Events having occurred; and (iv) the fifth (5th) business day after the last date on which a claim can be asserted under applicable law that the foreclosure and/or conveyance of title to the Collateral constituted a fraudulent transfer or conveyance, or may otherwise be rescinded; disaffirmed or avoided.. The "**One-Year Period**" means the date which is 370 days after the date of assignment to the purchaser at the foreclosure sale of Collateral, as the case may be.

5. Solvency.The DV, Makers and Pledgors represent and warrant, to their best knowledge that the DV, Makers and Pledgors are now and on the Closing Date will be solvent, the transfer of the Collateral to the NDV, its nominee or assignee will not render the DV, Makers or Pledgors insolvent, and the DV, Makers and Pledgors have made adequate provision for the payment of all their creditors other than the NDV. The DV, Makers and Pledgors represent and warrant that they have not entered into this transaction to provide preferential treatment to the NDV or any other creditor of the DV, Makers and Pledgors in anticipation of seeking relief under the Bankruptcy Code.

6. Lien Priority. The parties hereto agree and acknowledge that this Agreement is in no way intended to constitute a novation of the security agreement and interest granted under the [ ] Agreement. If it is determined that any other person or entity other than the NDV shall have a lien, encumbrance, or claim of any type which has a legal priority over any term of this Agreement, the original terms of the [ ] Agreement shall be severable from this Agreement and separately enforceable from the terms thereof as modified hereby in accordance with its original terms, and NDV shall retain all legal or equitable priorities which were in existence before the date of execution of this Agreement. It is understood by and is the intention of the parties hereto that any legal or equitable priorities of the NDV over any party which were

in existence before the date of execution of this Agreement shall remain in effect after the execution of this Agreement.

7. Cooperation. DV will cooperate with and provide NDV with information relating to the Collateral, and to develop audits of the economic value of the Collateral, and shall cooperate with NDV in NDV's efforts to recover the Collateral by foreclosure, public or private sale, or otherwise. DV shall also sign and deliver such other necessary and applicable documents as NDV may reasonably request in its sole discretion, including, but not limited to any requested budget information. Upon the occurrence of a Termination Event, DV shall not take any action of any kind or nature whatsoever, either directly or indirectly, to delay, oppose, impede, obstruct, hinder, enjoin, other wise interfere with, and DV will cooperate and comply with, the exercise by NDV of any and all of NDV's rights and remedies against DV, with respect to the Collateral, or any other rights or remedies of NDV with respect to the Operative Documents, or this Agreement.

B. Default Remedies.

If any Event of Default shall occur:

1. Transfer Rights. NDV shall have the right, at any time and from time to time, to effect the Transfer of any or all of the Collateral, subject only to the provisions of the UCC and any other applicable statute which, in accordance with such statute, cannot be waived, in any one or more of the following ways:

a. Register in the name of, or transfer to, NDV, a nominee or nominees, or designee or designees, of NDV (including deposit any and all of the Collateral to NDV with any committee, depository, transfer agent, registrar or other designated agency upon such terms and conditions as NDV may determine); provided that the provisions of the Section [ ] of the Agreement captioned "Strict Foreclosure" are complied with;

b. Sell, resell, assign and deliver, in NDV's sole and absolute discretion, any or all of the Collateral or any other security for the Secured Obligations (whether in whole or in part and at the same or different times) and all right, title and interest, claim and demand therein and right of redemption thereof, at public or private sale, for cash or upon credit (by NDV only), in accordance with the applicable procedures specified in the Article [ ] of this Agreement captioned "Sales of the Collateral"; and

c. Proceed by a suit or suits at law or in equity to foreclose all or any part of the security interests in the Collateral and sell the Collateral or any portion thereof, under a judgment or decree of a court of competent jurisdiction, retaining during the duration of such judicial enforcement all other rights with respect to the Collateral, including specifically the rights specified hereafter in Article of this Agreement captioned "Sales of the Collateral" with respect to each Pledged Entity.

d. Exercise any other rights at law or in equity, including, to prosecute and obtain a judgment for a charging order against the interest of DV and to proceed by judicial foreclosure to execute upon such judgment.

2. Voting Rights. NDV may exercise, either by itself or by its nominee or designee, in the name of DV, the rights, powers and remedies granted to NDV hereunder and under the other Loan Documents in respect of the Collateral at any time prior to effecting the Transfer of such Collateral to NDV or its nominee or designee, or any third party purchasers, as contemplated in Sections [ ] hereof, and whether or not any judicial action as contemplated in Sections [ ] hereof has been commenced or is continuing prior to a final unappealable judgment. Such rights and remedies shall include, and DV hereby grants to NDV the right to exercise by delivering notice to DV and the applicable Pledged Entity, (A) all voting, consent, managerial and other rights relating to the Pledged Equity, whether in DV's name or otherwise, including the right to appoint officers, directors, managers and other similar positions and (B) the right to exercise DV's rights, if any, of conversion, exchange, or subscription, or any other rights, privileges or options pertaining to any of the Pledged Equity, including the right to exchange, at NDV's sole and absolute discretion, any and all of the Pledged Equity upon the merger, consolidation, reorganization, recapitalization or other readjustment of such Pledged Entity, all without liability, except to account for property actually received by NDV. DV hereby irrevocably authorizes and directs each Pledged Entity, on receipt of any such notice (y) to deem and treat NDV or its nominee in all respects as a venturer, partner or shareholder, as applicable, (and not merely an assignee of a venturer, partner or shareholder) of such Pledged Entity, entitled to exercise all the rights, powers and privileges (including the right to vote on or take any action with respect to such Pledged Entity matters pursuant to the Organizational Documents) thereof, to receive all Distributions, to be credited with the capital account and to have all other rights, powers and privileges pertaining to such venturer, partner or shareholder interest, as applicable, to which DV would have been entitled had DV not executed this Agreement, and (z) to file an amendment to the Organizational Documents of such Pledged Entity admitting NDV or such nominee(s) as a venturer, partner or shareholder in place of DV.

3. Power of Attorney.

a. DV hereby irrevocably authorizes and empowers NDV, and assigns and transfers to NDV, and constitutes and appoints NDV and any of its assigns, its true and lawful attorney-in-fact and as its agent with full power of substitution for DV to proceed from time to time in DV's name, in order to more fully vest in NDV the rights and remedies provided for herein, in any statutory or non-statutory legal or other proceeding, including any bankruptcy proceeding, affecting DV, any Pledged Entity or the Collateral.

b. NDV and any of its assigns, or their respective nominees, may, to the extent permitted by applicable law, either pursuant to such power-of-attorney or otherwise, take any action and exercise and execute any instrument that it determines necessary or advisable to accomplish the purposes of this Agreement, including: (A) execute and file proof of claim with respect to any or all of the Collateral against any Pledged Entity and vote such claims with respect to all or any portion of such Collateral (X) for or against any proposal or resolution, (Y) for a trustee or trustees or for a receiver or receivers or for a committee of creditors, and/or (Z) for the acceptance or rejection of any proposed arrangement, plan of reorganization, composition or extension; (B) receive, endorse and collect all drafts, checks and other instruments for the payment of money made payable to DV representing any interest, payment of principal or other distribution payable in respect of the Collateral; (C) execute endorsements, assignments or other instruments of conveyance or transfer in respect of any other property which is or may become a part of the Collateral hereunder; and (D) execute releases and negotiate settlements, as appropriate, including on account of, or in exchange for, any or all of the Collateral, or any payment or distribution received by DV, or NDV on DV's behalf.

c. The foregoing power-of-attorney is irrevocable and coupled with an interest, and any similar or dissimilar powers previously given by DV in respect of the Collateral or any Pledged Entity to any Person other than NDV are hereby revoked. The power-of-attorney granted herein shall terminate automatically upon the termination of this Agreement in accordance with the terms hereof.

4. Management Rights. NDV may at such time and from time to time thereafter, without notice to, or consent of, DV or any other Person (to the extent permitted by law), but without affecting any of the Secured Obligations, in the name of DV or in the name of NDV: (i) notify any other party to any Organizational Document to make payment and performance directly to NDV, (ii) extend the time of payment and performance of, compromise or settle for cash, credit or otherwise, and upon any terms and conditions, any obligations owing to DV or claims of DV under any Organizational Documents of any Pledged Entity, as applicable, (iii) file any claims, commence, maintain or discontinue any actions, suits or other proceedings deemed by NDV reasonably necessary or advisable for the purpose of collecting upon or enforcing any Organizational Documents of any Pledged Entity, and (d) execute any instrument and do all other things deemed reasonably necessary and proper by NDV to protect and preserve and realize upon the Collateral or any portion thereof and the other rights contemplated hereby.

5. Right of Substitution. NDV shall have the right, without notice to or consent of DV, to become, or to designate its nominee, designee, agent or assignee to become, a partner, venturer, manager, officer or director, as applicable, of any Pledged Entity, in substitution of any existing Person serving in such capacity.

6. UCC Rights and Waivers.NDV may exercise all of the rights and remedies of a secured party under the UCC. DV releases NDV and waives any objection as to notice requirements under the UCC or other claims it may have for non-compliance, errors, omissions, or violations by NDV of any requirement under the UCC which would otherwise prevent, postpone or impair foreclosure against the Collateral or would subject NDV to any claim, allegation or threat for damages, liabilities or other obligations. Without limiting the generality of the foregoing, in accordance with Sections 9-602 and 9-624 of the UCC, DV confirms an event of default has occurred prior to its execution of this Agreement, and DV waives any right (i) to receive notice of any disposition by NDV of the Collateral pursuant to Section 9-611 of the UCC whether such disposition is by public or private sale under the UCC or otherwise, (ii) to compulsory disposition of the Collateral pursuant to Sections 9-609 or 9-620 to which it may be entitled; and (iii) to redemption of Collateral under Section 9-623.

7. NDV Self-Help Rights.

a. Subject to all applicable Legal Requirements, NDV shall have the right, but not the obligation, to take any appropriate action as it, in its reasonable judgment, may deem necessary to (i) pay or perform those items that caused any Event of Default being deemed to have cured such Events of Default on behalf of DV, (ii) cause any term, covenant, condition or obligation required under this Agreement or other Loan Document to be promptly performed or observed on behalf of DV or (iii) protect the Collateral and any other security obtained pursuant to the other Loan Documents. All amounts advanced by, or on behalf of, NDV in exercising its rights under this Section (including reasonable legal expenses and disbursements incurred in connection therewith), together with interest thereon at the Default Rate from the date of any such advance, shall be payable by DV to NDV upon demand therefor and shall be secured by the Collateral.

b. NDV shall not be obligated to perform or discharge any obligation of DV or any Pledged Entity as a result of this Agreement. The acceptance by NDV of this Agreement shall not at any time or in any event obligate NDV to (A) appear in or defend any action or proceeding relating to the Collateral to which it is not a party, or (B) take any action hereunder or thereunder, or expend any money or incur any expenses or perform or discharge any obligation, duty or liability under the Collateral.

C. Sales Of The Collateral

The following provisions of this Section C determine the standards that fulfill the duties of the NDV, as secured party, under UCC Article 9, Part 6.

1. Right to Conduct Partial Sale of Collateral.In connection with any sale of the Collateral, NDV may grant options and may impose reasonable conditions such as requiring any purchaser to represent that any "securities" constituting any part of the Collateral are being purchased for investment only. If all or any of the Collateral is sold at any such sale by NDV to a third party upon credit, NDV shall not be liable for the failure of the purchaser to purchase or pay for the same and, in the event of any such failure, NDV may resell such Collateral. It is expressly agreed that NDV may exercise its rights with respect to less than all of the Collateral, leaving unexercised its rights with respect to the remainder of the Collateral; provided, however, that such partial exercise shall in no way restrict or jeopardize NDV's right to exercise its rights with respect to the remaining Collateral at a later time or times. DV hereby waives and releases any and all rights of redemption with respect to the sale of any Collateral.

2. Sale Procedures.No demand, advertisement or notice, all of which are hereby expressly waived by DV, shall be required in connection with any sale or other disposition of all or any part of the Collateral, except that NDV shall give DV at least ten (10) days' prior notice of the time and place of any public sale or of the time and the place at which any private sale or other disposition is to be made, which notice DV hereby agrees is reasonable. All other demands, advertisements and notices are hereby irrevocably waived by DV. The notice of such sale shall (i) in case of a public sale, state the time and place fixed for such sale, (ii) in case of a sale at a broker's board or on a securities exchange, state the board or exchange at which such sale is to be made and the day on which the Collateral, or the portion thereof so being sold, first will be offered for sale at such board or exchange and (iii) in the case of a private sale, state the date after which such sale may be consummated. Any such public sale shall be held at such time or times within ordinary business hours and at such place or places as NDV may fix in the notice of such sale. The public sale of the collateral by an auctioneer company with at least 5 years of experience in the sale of commercial real estate shall qualify the dispositions being

commercially reasonable under UCC Revised Section 9-610(b), including, without limitation as to method, manner, time, place, terms, and the price of the Collateral, less further receipts by NDV from DV prior to such sale date, notwithstanding (x) that the sale of the Collateral might have been at higher price if sold in a different manner, (y) that the transferee may resell it at a higher price, and (z) that an independent appraisal may value the Collateral at a higher amount.

3. Adjournment; Credit Sale. NDV shall not be obligated to make any sale of the Collateral if it shall determine, in its sole and absolute discretion, not to do so, regardless of the fact that notice of sale may have been given, and NDV may without notice or publication adjourn any public or private sale, and such sale may, without further notice, be made at the time and place to which the same was so adjourned. Upon each public or private sale of all or any portion of the Collateral, unless prohibited by any applicable statute which cannot be waived, NDV (or its nominee or designee) may purchase all or any portion of the Collateral being sold, free and clear of, and discharged from, any trusts, claims, equity or right of redemption of DV, all of which are hereby waived and released to the extent permitted by law, and may make payment therefor by credit against any of the Secured Obligations in lieu of cash or any other obligations. DV agrees that unless NDV expressly notifies DV in writing that a foreclosure is a "strict foreclosure" or in accordance with UCC Section 9-620, the foreclosure is not a procedure of strict foreclosure, does not equate to any accord and satisfaction of the outstanding DV' obligations, and does not extinguish, reduce, postpone or impair the NDV's rights to recover for any deficiency and that the foreclosure and recovery of the deficiency are not the sole and exclusive remedy of NDV for recovery of the DV's obligations. If a private foreclosure is not completed or is terminated or is otherwise rescinded, NDV reserves the right to pursue all of its other rights and remedies at law or in equity for recovery of the DV's obligations, including, without limitation, to obtain judgment and proceed to collection by execution, levy and public sale, or, to reinstitute a foreclosure by private sale, as NDV may elect.

4. Expenses of Sale.In the case of any sale, public or private, of any portion of or all of the Collateral, DV shall be responsible for the payment of all reasonable costs and expenses of every kind for the sale and delivery including, brokers', auctioneers, and reasonable attorneys' fees and disbursements and any tax imposed thereon. The proceeds of the sale of the Collateral shall be available to cover such costs and expenses, and, after deducting such costs and expenses from the proceeds of the sale, NDV shall apply any remaining amounts to the payment of the Secured Obligations in such order of priority as NDV may determine in its sole and absolute discretion.

5. No Public Registration of Sale.DV is aware that Section 9-610(c) of the UCC may restrict NDV's ability to purchase the Collateral at a private sale. DV is also aware that Securities and Exchange Commission (the "**SEC**") staff personnel have, over a period of years, issued various No-Action Letters that describe procedures which, in the view of the SEC staff, permit a foreclosure sale of securities to occur in a manner that is public for purposes of Part 6 of Article 9 of the UCC, yet not public for purposes of Section 4(2) of the Securities Act of 1933 (the "**Securities Act**"). DV is also aware that NDV may wish to purchase certain interests that are sold at a foreclosure sale, and DV believes that such purchases would be appropriate in circumstances in which such interests are sold in conformity with the principles set forth in such No-Action Letters. Section 9-603 of the UCC permits DV to agree on the standards for determining whether NDV has complied with its obligations under Section 9-610.

Pursuant to Section 9-603 of the UCC, DV specifically agrees that a foreclosure sale conducted in conformity with the principles set forth in such No-Action Letters (a) shall be considered to be a **"**public disposition**"** for purposes of Section 9-610(c) of the UCC; (b) will be considered commercially reasonable notwithstanding that NDV has not registered or sought to register the interests under the Securities Act, even if DV or any Pledged Entity agree to pay all costs of the registration process; and (c) shall be considered to be commercially reasonable, notwithstanding that NDV purchases such interests at such a sale.

6. Strict Foreclosure.

a. NDV may, but shall have no obligation to, in its sole and absolute discretion, either negotiate an agreement ("**Strict Foreclosure Agreement**") with DV, or make a written proposal ("**Strict Foreclosure Proposal**") to DV, to retain the Collateral in full or partial satisfaction of the Indebtedness in accordance with the procedures specified in Section 9-620 of the UCC.

b. In the case of a Strict Foreclosure Proposal, DV shall, within ten (10) Business Days of DV's receipt of the Strict Foreclosure Proposal, indicate DV's (i) acceptance or rejection of such Strict Foreclosure Proposal and (ii) waiver of any right to redeem the Collateral pursuant to Section 9-624(c) of the UCC ("**UCC Redemption Waiver**"). Borrower's indication of acceptance of a Strict Foreclosure Proposal shall be made by delivering a notice in a form substantially identical to the form attached hereto as Exhibit A.

c. NDV shall notify any guarantor, any other creditor with perfected lien rights in the Collateral, and any other Person entitled to notice under Section 9-621 of the UCC ("**Interested Parties**") of any Strict Foreclosure Agreement or Strict Foreclosure Proposal. Such Interested Party shall, within ten (10) Business Days of receipt of notice thereof, indicate its (A) acceptance or rejection of the Strict Foreclosure Agreement or the Strict Foreclosure Proposal, and (B) UCC Redemption Waiver.

d. If NDV fails to receive (i) DV's acceptance of a Strict Foreclosure Proposal and UCC Redemption Waiver or (ii) acknowledgements from all Interested Parties of acceptance of the Strict Foreclosure Agreement or the Strict Foreclosure Proposal, as applicable) and their respective UCC Redemption Waivers, within ten (10) Business Days of receipt of the notice periods specified in Subsections (2) and (3) above (collectively the "**Notice Period**"), then DV, or such other Interested Party, as applicable, shall be deemed to have objected to the Strict Foreclosure Agreement or the Strict Foreclosure Proposal, as applicable.

e. Notwithstanding the acceptance of either a Strict Foreclosure Agreement or a Strict Foreclosure Proposal by DV and each Interested Party within the applicable Notice Period, DV and NDV shall not be required to consummate such transfer of the Collateral unless and until (A) twenty (20) days have elapsed after the delivery of such acceptance and, (B) any Interested Party shall have not paid and satisfied the Indebtedness in full within such twenty (20) day period as contemplated under Section 9-623 of the UCC (a "**Redemption**"). If a Redemption is consummated, DV's acceptance shall be deemed to have been revoked with the consent of NDV.

If all the conditions specified in Subsections (a) through (e) of this Section have been satisfied, DV and each Pledged Entity shall fully cooperate, at their sole expense, in all matters deemed reasonably necessary by NDV to effect such transfer of ownership on the records of such Pledged Entity in accordance with any applicable requirements of the Organizational Agreement of such Pledged Entity and/or the Mortgage Loan Documents. Such cooperation shall include using DV's best efforts to assist NDV in obtaining any necessary review, approvals and other administrative action from such Pledged Entity, Mortgage NDV, any applicable Rating Agencies, and any master or special servicer of the Mortgage Loan. Such assistance shall include at NDV's request (y) attending all meetings with, and providing all related financial and operational documents and materials to, such third parties, and (z) providing such assurances and executing such documentation as is required by such third parties or NDV to effect such transfer.

7. Receipt of Sales Proceeds.Upon any sale of the Collateral, or any portion thereof, by NDV hereunder (whether by virtue of the power of sale herein granted, pursuant to judicial process or otherwise), the receipt of the proceeds by NDV or the officer making the sale shall be a sufficient discharge to the purchaser or purchasers of the Collateral so sold, and such purchaser or purchasers shall not be obligated to see to the application of any part of the purchase money paid over to NDV or such officer or be answerable in any way for the misapplication or non-application thereof.

8. Application of Collateral.All proceeds from the sale of all or any portion of the Collateral, and all Distributions now or at any time hereafter received or retained by NDV pursuant to the provisions of this Agreement shall be applied by NDV to the satisfaction of the Secured Obligations in such order and priority as determined by NDV in its sole and absolute discretion and in accordance with applicable law.

9. Preferences.NDV shall have no obligation to marshal any assets in favor of DV or any other party or against, or in payment of, any or all of the Secured Obligations. To the extent DV makes a payment or payments to NDV, which payment or proceeds or any part thereof are subsequently invalidated, declared to be fraudulent or preferential, set aside or required to be repaid to a trustee, receiver or any other party under any bankruptcy law, state or federal law, common law or equitable cause, then, to the extent of such payment or proceeds received, the Secured Obligations intended to be satisfied shall be revived and continue in full force and effect, as if such payment or proceeds had not been received by NDV.

D. Sale of Mortgaged Premises.

1. If the Mortgaged Premises have not been sold by [___________], DV shall immediately take, or cause to be taken, steps to market, advertise and publicize, the sale of the Mortgaged Premises, including, without limitation, entering into a listing agreement for the sale of the Mortgaged Premises with a listing agent or broker acceptable to NDV ("**Broker**"), provided that such listing agreement shall terminate no later than such time and date that NDV directs. DV shall cause Broker to inform NDV of the names of all potential purchasers of the Mortgaged Premises, names of parties responding with interest, the terms of any proposed sale, and any other information requested by NDV with respect to the sale of the Mortgaged Premises. Such sale shall meet the following conditions: (1) the agreement shall be for a sale price satisfactory to NDV; (2) closing to occur on or before such time and date that NDV directs; and

(3) any deposit or escrow funds to be held by NDV, and if forfeited by the prospective buyer to be directly to NDV on account of DV's obligations, then its principal.

2. Power of Attorney. If the Mortgaged Premises have not been sold by [________________], contemporaneously with DV effort thereafter to sell the Mortgaged Premises, DV hereby authorizes NDV, and NDV shall have the right, to either procure a buyer and sell or conduct an auction for the sale of such assets. DV will, at any time hereafter upon the request of NDV, execute and deliver such documents as may be necessary, in NDV's sole discretion, to effectuate such sale or auction, and to grant such rights to NDV. Consistent with this Section, DV shall execute and deliver to NDV together with this agreement a Special Power of Attorney in the form attached hereto as **Exhibit "B"** and such other powers of attorney, deeds in lieu of foreclosure, certificates and other documents necessary, in NDV's sole discretion, to permit NDV to sell, whether by auction or otherwise, all of DV's assets, including without limitation the Mortgaged Premises.

3. No Obligation or Liability. The DV acknowledges and agrees that the acceptance by the NDV, its nominee or assignee of the power of attorney to sell the Mortgaged Premises pursuant to the terms of this Agreement and the assignment to the NDV, its nominee or assignee of various contracts and agreements pertaining to the Mortgaged Premises will not create any obligation on the part of the NDV, its nominee or assignee, to third parties which might have claims of any kind whatsoever against the DV or the Mortgaged Premises and that the NDV for itself and its nominee or assignee does not assume or agree to discharge any liabilities pertaining to the Mortgaged Premises which originated prior to the closing date of its sale, or undertake any obligation to complete the leasing or sale of the Mortgaged Premises. No person not a party to this Agreement will be a third-party beneficiary or acquire any rights hereunder.

Exhibit A

Acceptance of NDV's Proposal under Section [   ]

___________ __, 20___

[_______________________]
[_______________________]
[_______________________]

Ladies and Gentlemen:

This letter agreement and waiver is being delivered by the undersigned (**[**individually and collectively, as the context requires,**]** "**DV**") to [___________________]("**NDV**") in connection with that certain Pledge and Security Agreement dated as of _____ __, 20__ by DV in favor of [________________________] (the "**Pledge Agreement**"). All capitalized terms used herein, unless otherwise defined herein, shall have the meanings specified or otherwise provided for in the Pledge Agreement.

1. As contemplated by Section [   ] of the Pledge Agreement, DV hereby accepts NDV's Strict Foreclosure Proposal to retain all right, title and interest in and to the Collateral, and agrees to ratify such retention at the direction of NDV in accordance with such Section 6.6 and the other applicable provisions of the Loan Documents.

2. This acceptance is irrevocable and unconditional, subject, however, to the terms of Section 5 below.

3. All of the Interested Parties acknowledge and consent to the acceptance and agreements set forth in Section 1 and Section 2 hereof.

4. In accordance with Section 9-624(c) of the UCC, each Pledged Entity and each Interested Party, hereby waives, effective as of the date hereof, all of its rights under the UCC with respect to the Loan, the Pledge Agreement and the Collateral, if any, including any rights described in Section 9-623 of the UCC, in each case to the fullest extent such rights may be waived in accordance with the UCC ("**UCC Redemption Waiver**").

5. Notwithstanding the acceptance and UCC Redemption Waiver, DV and NDV shall not be required to consummate such retention by NDV unless and until (a) twenty (20) days have elapsed after the delivery of such acceptance, and (b) none of the Interested Parties have caused the entire Indebtedness to be paid and satisfied in full within such twenty day period (a "**Redemption**"), and, if a Redemption is consummated pursuant to the terms of the Loan Documents and in accordance with **[**Delaware**]** law, DV's acceptance shall be deemed to have been revoked with the consent of NDV.

Very truly yours,

[____________________]

By:_______________________
Name:____________________
Its:_______________________

ACKNOWLEDGED AND AGREED:

_________________________________,
a _______________________________

By:_____________________________
Name:__________________________
Its:_____________________________